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UNITED STATES REPORTS

VOLUME 314

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1941

FROM OCTOBER 6, 1941, TO AND INCLUDING JANUARY 5, 1942

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REPORTER

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ERRATUM.—312 U. S. 708, line 1, "673" should be 677.

II

JUSTICES
OF THE
SUPREME COURT
DURING THE TIME OF THESE REPORTS

HARLAN FISKE STONE, CHIEF JUSTICE.[1]
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.
JAMES F. BYRNES, ASSOCIATE JUSTICE.[2]
ROBERT H. JACKSON, ASSOCIATE JUSTICE.[3]

RETIRED

CHARLES EVANS HUGHES, CHIEF JUSTICE.
JAMES CLARK McREYNOLDS, ASSOCIATE JUSTICE.
LOUIS D. BRANDEIS, ASSOCIATE JUSTICE.[4]
GEORGE SUTHERLAND, ASSOCIATE JUSTICE.

FRANCIS BIDDLE, ATTORNEY GENERAL.[5]
CHARLES FAHY, SOLICITOR GENERAL.[6]
CHARLES ELMORE CROPLEY, CLERK.
THOMAS ENNALLS WAGGAMAN, MARSHAL.

* Notes on p. IV.

NOTES

[1] Mr. Justice Stone was nominated by President Roosevelt on June 12, 1941, to be Chief Justice; the nomination was confirmed by the Senate on June 27, 1941; he was commissioned July 3, 1941, took the oath of office on that day, and took his seat October 6, 1941.

[2] Senator James F. Byrnes, of South Carolina, was nominated by President Roosevelt on June 12, 1941, to be Associate Justice; the nomination was confirmed by the Senate the same day; he was commissioned June 25, 1941, took the oath of office July 8, 1941, and took his seat October 6, 1941.

[3] Attorney General Robert H. Jackson was nominated by President Roosevelt on June 12, 1941, to be Associate Justice; the nomination was confirmed by the Senate on July 7, 1941; he was commissioned July 11, 1941, took the oath of office the same day, and took his seat October 6, 1941.

[4] Mr. Justice Brandeis, who retired from active service February 13, 1939 (306 U. S. III), died in Washington, D. C., October 5, 1941. See *post*, p. VII.

[5] Solicitor General Biddle was nominated by President Roosevelt on August 25, 1941, to be Attorney General; the nomination was confirmed by the Senate on September 5, 1941; he was commissioned and took the oath September 5, 1941.

[6] Mr. Charles Fahy, of New Mexico, was nominated by President Roosevelt on October 29, 1941, to be Solicitor General; the nomination was confirmed by the Senate on November 13, 1941; he was commissioned November 15, 1941, and took the oath on November 17, 1941.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

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

For the First Circuit, Felix Frankfurter, Associate Justice.

For the Second Circuit, Robert H. Jackson, Associate Justice.

For the Third Circuit, Owen J. Roberts, Associate Justice.

For the Fourth Circuit, Harlan F. Stone, Chief Justice.

For the Fifth Circuit, Hugo L. Black, Associate Justice.

For the Sixth Circuit, Stanley Reed, Associate Justice.

For the Seventh Circuit, James Francis Byrnes, Associate Justice.

For the Eighth Circuit, Frank Murphy, Associate Justice.

For the Ninth Circuit, William O. Douglas, Associate Justice.

For the Tenth Circuit, Frank Murphy, Associate Justice.

For the District of Columbia, Harlan F. Stone, Chief Justice.

October 14, 1941.

(For next previous allotment, see 313 U. S. p. iv.)

SUPREME COURT OF THE UNITED STATES.

MONDAY, OCTOBER 6, 1941

Present: The CHIEF JUSTICE, MR. JUSTICE ROBERTS, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, MR. JUSTICE BYRNES, and MR. JUSTICE JACKSON.

MR. JUSTICE ROBERTS said:

"Since the adjournment of the last term the retirement of Mr. Chief Justice Hughes has become effective. The President has nominated and the Senate has confirmed Mr. Justice Stone as Chief Justice of the United States. He has presented his commission and has taken the oaths prescribed by law, and it is, therefore, ordered that his commission be recorded and that his oaths be filed."

The CHIEF JUSTICE said:

"Since the adjournment of the Court in June the President has nominated and, with the advice and consent of the Senate, has appointed Senator James Francis Byrnes, of South Carolina, and Attorney General Robert Houghwout Jackson, of New York, to be Associate Justices of this Court in succession, respectively, to Associate Justice James Clark McReynolds, retired, and to Associate Justice Harlan F. Stone, appointed Chief Justice. They have presented their respective commissions and have taken the oaths prescribed by law. It is ordered that their commissions be recorded and that their oaths be filed."

The CHIEF JUSTICE said:

"With profound sorrow I announce the death last evening of Louis Dembitz Brandeis. For nearly twenty-three years he was in active service as an Associate Justice of

this Court, and from February 13, 1939, when he exercised his right of retirement, until his death, he was a retired Justice of this Court.

"Learned in the law, with wide experience in the practice of his profession, he brought to the service of the Court and of his country rare sagacity and wisdom, prophetic vision, and an influence which derived power from the integrity of his character and his ardent attachment to the highest interests of the Court as the implement of government under a written constitution. His death brings to a close a career of high distinction and a life of tireless devotion to the public good.

"The funeral service will be private. There will be a public memorial service at a time and place to be later announced.

"As a mark of respect to Justice Brandeis' memory the Court will adjourn without transacting further business.

"The papers upon all motions now ready for submission may be filed with the Clerk and will receive the attention of the Court.

"To enable the Court to consider in conference and make appropriate disposition of the great number of petitions for certiorari and other applications which have been filed during the summer, the recess of the Court will be continued until Monday, October 13. The Court will now adjourn."

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1941.

ALABAMA *v.* KING & BOOZER, A PARTNERSHIP, ET AL.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 602. Argued October 23, 24, 1941.—Decided November 10, 1941.

1. No constitutional immunity of the United States from state taxation prevents a State from applying its sales tax to a purchase of building materials by one who buys them for use, and uses them, in performing a "cost-plus" building contract for the Government, although the contract provides that the title to such materials shall vest in the United States upon their delivery, inspection, and acceptance by a Government officer, at the building site, and that the contractor shall be reimbursed by the Government for the cost of the materials, including the tax. P. 8.

   (1) The fact that the economic burden of the tax is passed on to the United States does not make it a tax upon the United States. *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, and *Graves* v. *Texas Co.,* 298 U. S. 393, overruled. P. 9.

   (2) In this case, the legal incidence of the tax was on the contractor, not on the United States; the contractor, in buying the materials, was not the agent or representative of the Government; and the transaction was not such as to place the Government in the rôle of purchaser. P. 9.

   No question was here raised of the power of Congress to free from state taxation transactions of individuals where the economic burden of the tax is passed on to the United States. P. 8.

2. Under the Alabama statute here involved (it is conceded and assumed for the purposes of this case) the purchaser of tangible goods, who is subjected to the tax measured by the sales price, is the person who orders and pays for them when the sale is for cash or who

is legally obligated to pay for them if the sale is on credit; and under the contract here involved the contractors were to purchase in their own names and on their own credit all the materials required, unless the Government should elect to furnish them, and the Government was not bound by their purchase contracts, but was obligated only to reimburse the contractors when the materials purchased should be delivered, inspected and accepted at the site. P. 10.

241 Ala. 557, 3 So. 2d 572, reversed.

CERTIORARI, *post*, p. 599, to review a decree of the Supreme Court of Alabama which reversed a decision of a state circuit court sustaining a sales tax. The decision of the circuit court was rendered upon an appeal from the assessment. The United States was permitted to intervene.

Messrs. Thomas S. Lawson, Attorney General of Alabama, and *John W. Lapsley,* Assistant Attorney General, with whom *Mr. J. Edward Thornton,* Assistant Attorney General, was on the brief, for petitioner.

Assistant Solicitor General Fahy, with whom *Assistant Attorney General Clark* and *Messrs. J. Louis Monarch, Berryman Green, Paul F. Mickey, O. W. Hammonds, Jr., Warner W. Gardner,* and *Fred L. Blackmon* were on the brief, for respondents.

The tax is imposed upon the purchaser.

The United States in its purchases is immune from a sales tax upon the buyer.

Congress has power to waive the immunity from state taxation which would otherwise attach to federal instrumentalities and transactions, and has also power to exempt from state taxation transactions of the United States and its instrumentalities which might otherwise be taxable.

Any tax upon a transaction will affect both parties. Recognition of this has, at least until recent years, forced the Court to attempt a distinction between various trans-

action taxes according to the immediacy of their effect upon the Government. That task has been notoriously difficult. We think that it should be abandoned, and that, in the silence of Congress, immunity should turn upon the simpler and more satisfactory test of whether the tax is imposed upon the Government or upon a private person.

The Court has in the large adhered to some six general tests by which to distinguish the good tax from the bad tax as applied to the transaction between the Government and a private person. These may be classified as follows: (1) Presence of burden upon the Government. (2) Interference with government functions. (3) Is the tax upon the governmental source of the payment taxed? (4) Is the economic burden borne by the Government? (5) Is the tax nondiscriminatory? (6) Is the tax, in law, imposed upon the Government or the private person? We think the first four criteria are unsound and have been rejected by the Court and that acceptance of the fifth and sixth is required both by principle and by existing authority.

Tax-on-the-source test, exemplified in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, has been rejected, both in terms and in practical results. See *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 480–481. The formula would have required the invalidation of the taxes sustained in the *O'Keefe* case, *supra*, and other cases.

It is very hard to tell what is meant by the statement that a tax interferes with or burdens the Government's transaction. Ordinarily, the only practical interference would seem to be the discouragement found in the economic burden of the tax.

Economic Burden of the Tax: A simple and intelligible reason for invalidating a tax laid upon a private person is that, as a practical matter, it will increase the costs or

reduce the revenues of the government with which he deals. But this reason has been advanced in only three of the opinions declaring an immunity from taxation. Indeed, the Court has firmly stated that "The question here is one of power and not of economics." *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 519.

One supposes that an economic analysis or intuition lies back of every decision that a private person is immune from taxation because he deals with the Government. See *Graves* v. *Texas Co.*, 298 U. S. 393, 395. Yet the difficulty with the analysis is that it inevitably proves too much. When the Government buys an article, or receives goods and services under contract, it must in the normal course pay all of the costs required for the finished product. These costs include taxes of all forms. There is no economic reason why these taxes should be valid and the tax upon the final transaction, sale or delivery to the Government, invalid. True, it is probable that the final tax would somewhat more certainly be shifted to the Government than those anterior in point of time. But even the final tax is by no means certain to be shifted. See Mr. Justice Stone, dissenting in *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 581. And the earlier taxes could easily be isolated through accounting procedures and by contract be made specifically reimbursable by the Government; yet none would suppose that the resulting certainty of tax incidence upon the Government would invalidate taxes otherwise unobjectionable.

For these reasons, the economic test is illusory and incapable of consistent application.

The Court in its recent opinions seems to have rejected the economic burden as a criterion of validity or invalidity. That rejection has taken two forms: (a) an outright refusal to accept increased cost as a reason for invalidation and (b) an analysis which indicates that the economic bur-

den of the challenged tax on the Government is speculative, and so indicates that the economic incidence of any tax must always be speculative. Each of the recent opinions dealing with the question has adopted both approaches. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 160; *Helvering* v. *Producers Corp.*, 303 U. S. 376; *Helvering* v. *Gerhardt*, 304 U. S. 405, 418–419, 422; *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 483, 484, 487.

The existence or nonexistence of an economic burden upon the Government can no longer be accepted as the touchstone of validity or invalidity of a tax imposed upon a private person.

A discriminatory tax, singling out a governmental function to bear abnormal and unfriendly burdens, does in truth involve the power to destroy. Cf., *McCulloch* v. *Maryland*, 4 Wheat. 316; *Veazie Bank* v. *Fenno*, 8 Wall. 533. Accordingly, the principle that a tax, so long as it has any effect upon the Government's operations, must be nondiscriminatory to be upheld, is one of pervading application and importance.

The rules of intergovernmental tax immunity, so far as they have been developed and applied to private persons who deal with the Government, exhibit a great diversity of decision and reasoning. A number of cases have expressly been overruled; many more have been distinguished on the narrowest of grounds; and in still other decisions technical rules have been devised to reach results in practical contradiction of earlier cases. In short, there is no single decision exempting a private taxpayer from a nondiscriminatory tax which can with confidence be said to be good law today.

The decisions relating to a tax on the United States itself show an unqualified uniformity. No decision of this Court has ever held, in the absence of legislative consent, that the National Government could be taxed by a State or local government.

The validity of taxes challenged as invading the immunity of the Government should be decided, we therefore submit, in terms of the legal incidence of the tax. In terms of the present issue, we urge that purchases which the United States makes through the cost-plus-a-fixed-fee contractor are in reality those of the United States and not those of the contractor. In advancing a test based upon the legal incidence of the tax upon the Government or a private person, we do not speak in terms of technicalities but in terms of the realities of the governmental functions with which the constitutional protection is concerned.

The immunity includes a vendee sales tax collected through a private person. The Alabama sales tax is imposed upon the vendee and the immunity of the United States is not lost because it makes its purchases through a cost-plus-a-fixed-fee contractor. The problem is simply whether the immunity of the United States from a state tax imposed upon it includes a sales tax the legal incidence of which is upon the purchaser but which is collected through the seller. Whether, in other words, the Government's immunity vanishes if the tax is collected from the Government by the vendor instead of by a direct payment to the tax collector of the State.

Messrs. Eugene Stanley, Attorney General of Louisiana, and *Cicero C. Sessions* filed a brief on behalf of the State of Louisiana, as *amicus curiae,* urging reversal.

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

Respondents King and Boozer sold lumber on the order of "cost-plus-a-fixed-fee" contractors for use by the latter in constructing an army camp for the United States. The question for decision is whether the Alabama sales tax with which the seller is chargeable, but which he is required

to collect from the buyer, infringes any constitutional immunity of the United States from state taxation.

The Alabama statute, Act No. 18, General Acts of Alabama, 1939, expressly made applicable to sales of building materials to contractors, § I (j), lays a tax of 2 per cent on the gross retail sales price of tangible personal property. While in terms, § II, the tax is laid on the seller, who is denominated the "taxpayer," by § XXVI it is made the duty of the seller "to add to the sales price and collect from the purchaser the amount due by the taxpayer on account of said tax."

Section VII provides that when sales are made on credit the tax is payable as and when the collection of the purchase price is made. The Supreme Court of Alabama has construed these provisions as imposing a legal obligation on the purchaser to pay the tax, which the seller is required to add to his sales price and to collect from the purchaser upon collection of the price, whether the sale is for cash or on credit. See *Lone Star Cement Corp.* v. *State Tax Commission,* 234 Ala. 465, 175 So. 399; *Long* v. *Roberts & Son,* 234 Ala. 570, 176 So. 213; *National Linen Service Corp.* v. *State Tax Commission,* 237 Ala. 360, 186 So. 478; *Wood Preserving Corp.* v. *State Tax Commission,* 235 Ala. 438, 179 So. 254. Section V excludes from the tax the proceeds of sales which the state is prohibited from taxing by the Constitution or laws of the United States.

Respondents King and Boozer, who furnished the lumber in question on the order of the contractors, appealed to the state circuit court from an assessment of the tax by the state department of revenue, on the ground that the tax is prohibited by the Constitution because laid upon the United States, and is excluded from the operation of the taxing statute by its terms. The United States was permitted to intervene and joined in these contentions.

The trial, upon a stipulation of facts embodying the relevant documents, resulted in a decree sustaining the tax,

which the Supreme Court of Alabama reversed, 3 So. 2d 572. Apart from the constitutional restriction, it found no want of authority in the taxing statute for the collection of the tax from the contractors. But it concluded that although the contractors were indebted to the seller for the purchase price of the lumber, they were so related by their contract to the Government's undertaking to build a camp, and were so far acting for the Government in the accomplishment of the governmental purpose, that the tax was in effect "laid on a transaction by which the United States secures the things desired for governmental purposes," so as to infringe the constitutional immunity, citing *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218; *Graves* v. *Texas Co.,* 298 U. S. 393. We granted certiorari, 314 U. S. 599, the question being one of public importance.

Congress has declined to pass legislation immunizing from state taxation contractors under "cost-plus" contracts for the construction of governmental projects.[1] Consequently, the participants in the present transaction enjoy only such tax immunity as is afforded by the Constitution itself, and we are not now concerned with the extent and the appropriate exercise of the power of Congress to free such transactions from state taxation of individuals in such circumstances that the economic burden of the tax is passed on to the National Government. The Government, rightly we think, disclaims any contention that the Constitution, unaided by Congressional legislation, prohibits a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials

[1] See proposed Senate Amendment No. 120, to H. R. 8438, which became the Act of June 11, 1940, 54 Stat. 265; Cong. Rec., 76th Cong., 3rd Sess., Vol. 86, Part 7, pp. 7518–19, 7527–7535, 7648.

to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co.* v. *Knox, supra; Graves* v. *Texas Co., supra,* we think it no longer tenable. See *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514; *Trinityfarm Co.* v. *Grosjean,* 291 U. S. 466; *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 160; *Helvering* v. *Gerhardt,* 304 U. S. 405, 416; *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466.

The contention of the Government is that the tax is invalid because it is laid in such manner that, in the circumstances of this case, its legal incidence is on the Government rather than on the contractors, who ordered the lumber and paid for it but who, as the Government insists, have so acted for the Government as to place it in the role of a purchaser of the lumber. The argument runs: the Government was a purchaser of the lumber, and but for its immunity from suit and from taxation, the state applying its taxing statute could demand the tax from the Government just as from a private individual who had employed a contractor to do construction work upon a like cost-plus contract.

The soundness of this conclusion turns on the terms of the contract and the rights and obligations of the parties under it. The taxing statute, as the Alabama courts have held, makes the "purchaser" liable for the tax to the seller, who is required "to add to the sales price" the amount of the tax and collect it when the sales price is collected, whether the sale is for cash or on credit. Who, in any particular transaction like the present, is a "purchaser" within the meaning of the statute, is a question of state

law on which only the Supreme Court of Alabama can speak with final authority. But it seems plain, as the Government concedes and as we assume for present purposes, that under the provisions of the statute the purchaser of tangible goods who is subjected to the tax measured by the sales price, is the person who orders and pays for them when the sale is for cash or who is legally obligated to pay for them if the sale is on credit. The Government's contention is that it has a constitutional immunity from state taxation on its purchases and that this was sufficiently a Government purchase to come within the asserted immunity.

As the sale of the lumber by King and Boozer was not for cash, the precise question is whether the Government became obligated to pay for the lumber and so was the purchaser whom the statute taxes, but for the claimed immunity. By the cost-plus contract the contractors undertook to "furnish the labor, materials, tools, machinery, equipment, facilities, supplies not furnished by the Government, and services, and to do all things necessary for the completion of" the specified work. In consideration of this the Government undertook to pay a fixed fee to the contractors and to reimburse them for specified expenses including their expenditures for all supplies and materials and "state or local taxes . . . which the contractor may be required on account of his contract to pay." The contract provided that the title to all materials and supplies for which the contractors were "entitled to be reimbursed" should vest in the Government "upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer." The Government reserved the right to furnish any and all materials necessary for completion of the work, to pay freight charges directly to common carriers, and "to pay directly to the persons concerned all sums due from the Contractor for labor, materials or other charges." Upon

termination of the contract by the Government, it undertook to "assume and become liable for all obligations . . . that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance with the provisions of this contract."

A section of the contract, designated as one of several "special requirements," stipulated that contractors should "reduce to writing every contract in excess of two thousand dollars ($2,000) made by him for the purpose of the work hereunder for services, materials, supplies . . .; insert therein a provision that such contract is assignable to the Government; make all such contracts in his own name, and not bind or purport to bind the Government or the Contracting Officer thereunder." While this section refers to contracts in excess of $2,000, we think all the provisions which we have mentioned, read together, plainly contemplate that the contractors were to purchase in their own names and on their own credit all the materials required, unless the Government should elect to furnish them; that the Government was not to be bound by their purchase contracts, but was obligated only to reimburse the contractors when the materials purchased should be delivered, inspected and accepted at the site.

The course of business followed in the purchase of the lumber conformed in every material respect to the contract. King and Boozer submitted to the contractors in advance a proposal in writing to supply as ordered, at specified prices, all the lumber of certain description required for use in performing their contract with the Government. The contractors, after procuring approval by the contracting officer of the particular written order for lumber with which we are presently concerned, placed it with King and Boozer on January 17, 1941. It directed shipment to the Construction Quartermaster at the site "for account of" the contractors and stated "this purchase order does not bind, nor purport to bind, the United States

Government or Government officers." King and Boozer thereupon shipped the lumber ordered by the contractors by contract trucks to the site as directed, where it was used in performance of the contract. The sellers delivered to the contractors the invoice of the lumber, stating that it was "sold to the United States Construction Quartermaster %" (for account of) the contractors.[2] The invoice was then approved by the Construction Quartermaster for payment; the contractors paid King and Boozer by their check the amount of the invoice and were later reimbursed by the Government for the cost of the lumber.

We think, as the Supreme Court of Alabama held, that the legal effect of the transaction which we have detailed was to obligate the contractors to pay for the lumber. The lumber was sold and delivered on the order of the contractors, which stipulated that the Government should not be bound to pay for it. It was in fact paid for by the contractors, who were reimbursed by the Government pursuant to their contract with it. The contractors were thus purchasers of the lumber, within the meaning of the taxing statute, and as such were subject to the tax. They were not relieved of the liability to pay the tax either because the contractors, in a loose and general sense, were acting for the Government in purchasing the lumber or, as the Alabama Supreme Court seems to have thought, because the economic burden of the tax imposed upon the purchaser would be shifted to the Government by reason of its contract to reimburse the contractors.

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[2] The statement that the lumber was "sold" to the Construction Quartermaster appears to have been inadvertent. On the argument the Government conceded that this was not the usual practice. The invoices appearing of record in *Curry* v. *United States*, *post*, p. 14, issued to the same contractors for supplies ordered by them and delivered at the same site stated that the supplies were sold to the contractors.

The Government, to support its thesis that it was the purchaser, insists that title to the lumber passed to the Government on shipment by the seller, and points to the very extensive control by the Government over all purchases made by the contractors. It emphasizes the fact that the contract reserves to Government officers the decision of whether to buy and what to buy; that purchases of materials of $500 or over could be made by the contractors only when approved in advance by the contracting officer; that the Government reserved the right to approve the price, to furnish the materials itself, if it so elected; and that in the case of the lumber presently involved, the Government inspected and approved the lumber before shipment. From these circumstances it concludes that the Government was the purchaser. The necessary corollary of its position is that the Government, if a purchaser within the taxing statute, became obligated to pay the purchase price.

But however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the Government to enter into contracts or to pledge its credit. See *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 421; *United States* v. *Driscoll*, 96 U. S. 421. It can hardly be said that the contractors were not free to obligate themselves for the purchase of material ordered. The contract contemplated that they should do so and that the Government should reimburse them for their expenditures. It is equally plain that they did not assume to bind the Government to pay for the lumber by their order, approved by the Contracting Officer, which stipulated that it did not bind or purport to bind the Government. The circumstance that the title to the lumber passed to the Government on delivery

does not obligate it to the contractor's vendor under a cost-plus contract more than under a lump sum contract. Cf. *James* v. *Dravo Contracting Co., supra; United States* v. *Driscoll, supra.*

We cannot say that the contractors were not, or that the Government was, bound to pay the purchase price, or that the contractors were not the purchasers on whom the statute lays the tax. The added circumstance that they were bound by their contract to furnish the purchased material to the Government and entitled to be reimbursed by it for the cost, including the tax, no more results in an infringement of the Government immunity than did the tax laid upon the contractor's gross receipts from the Government in *James* v. *Dravo Contracting Co., supra.* See *Metcalf & Eddy* v. *Mitchell, supra,* 523, 524; *Trinityfarm Co.* v. *Grosjean, supra,* 472; *Helvering* v. *Gerhardt, supra,* 416; *Graves* v. *New York ex rel. O'Keefe, supra,* 483.

Reversed.

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

CURRY, COMMISSIONER OF REVENUE OF ALABAMA, *v.* UNITED STATES ET AL.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 603. Argued October 24, 1941.—Decided November 10, 1941.

A state use-tax imposed on a contractor in respect of materials which he purchased outside of, and used within, the State in performance of a "cost-plus" contract with the Government can not be adjudged invalid as a tax on the United States, either upon the assumption that the contractor is the Government's agent or representative in the matter, which is not correct, or because of the fact that the economic burden of the tax is shifted to the United States when the

Government, pursuant to the contract, reimburses the contractor for the cost of the materials, tax included. *Alabama* v. *King & Boozer*, *ante*, p. 1. P. 18.

241 Ala. 569, 3 So. 2d 582, reversed.

CERTIORARI, *post*, p. 599, to review a decree of the Supreme Court of Alabama which reversed a decree of the Alabama Circuit Court sustaining a use tax laid on government contractors. The suit was brought in the latter court by the United States and the contractors against the State Commissioner of Revenue to determine the tax liability and for a refund of payment made.

Messrs. John W. Lapsley, Assistant Attorney General of Alabama, and *Thomas S. Lawson*, Attorney General, with whom *Mr. J. Edward Thornton*, Assistant Attorney General, was on the brief, for petitioner.

Assistant Solicitor General Fahy, with whom *Assistant Attorney General Clark* and *Mr. Warner W. Gardner* were on the brief, for respondents.

The Alabama use tax is imposed upon the user.

The United States in storing and using tangible personal property is immune from use tax. Here, as in the *King & Boozer* case, *ante*, p. 1, the problem admits of ready solution under the guiding principle that the United States is immune from any tax imposed upon and paid by the Government itself. As that immunity includes a sales tax, it includes, *a fortiori*, a use tax collected directly from the consumer of the goods.

The immunity of the United States is not lost when it stores or uses goods through a cost-plus contractor.

Messrs. Eugene Stanley, Attorney General of Louisiana, and *Cicero C. Sessions* filed a brief on behalf of the State of Louisiana, as *amicus curiae*, urging reversal.

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

This is a companion case to *Alabama* v. *King & Boozer*, *ante*, p. 1. It presents the question whether, by the cost-plus contract involved in the *King & Boozer* case, the contractors, who are respondents here, are immune from the use tax imposed by the Alabama statute, Act No. 67, General Acts of Alabama, 1939, because the materials, with respect to the use of which the tax was laid, were ordered by the contractors and used by them in the performance of their contract with the Government.

Section II of the taxing act provides: "(a) An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased at retail . . . for storage, use or other consumption in this state at the rate of two per cent (2%) of the sales price of such property, . . . (b) . . . Every person storing, using or otherwise consuming in this State tangible personal property purchased at retail shall be liable for the tax imposed by this act . . ." Section III exempts from the operation of the statute the storage, use or other consumption of property, the sale of which is taxed by other provisions of the statutes, and the storage, use or consumption of property, taxation of which is prohibited by the Constitution or laws of the United States.

Petitioner, Commissioner of Revenue for the State, assessed and collected from the contractors a tax on their use or consumption, within the state, of a quantity of roofing which they purchased outside the state and caused to be shipped to the camp-site within the state, where they used it in the performance of their construction contract with the Government. The present suit was brought by the United States and the contractors in the state circuit court against petitioner, individually and as Commissioner, for a declaratory judgment determining the tax

liability of the contractors and for a decree ordering refund of the tax paid by the contractors. The lawfulness of the tax was challenged specifically on the ground that the plaintiffs, respondents here, are exempt from the tax by the provisions of the state statute, and are immune from it, because the use and consumption of the roofing by the contractors as agents or instrumentalities of the United States is constitutionally immune from taxation.

The circuit court sustained the tax, declaring that it was laid upon the contractors by the statute and that they were not constitutionally immune from the tax because of their use of the purchased property in performance of their contract with the United States. The Supreme Court of Alabama reversed, 3 So. 2d 582, holding that the tax infringed the constitutional immunity of the United States, for reasons stated in its opinion in *King & Boozer* v. *Alabama,* 241 Ala. 557, 3 So. 2d 572. We granted certiorari, 314 U. S. 599, so that we might consider this with the *King & Boozer* case.

Since the Supreme Court of Alabama rested its decision on the constitutional ground and not upon the inapplicability of the taxing statute to the contractors, we assume for present purposes, as we take it the state court assumed, that the contractors are subject to the tax but for the asserted Government immunity, and that upon the correct interpretation of the Alabama statute they would have been subject to the tax if their cost-plus contract had been with a private individual. Cf. *Felt & Tarrant Co.* v. *Gallagher,* 306 U. S. 62; *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167; *Department of Treasury* v. *Wood Corp.,* 313 U. S. 62.

For the reasons stated at length in our opinion in the *King & Boozer* case, we think that the contractors, in purchasing and bringing the building material into the state and in appropriating it to their contract with the Government, were not agents or instrumentalities of the Gov-

ernment; and they are not relieved of the tax, to which they would otherwise be subject, by reason of the fact that they are Government contractors. If the state law lays the tax upon them rather than the individual with whom they enter into a cost-plus contract like the present one, then it affects the Government, like the individual, only as the economic burden is shifted to it through operation of the contract. As pointed out in the opinion in the *King & Boozer* case, by concession of the Government and on authority, the Constitution, without implementation by Congressional legislation, does not prohibit a tax upon Government contractors because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the Government.

Upon the record as it comes to us, we are not called upon to determine whether the taxing statute is applicable to transactions of the contractors on the camp-site, a government reservation. We decide only the question passed upon by the Supreme Court of Alabama, that if the statute is applicable to, and taxes, the contractors upon a cost-plus contract like the present, if entered into with a private person, they are not immune from the tax when, as here, the contract is with the Government.

Reversed.

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

BERNARDS ET AL. *v.* JOHNSON ET AL.

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

No. 2. Reargued October 14, 1941.—Decided November 10, 1941.

1. Where the Circuit Court of Appeals, to await the outcome of a petition to this Court for certiorari, stays the issue of its mandate, but issues the mandate at a subsequent term when the certiorari is denied, it has jurisdiction at that later term to recall the mandate and reconsider the appeal. P. 29.
2. An order of the court of bankruptcy dismissing an untimely petition for rehearing or review does not extend the time for appeal from the original order. P. 31.
3. Farmer-bankrupts, claiming that foreclosure proceedings in a state court, whereby mortgage-creditors had obtained deeds to land pending the bankruptcy proceeding, were void because of provisions of § 75 of the Bankruptcy Act, sought to reopen final orders of the bankruptcy court sustaining the proceedings. The time for appeal having expired, that court dismissed the petition because of its untimeliness, without re-examining the adjudicated merits. *Held:*

   (1) That the merits of the claim were not open upon the bankrupts' appeal to the Circuit Court of Appeals. P. 32.

   (2) Although the bankruptcy court, acting on prayers for affirmative relief in the answers of the mortgagee-respondents and the trustee, made certain findings based upon admissions of the bankrupts, as to the validity of the mortgage titles, and quieted them, and made other findings, and gave its approvals and instructions to the trustees, touching the administration of the estate, this was not a review of the bankrupts' claim against the mortgagees. P. 31.

   (3) Other findings, to the effect that the bankrupts had made no attempt to comply with § 75 (s) of the Act and that there had been no hope or possibility of their financial rehabilitation, were not necessary to the decision of questions presented and did not render their disposition erroneous. P. 31.
4. The remedy for correcting erroneous orders and decrees of the bankruptcy court sustaining foreclosure proceedings in a state court and titles emanating therefrom, over the bankrupt's claim that because of provisions of § 75 of the Bankruptcy Act the proceedings

and titles are void, is by timely application for review or by timely appeal. P. 32.
103 F. 2d 567, affirmed.

CERTIORARI, 310 U. S. 616, to review a decree of the Circuit Court of Appeals affirming orders of the District Court in bankruptcy. The orders refused to reopen certain earlier orders sustaining foreclosures in a state court, upon the ground that they were final adjudications and that the time allowed for reviewing them had expired. They also ratified orders of a conciliation commissioner, and in effect directed that the cause proceed as an ordinary bankruptcy and not under § 75 (s) of the Bankruptcy Act. Petition for certiorari was denied, 308 U. S. 595. A second petition for certiorari was granted, 310 U. S. 616, upon which, after argument, there was an affirmance by an equal division of opinion among the Justices, 313 U. S. 537. A rehearing was ordered, 313 U. S. 597.

Mr. William Lemke for petitioners.

Messrs. William L. Brewster and *Harrison G. Platt,* with whom *Mr. A. D. Platt* was on the brief, for respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

We took this case because it presents important questions of appellate practice under § 75 [1] of the Bankruptcy Act.

The petitioners, who are adjudicated bankrupts, attack an order and a decree of the District Court, which were affirmed by the Circuit Court of Appeals.[2] The respondents are mortgagees who purchased property of the

[1] 11 U. S. C. § 203.
[2] 103 F. 2d 567.

DEPARTMENT OF
LEGISLATIVE REFERENCE
CITY HALL
BALTIMORE, MD.

bankrupts at foreclosure sales, and the trustee in bankruptcy.

The petitioners were owners of land in Oregon. April 12, 1933, the respondent, Collins, brought foreclosure proceedings on a mortgage which was a first lien on a portion of the land. April 6, 1934, two of the respondents, Johnson and United States National Bank (herein, for the sake of brevity, referred to as Johnson) instituted a foreclosure suit under a mortgage which was secured by a pledge of personalty and was also a first lien on all the land not covered by the Collins mortgage, and a second lien on the tract mortgaged to Collins. July 11, 1934, a state court entered a decree of foreclosure in the latter suit.

August 10, 1934, the petitioners jointly applied to the District Court, as farmers, for composition or extension of their indebtedness. On the same day the court restrained, until further order, any sale under the Johnson mortgage, and referred the cause to a conciliation commissioner. That officer having reported, on the reference and on a re-reference, failure to agree on a composition or extension, the petitioners, December 19, 1934, reciting the failure and their desire to have the benefits of the Bankruptcy Act, and particularly of sub-section (s) of § 75 as it then stood,[3] prayed that "they and each of them be adjudged by this court to be bankrupts, within the purview of said Acts of Congress." An adjudication as to each petitioner was entered, and, December 20, 1934, the case was referred to a referee.

February 8, 1935, the bankrupts petitioned for the appointment of appraisers and to be allowed to retain possession of their property, as provided in sub-section (s).

February 18, 1935, the restraining order of August 10, 1934, was vacated as superfluous, inasmuch as sub-divi-

[3] The sub-section was added to § 75 by the Act of June 28, 1934, 48 Stat. 1289.

sions (a) to (r) of § 75 are self-executing.[4] May 21, 1935, appraisers were appointed. May 27, 1935, this court held sub-section (s) unconstitutional.[5]

June 28, 1935, the petitioners applied for a re-reference of their original petition for composition or extension to a conciliation commissioner. The application was denied by the court on the ground that they had been adjudged bankrupts and that their bankruptcy proceeding was then pending before a referee. No appeal was taken.

June 29, 1935, Johnson purchased the mortgaged realty and the pledged personalty at a sale in the Johnson foreclosure suit, held pursuant to order of the state court, and the sale was confirmed July 20, 1935. The petitioners appeared and opposed confirmation, but did not appeal from the decree.

August 26, 1935, a sale was made to Collins pursuant to a foreclosure decree entered by the state court, July 9, 1935, under the Collins mortgage, and the sale was confirmed September 16, 1935.

A new sub-section (s), to replace that held unconstitutional, having been adopted August 28, 1935,[6] the petitioners, September 30, 1935, reciting their adjudication as bankrupts and the reference of the case to a referee, and, relying on the newly adopted sub-section (s), which authorizes conciliation commissioners to act as referees in § 75 cases subsequent to adjudication, moved the court to recall the proceedings from the referee. By order of even date the prior reference was recalled, and the referee was directed to remit the record to the court.

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[4] It appears from the record that this order was entered *nunc pro tunc* on August 31, 1938, the court reciting that, through inadvertence, the order was not entered when made, although shown on the clerk's notes, and within the recollection of the judge. The petitioners do not challenge the verity of the recital.

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

[6] Act of August 28, 1935, 49 Stat. 942, 943.

Although, under the Oregon law, a purchaser at foreclosure sale is entitled to possession of the land from the day of sale,[7] the debtors remained in possession. To oust them, Johnson applied to the state court for a writ of assistance. October 3, 1935, the bankruptcy court, at petitioners' instance, temporarily restrained the sheriff from executing any such writ.

By order of October 15, 1935, the court, reciting the adjudication of December 19, 1934, referred the bankruptcy case to a conciliation commissioner.

December 18, 1935, the court dissolved the temporary restraining order against the sheriff, for the reasons that the property had been sold pursuant to an execution in the Johnson foreclosure and the sale duly confirmed; that, when these steps were taken, the state court had jurisdiction acquired prior to the commencement of the proceedings under § 75; and that the execution of the writ of assistance would not, therefore, interfere with any property of the bankrupt. No appeal was taken from the order, the writ of assistance issued, and the petitioners were dispossessed January 25, 1936.

The period of redemption from the sale in the Johnson foreclosure expired June 29, 1936, and, on July 1, a sheriff's deed was delivered.

July 15, 1936, the bankrupts filed with the conciliation commissioner a petition reciting the institution of the extension proceeding, its futility, the consequent adjudication of bankruptcy, the sheriff's sale under the Johnson mortgage, and its confirmation. They alleged that they were farmers within § 75 as amended August 28, 1935, and were, under the terms of the statute, entitled to the possession of the mortgaged property and its proceeds; that Johnson was endeavoring to exercise control of, and ex-

[7] Oregon Code, 1930, § 3–510. Sales of personal property are without redemption; *Dixie Meadows Co.* v. *Kight,* 150 Ore. 395, 405, 45 P. 2d 909.

clude them from, the property. They prayed an order granting them immediate possession, control, and management of the real estate, and restraining the sheriff, Johnson, and Collins "from transferring without purchase of said property in accordance with the Frazer-Lemke Act as amended" [sic]; and for a further order "specifically extending the period of redemption as provided" in the Act.

Johnson filed an answer and cross-petition, which is not included in the transcript of record certified to this court. The debtors replied, asking that the answer be dismissed; that they be accorded the full benefits of the Act; that the sheriff's deed be cancelled; and that Johnson be required to account for all crops harvested and property removed from the land.

August 8, 1936, the commissioner found that the bankrupts had never petitioned under the new sub-section (s) for appraisal, the setting aside of their exempt property, and for possession of their property under the control of the court; that appraisers had never been appointed or the property appraised; that no order in respect of exemptions or for possession by the bankrupts had ever been made; that no stay order had been entered; that no rental had ever been fixed; that no order of any sort had been made under the amended sub-section except the orders recalling the proceedings from the referee and referring them to the commissioner; that the bankrupts are not farmers within the definition of the Act; that on August 28, 1935, when the new sub-section (s) took effect, they had only an equity of redemption in the lands, except for the tract covered by the Collins mortgage; and that the new sub-section (s) was unconstitutional. He entered a decree to the effect that since June 29, 1935, the date of the foreclosure sale, the bankruptcy court had had no jurisdiction of the land then sold; that the new sub-section (s) had no application to any of the land sold in fore-

closure; that the bankrupts were not farmers within the meaning of the Act, and were not entitled to the benefits of the Act; that their petition should be denied; and that a trustee should be appointed to liquidate the estate.

The time fixed by standing rule of the District Court for petitioning for a review of a referee's order in bankruptcy is twenty days. No application was made within that time to have the order reviewed.

August 29, 1936, the creditors elected, and the commissioner thereupon appointed, the respondent Loomis trustee; and, September 3, the commissioner entered an order approving his bond.

September 10, 1936, the year for redemption from the sale in the Collins foreclosure having expired, the sheriff delivered his deed to Collins as purchaser.

September 19, 1936, the bankrupts filed with the commissioner a "notice of appeal" from the orders of August 29 and September 3. Treating the notice as a petition for review, the commissioner filed his certificate with the District Court.

Meantime, administration of the estate proceeded as in ordinary bankruptcy, and appraisers were appointed, September 25, 1936. October 23, they filed an appraisement of the property of the bankrupts, not including that which had been sold in foreclosure.

December 15, 1936, the District Court entered a decree confirming the commissioner's orders of August 29 and September 3. No appeal was taken.

January 4, 1937, the bankrupts filed with the commissioner a petition reciting their adjudication as bankrupts, and praying that the commissioner proceed with the appraisal of their property; that he rescind the order of August 8, 1936; that he remove the trustee because the latter was not elected by the requisite majority in amount of unsecured creditors, and was an improper person; that the trustee be ordered to account for all property coming

into his possession; and that the bankrupt's exemptions be set aside to them. They asked for other specific relief, not necessary to detail, and for general relief. January 11, 1937, the commissioner ordered the petition dismissed, "for the reason that all matters and things in said petition alleged have heretofore been considered upon petition filed by said bankrupts and decided adversely to said bankrupts, and said orders have all become final and conclusive."

January 13, 1937, the bankrupts filed in the District Court a petition for an order restraining the trustee from selling the personal property of the estate. The petition was denied two days later. No appeal was taken.

January 15, 1937, they filed in the District Court a petition wherein, after praying that all the files in the case be incorporated by reference, they set out in summary a history of the proceeding from the filing of the original petition for extension or composition, attacked many of the orders theretofore made, prayed that their failure to seek a review of the order of the commissioner of August 8, 1936, within the time limited for that purpose be excused; that the court review the entire proceeding, reverse all previous orders of the commissioner, and hold the petitioners farmers entitled to the benefits of the Act; that the court treat the petition "as exceptions to said decisions of the commissioner," and grant the petitioners appropriate relief, and, meantime, restrain the trustee from selling any personal property of the estate.

January 29, 1937, they filed with the court a petition for review of the commissioner's order of January 11, 1937, dismissing their petition of January 4, 1937.

To the petition of January 15, 1937, Johnson and Collins filed answers reciting the various steps in the proceeding, and the orders made by the commissioner and the court, as to which there had been no review or appeal; and alleging that all the issues raised in the petition had

consequently been finally adjudicated against the petitioners.

In addition, each answer recited the proceedings in the state court as they are above outlined, and asserted that as a result of those proceedings each respondent had acquired title and possession, and that the bankrupt, Bernards, was interfering with that possession, and prayed that their title might be quieted. The trustee in bankruptcy also filed an answer setting up the finality of the unappealed and unreviewed orders in the cause and praying certain relief.

April 13, 1938, the bankrupts filed in the court a motion to vacate and set aside "all orders of this Court, and of all the Referees and Conciliation Commissioners where it was sought to set aside or delay the carrying out of any of the provisions of the Bankrupt Act" and to reinstate the cause. The grounds assigned were to the effect that the court, the referee and conciliation commissioner had failed to comply with the Act.

The District Court held a single hearing upon the petition of January 15, 1937, the petition for review of January 29, 1937, and the motion of April 13, 1938. The bankrupts admitted the truth of the facts set up by the respondents in their cross-petitions, but not their legal effect. As all the facts were of record or admitted no testimony was taken.

May 10, 1938, the court affirmed the commissioner's order of January 11, 1937. Upon the petition of January 15, 1937, and the motion of April 13, 1938, the court made findings of fact and stated conclusions of law which were embodied in the order and decree entered. This dismissed the petition and denied the motion, quieted the title of the mortgage-creditor respondents as against the bankrupts to the lands purchased by them at foreclosure sale, ratified and approved the orders of the commissioner,

and in effect directed that the cause proceed as an ordinary bankruptcy and not under § 75 (s).

In its findings the court details the history of the proceeding and recites the order of the court of December 18, 1935, the order of the commissioner of August 8, 1936, the order of the court of December 15, 1936, affirming the commissioner's orders of August 29 and September 3, 1936, and finds with respect to each that no review was prayed or appeal taken within the time limited by rule or by law and that each of them had become final.

The bankrupts took one appeal from the order affirming on review the commissioner's order of January 11, 1937, and the order and decree dismissing their petition of January 13, 1937, and their motion of April 13, 1938, and granting the relief asked by the respondents.

May 2, 1939, the Circuit Court of Appeals affirmed both orders. May 25, 1939, that court stayed its mandate until July 15, and, directed that if a petition to this court for certiorari should be docketed by that date, the mandate should be stayed until after we had passed upon the petition.

A petition for certiorari was docketed July 10, 1939, and was denied October 23. The mandate of the Circuit Court of Appeals issued October 28. A motion made November 4, to recall the mandate and hold it pending our decision in *John Hancock Mutual Life Insurance Co.* v. *Bartels*, 308 U. S. 180, was denied November 6. The *Bartels* case was decided December 4, 1939. January 2, 1940, the petitioners presented to the Circuit Court of Appeals a motion "for recall and correction, amendment, revision or opening and vacating mandate and judgment entered thereon," upon the ground that the court's decision was contrary to ours in the *Bartels* case.

January 2, 1940, this court decided *Kalb* v. *Feuerstein*, 308 U. S. 433, and, January 18, the bankrupts supplemented their pending motion, alleging that our decision

was in conflict with that of the Circuit Court of Appeals in the instant case.

March 22, 1940, the Circuit Court of Appeals denied the motion, and, April 12, the bankrupts again petitioned for certiorari, asserting that the court had disregarded our two decisions in holding that the bankrupts' inability to rehabilitate themselves was a relevant factor in appraising their right to resort to § 75 (s), and in holding further that the automatic stay created by sub-section (o) did not survive adjudication under sub-section (s), and had refused, although it had the power, to recall its mandate so as to correct its erroneous construction of the Act. We granted certiorari April 29, 1940.

Three questions emerge from this long and complicated record. They are:

1. Assuming the decision of the Circuit Court of Appeals was erroneous, had it power to recall its mandate and reconsider the appeal? We hold that it had.

2. Assuming the challenged orders of the commissioner and the court were erroneous, were they final, binding, and impregnable to subsequent attack, since review or appeal was not sought or taken within the time limited by court rule or by law? We hold that they were.

3. Had the state court jurisdiction to proceed with foreclosure and to invest the mortgage creditors, as purchasers at the execution sales, with valid title to the mortgaged lands? We hold that it had.

First. The judgment of the Circuit Court of Appeals was rendered in its October 1938 Term. The stay of the mandate did not end, and the mandate was not issued, until that term had expired. The application for recall of the mandate was presented within the following term, during which the mandate had gone down. The respondents assert that the court lacked authority, after the term in which its judgment was rendered, to recall its mandate and to amend its judgment in matter of substance.

In granting the stay, the Circuit Court of Appeals might have extended the term so that it could further consider the case after this court had acted on the petition for certiorari. We think that, by staying the issue of the mandate and retaining the cause until after the subsequent term had opened, the court, in effect, did extend the term as respects the instant case and that, upon disposition of the petition for certiorari, it had power to take further steps in the cause during the term in which the stay expired and the mandate issued.

Second. The District Court disposed of three distinct matters in the orders under review: The petition for review of the commissioner's orders of January 11, 1937, the petition of January 15, 1937, and the motion of April 13, 1938.

The court dismissed the petition for review. The commissioner had denied the petition of January 4, 1937, on the sole ground "that all the matters and things set out in said petition have been previously adjudicated and no review thereof has been had, or if review was taken, such actions of the Referee have been approved on review," and that "all matters and things in said petition alleged have heretofore been considered upon petition filed by said bankrupts and decided adversely to said bankrupts, and said orders have all become final and conclusive." The order affirming the action of the commissioner did not deal with the merits. The court clearly affirmed the commissioner's refusal to consider the petition for the reason stated by him.

In dismissing the petition of January 15, 1937, and the motion of April 13, 1938, the court made findings of fact and stated conclusions of law covering both. It entered what it denominated an "order and decree" with respect to both, and, as above noted, dismissed both the petition and the motion, on the stated ground that all issues therein

raised had been finally adjudicated and no review or appeal had been timely sought or taken.

If the respondents had not cross-petitioned for affirmative relief, the District Court need have taken no further action than it did in dismissing the bankrupts' petition and motion. An order denying a petition for rehearing or review, which is dismissed because the petition was filed out of time, without reconsideration of the merits, does not extend the time for appeal from the original order.[8] But there remained for disposition the prayers of the respondents for affirmative relief. The additional provisions of the decree were in answer to these prayers. As those provisions were assigned as error, the Circuit Court of Appeals had jurisdiction to review them.

Upon the admission of counsel for the bankrupts, the District Court found the facts as to the foreclosure proceedings and found that they were before a court having jurisdiction; that the titles acquired through the execution sales were good as against the bankrupts, and quieted the titles of the mortgagees as purchasers. With respect to the relief and the instructions prayed by the trustee, the court made certain findings as to what had been done in the administration of the estate, confirmed that action, and instructed the trustee as to his further proceedings. These findings and these provisions of the decree obviously were made in response to the cross-petitions of the respondents. They cannot be considered as a review of the merits requested by the petitioners.

The court also found that the bankrupts had made no attempt to comply with the new sub-section (s) of § 75; that they had, ever since the filing of their petition for adjudication on December 19, 1934, been beyond all hope of financial rehabilitation; that there was no possibility of such rehabilitation. Such findings constitute no basis

[8] *Bowman* v. *Loperena*, 311 U. S. 262, 266.

either for a refusal to adjudicate the farmer-petitioner a bankrupt under § 75 (s) or for dismissing the cause instead of following the procedure outlined in the sub-section.[9] In the instant case, however, these findings, though evidently directed to the relief prayed by the respondents, were not necessary to the decision of any of the questions they submitted to the court and do not render erroneous the proper disposition of the issues submitted.

Third. The petitioners urge that the automatic stay imposed by sub-section (o), and the extension of the period of redemption created by sub-section (n), continued throughout the case; and that all action taken in the state court was, therefore, void under the doctrine announced in *Kalb* v. *Feuerstein, supra.* The respondents insist that, in order to continue the extension and have the benefit of the stay after the conclusion of the conciliation proceedings and the adjudication in bankruptcy, timely application to the bankruptcy court to that end had to be made by the petitioners. We find it unnecessary to discuss or decide the important question thus mooted, for the reason that the orders and decrees entered by the bankruptcy court, if valid, relieved the respondents, as mortgagees, of any disability to pursue their foreclosure suits arising out of the pendency of the bankruptcy proceeding and left them free to prosecute the foreclosures in the state courts. However erroneous the challenged orders, the remedy for their correction was by timely application for review or timely appeal.[10] Since the District Court refused to review these orders and decrees out of time, the petitioners could not attack them in the Circuit Court of Appeals.

The judgment is

Affirmed.

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[9] *John Hancock Mutual Ins. Co.* v. *Bartels,* 308 U. S. 180, 184–185.

[10] *Union Joint Stock Land Bank* v. *Byerly,* 310 U. S. 1, 10.

REITZ *v.* MEALEY, COMMISSIONER OF MOTOR VEHICLES OF THE STATE OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

No. 21. Reargued October 22, 1941.—Decided November 10, 1941.

1. Section 94–b of the Vehicle and Traffic Law of New York, as originally enacted, provides that one against whom a judgment is rendered for injury resulting from the operation of a motor car and who fails to pay it within a time designated, shall have his license and registration suspended for three years, unless in the meantime the judgment is satisfied or discharged, except by discharge in bankruptcy; and that the suspension shall persist, after the three years or the satisfaction of the judgment, and until the licensee gives proof of his ability to respond in damages by the procurement of insurance, the giving of a bond or the posting of a deposit. *Held* consistent with due process of law and not in derogation of the Bankruptcy Act. P. 36.
2. The amendment of § 94–b, *supra,* by the Act of May 4, 1936, N. Y. Laws, c. 448, which provides that "if the creditor consents in writing, the debtor may be allowed a license and registration for six months from the date of such consent and thereafter until the consent is revoked in writing, if proof of ability to respond to damages is furnished," is not inconsistent with due process of law. P. 37.
3. Assuming that amendments of § 94–b, *supra,* by N. Y. Laws, 1936, c. 448, *id.* 1939, c. 618, are contrary to the Bankruptcy Act because of the power they purport to give the judgment creditor over the license of the debtor who has been discharged in bankruptcy, the amendments are severable and their invalidity would not affect proceedings based entirely on the original statute. P. 38.
4. Under the law of New York, a statute, in itself constitutional, is not affected by an unconstitutional amendment. P. 38.
5. Whether an amendment stands by itself as an independent enactment, or is incorporated in the setting of the act which it amends, by a provision that the act "shall read as follows:" is a matter of draftsmanship or legislative mechanics. It does not touch the substance of constitutionality. P. 39.

34 F. Supp. 532, affirmed.

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APPEAL from a decree of the District Court of three judges dismissing a bill to enjoin the above-named Commissioner from suspending the plaintiff-appellant's automobile driving license. The hearing below was on bill and answer. The decree was affirmed here by an equally divided Court, 313 U. S. 542; subsequently, a petition for rehearing was granted, the judgment was vacated, and the case was restored to the docket for reargument, 313 U. S. 597.

Mr. Harry A. Allan, with whom *Mr. Daniel H. Prior* was on the brief, for appellant.

Mr. Jack Goodman, Assistant Attorney General of New York, with whom *Messrs. John J. Bennett, Jr.,* Attorney General, and *Henry Epstein,* Solicitor General, were on the brief, for appellee.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This is a suit to restrain the appellee from enforcing a suspension of the appellant's driver's license. The complaint alleges that the order suspending the license was issued May 29, 1940, pursuant to § 94–b of the Vehicle and Traffic Law of New York,[1] upon receipt by the appellee, from the Clerk of the Supreme Court of Albany County, of a transcript of a judgment, accompanied by evidence of its finality and nonpayment, rendered against the appellant in the sum of $5,138.25, in an action to recover damages for personal injuries caused by appellant's operation of an automobile. It is alleged that on June 21, 1940, the appellant was adjudicated a bankrupt and his cause referred to a referee; that the judgment was scheduled as a debt; and, although no discharge had been granted, the judgment is a dischargeable debt. The complaint charges that § 94–b

[1] Consolidated Laws, c. 71.

violates the due process clause of the 14th Amendment and is rendered void by § 17 of the Bankruptcy Act.[2] A temporary and a permanent injunction are prayed. A restraining order issued. The answer of the appellee admits all of the relevant allegations except that the judgment was dischargeable in bankruptcy. Upon the hearing of a motion for injunction, based upon the bill and answer, a court of three judges denied the injunction and dismissed the bill.[3] At the argument before us it was admitted that a discharge has been granted and that the judgment debt is thereby discharged.

Section 94–b provides for suspension of the operator's license and registration certificate of any person if a judgment against him, for injury to person or property resulting from the operation of a motor car, be not paid within fifteen days, upon certification of the judgment, its finality, and nonpayment, to the commissioner by the county clerk. It directs the commissioner to suspend the license for three years unless, in the meantime, the judgment is satisfied or discharged, except by a discharge in bankruptcy. The suspension persists after the expiration of the three years or satisfaction of the judgment, until the licensee gives proof of his ability to respond in damages by the procurement of insurance, the giving of a bond, or the posting of a deposit.[4] The county clerk is required to certify to the commissioner any such judgment unappealed and unsatisfied for fifteen days after entry.

So the statute stood until May 4, 1936, when, by an amendatory act,[5] a proviso was added that, if the creditor consents in writing, the debtor may be allowed a license and registration for six months from the date of such consent and thereafter until the consent is revoked in

[2] 11 U. S. C. § 35.

[3] 34 F. Supp. 532.

[4] See § 94–c.

[5] New York Laws, 1936, c. 448.

writing, if proof of ability to respond to damages is furnished. A further amendment, of May 31, 1939,[6] made it the duty of the county clerk to certify the judgment only upon written demand of the creditor or his attorney.

The purpose of the statute is clear. It is not a condition of the grant of license that the applicant shall have insurance. Instead, the policy of the State is that, if a driver has an accident in respect of which a judgment convicts him of negligence, his license will be suspended and so remain unless he furnishes proof of his ability to respond for damage thereafter caused; and that, in any event, it will be suspended for three years unless, in the meantime, the judgment is satisfied or the creditor consents that the license be reinstated and remain in force.

First. The statute, leaving out of consideration the amendments, is not obnoxious to the due process clause of the 14th Amendment. The use of the public highways by motor vehicles, with its consequent dangers, renders the reasonableness and necessity of regulation apparent. The universal practice is to register ownership of automobiles and to license their drivers. Any appropriate means adopted by the states to insure competence and care on the part of its licensees and to protect others using the highway is consonant with due process. Some States require insurance, or its equivalent, as a condition of the issue of a license. New York chose to obtain the same end by providing for the revocation or suspension of a license if the holder is adjudged guilty of negligent driving. Section 94–b permits the restoration of the license upon payment or satisfaction of the judgment. As the court below has held, the effect of the statute as it stood prior to the amendment of 1936 was to make the license privilege a form of protection against damage to the public inflicted through the licensee's carelessness.[7]

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[6] New York Laws, 1939, c. 618.

[7] See also *Munz* v. *Harnett*, 6 F. Supp. 158.

Second. Prior to the amendment of 1936, the license could not be restored until three years had expired from its suspension, unless the judgment were paid or discharged, except by a discharge in bankruptcy, and unless, also, the licensee furnished proof of his ability to respond in damages for any future accident.

If the statute went no further, we are clear that it would constitute a valid exercise of the State's police power not inconsistent with § 17 of the Bankruptcy Act. The penalty which § 94–b imposes for injury due to careless driving is not for the protection of the creditor merely, but to enforce a public policy that irresponsible drivers shall not, with impunity, be allowed to injure their fellows. The scheme of the legislation would be frustrated if the reckless driver were permitted to escape its provisions by the simple expedient of voluntary bankruptcy, and, accordingly, the legislature declared that a discharge in bankruptcy should not interfere with the operation of the statute. Such legislation is not in derogation of the Bankruptcy Act. Rather it is an enforcement of permissible state policy touching highway safety.

Third. The appellant insists that the section as amended, and as it was at the time the judgment was rendered against him, violates the due process clause and runs afoul of the Bankruptcy Act in virtue of the power given the creditor to have the judgment certified to the commissioner of motor vehicles, that is, the power to bring § 94–b into operation, and the further power to suspend the operation of the section.

The claim of deprivation of rights without due process of law is frivolous. The State has seen fit to give the plaintiff an additional means of enforcing the payment of a judgment for damages inflicted in the operation of a motor vehicle by dealing with the registration and license of the driver. The grant of this additional remedy is not inconsistent with the concept of due process.

A more serious question arises in connection with § 17 of the Bankruptcy Act. The discharge of the debtor is a defense available against a suit on the judgment and against execution process issued upon it. And there is force in the argument that § 94–b, as amended, in truth deprives the debtor of the immunity afforded by his discharge, leaves out of view the public policy of the State or makes that public policy subservient to the private interest of the creditor by affording him the opportunity to initiate, remove and revive the suspension of the license upon terms as to payments on account of his claim.

The District Court held that it need not consider the validity of the amendment of 1939, which requires the county clerk to certify the judgment only upon the request of the creditor. Under the old law it was the duty of the county clerk to certify every such judgment which had become final and remained unsatisfied for fifteen days. It is true that the bill alleges the judgment in this case was certified at the request of the plaintiff's attorney. But if the amendment is void, because it confers a power on the creditor inconsistent with the effect of the debtor's discharge, and is eliminated from the statute for that reason, it still remains that under the old law the county clerk's duty to certify was mandatory, and this judgment would have been certified if he had performed his official duty.

The court also found it unnecessary to pass upon the validity of the 1936 amendment. The power of the creditor to lift the suspension and restore it during the period of three years does not appear to have been invoked in the present case. If the creditor attempts to exercise that power, the commissioner will have to determine whether the amendment giving the creditor such power is valid.

The court was of the view that if the amendments are invalid, as inconsistent with § 17 of the Bankruptcy Act, they are severable, and that the statute may stand as a complete act without them, since, under the law of New

York, a statute, in itself constitutional, is not affected by an unconstitutional amendment;—the amendment dropping out and the original act remaining in force. Decisions of the highest court of the State are cited to this effect.[8]

These decisions hold that, where the original and amending acts were enacted by different legislatures, it cannot be thought that the original act would not have been retained except for the amendments, and this principle has been applied where the amending act declares, as it does in this instance, that the original act is "amended to read as follows" and then contains a redraft of the entire act with the amendment inserted. Whether an amendment stands by itself as an independent enactment, or is incorporated in the setting of the act which it amends, by a provision that the act "shall read as follows:" is a matter of draftsmanship or legislative mechanics. It does not touch the substance of constitutionality.

There is no evidence of intent that if the amendments could not stand the legislation as a whole should fail. On the contrary, the legislative history discloses a persistent purpose that such a scheme for the control of motor drivers should remain. Successive and frequent amendments have dealt with details but have left intact the major features of the legislation.[9] In any case, we should accord great weight to the District Court's view of New York law. But an examination of the authorities convinces that in this case any contrary view is untenable. Since the judgment in this case would or should have been

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[8] *E. g., People* v. *Mensching,* 187 N. Y. 8, 23, 79 N. E. 884; *Markland* v. *Scully,* 203 N. Y. 158, 96 N. E. 427; *People* v. *Klinck Packing Co.,* 214 N. Y. 121, 108 N. E. 278; *People* v. *Knapp,* 230 N. Y. 48, 63, 129 N. E. 202.

[9] See Laws 1930, c. 398; Laws 1931, c. 669; Laws 1934, c. 438; Laws 1936, c. 293; Laws 1936, c. 771; Laws 1937, c. 114; Laws 1937, c. 463; Laws 1939, c. 618.

certified prior to the amendment of 1939, and since the creditor has not sought to invoke the amendment of 1936 which gives him a control over the restoration of appellant's license and its continued force during the three year suspension period, we think the court was right in abstaining from deciding whether the amendments are annulled by § 17 of the Bankruptcy Act.

The decree is

Affirmed.

MR. JUSTICE DOUGLAS, dissenting:

Under the statute in question, it becomes the duty of the commissioner of motor vehicles to suspend the operator's license of one against whom the unsatisfied judgment has been rendered (*Matter of Jones* v. *Harnett,* 247 App. Div. 7, 286 N. Y. S. 220; aff'd 271 N. Y. 626, 3 N. E. 2d 455), "upon receiving a certified copy" of such final judgment from the court. McKinney's Cons. L. Bk. 62–A, § 94–b. The statute further provides that "It shall be the duty of the clerk of the court, or of the court, where it has no clerk, in which any such judgment is rendered, to forward immediately, *upon written demand of the judgment creditor or his attorney* . . . to such commissioner a certified copy of such judgment or a transcript thereof." [Italics supplied.] *Id.*

In this case the judgment creditor invoked the power which the New York legislature placed in his hands. At the request of his attorney, the clerk of the court forwarded a transcript of the judgment to the commissioner, who thereupon issued the order of suspension.

The power thus granted the judgment creditor contravenes § 17 of the Bankruptcy Act. Judgments on claims of the kind involved here [1] are provable (*Lewis* v. *Roberts,*

[1] The appearance of judgments, arising out of automobile accidents, among individual bankrupts' schedules of liabilities has been common. Causes of Business Failures and Bankruptcies of Individuals in New Jersey in 1929–30, U. S. Dept. of Commerce, Don. Comm. Series No.

267 U. S. 467) and do not fall within any of the categories of debts excepted from discharge by § 17. Since they are dischargeable, a state cannot supply a device for their collection which survives a discharge in bankruptcy. The bankruptcy power is "unrestricted and paramount"; the states "may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations." *International Shoe Co.* v. *Pinkus,* 278 U. S. 261, 265. The power which New York has placed in the hands of this judgment creditor is such an interference, though the discharge in bankruptcy be deemed to destroy only the remedy (*Zavelo* v. *Reeves,* 227 U. S. 625) not the debt.

Under the New York scheme a creditor whose claim has been discharged still holds a club over his debtor's head. The state has given him a remedy which survives bankruptcy. If the bankrupt refuses to pay his discharged debt, the creditor will see to it that his driver's license is suspended. If, however, the bankrupt will pay up, the creditor will refrain.

The practical pressures of this collection device are apparent. Where retention of the operator's license is essential to livelihood, as here alleged, the bankrupt is at the creditor's mercy. Bankruptcy is not then the sanctuary for hapless debtors which Congress intended. The bankrupt, instead of receiving by virtue of his discharge "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt" (*Local Loan Co.* v. *Hunt,* 292 U. S. 234, 244) finds himself still entangled with a former creditor.

In practical effect the bankrupt may be in as bad, or even worse, a position than if the state had made it possible for a creditor to attach his future wages. Such a device

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54, pp. 25–26 (1931); Causes of Commercial Bankruptcies, *id.*, No. 69, pp. 14–16 (1932); Causes of Bankruptcies Among Consumers, *id.*, No. 82, pp. 14–15 (1933).

would clearly contravene the Bankruptcy Act. *Local Loan Co.* v. *Hunt, supra.* The present one likewise runs afoul of the Act.

But it is said that if this provision of the statute falls out, the old one falls in; and under the old one it was the duty of the clerk to certify the unsatisfied judgment to the commissioner. The difficulty with that view is that this is not that case. This bankrupt's license was suspended as a result of legal compulsion by the creditor. Whether it would have been suspended had the commissioner been advised that the amendment giving the creditor that power contravened the Bankruptcy Act is wholly conjectural. The question of whether a provision of a state statute survives an invalid amendment is a question of state law. See *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298. We do not know what the ruling of the New York courts would be under this statute. Nor do we know whether as a matter of administrative policy the clerk and the commissioner would have proceeded on the basis of the old statute or would have awaited legislative clarification. But, since we do know that the bankrupt was deprived of his license by reason of a statute which conflicts with the Bankruptcy Act, we should strike down the statutory provision which in fact was invoked.

The constitutional objection to this statute, however, persists even though we assume that the bankrupt's license would have been suspended without the creditor's initiative. The Act also provides that "*if the judgment creditor consents in writing that the judgment debtor be allowed license and registration,* the same may be allowed for six months from the date of such consent by the commissioner and thereafter. . . ." (Italics supplied.) I do not think we can pass over that provision on the theory that the power of the creditor to lift the suspension does not appear to have been invoked in this case and that if the creditor

attempts to exercise such power the commissioner will have to pass on the constitutional issue. Meanwhile, the provision in question will give to the creditor enormous leverage. His bargaining position will be greatly fortified. The bankrupt is at his mercy where the means of livelihood are at stake. If the bankrupt agrees to a settlement, makes arrangements for instalment payments, or the like, the creditor will see to it that the license is restored. If the bankrupt rests on his rights, the creditor will show no mercy. In the interim, there is no way by which the bankrupt can rid himself of that pressure, unless he makes peace with the creditor; he cannot force the constitutional issue in any way other than the present suit. If the creditor agrees to lift the suspension, the bankrupt would be the last to object. In any event, the provision by that time would have spent much of its force. In short, this power which New York has given the creditor is a powerful collection device which should not be allowed to survive bankruptcy.

I agree that we should not meet a constitutional issue unless it is unavoidable. But that issue cannot be escaped here, unless we are to overlook the realities of collection methods.

MR. JUSTICE BLACK, MR. JUSTICE BYRNES and MR. JUSTICE JACKSON join in this dissent.

BALTIMORE & OHIO RAILROAD CO. *v.* KEPNER.

CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 20. Reargued October 20, 1941.—Decided November 10, 1941.

1. Under § 6 of the Federal Employers Liability Act, as amended, the injured employee has the federal privilege of bringing his action in any district in which the railroad is doing business, though the district chosen be far from the district in which he resides, or in which the cause of action arose, and in another State. P. 52.
2. A state court may not validly exercise its equitable jurisdiction to enjoin a resident of the State from prosecuting a cause of action arising under the Federal Employers Liability Act in a federal court of another State where the Act gave venue, on the ground that the prosecution in that district is inequitable, vexatious and harassing to the carrier. P. 53.

137 Ohio St. 409; 30 N. E. 2d 982, affirmed.

CERTIORARI, 312 U. S. 671, to review a decree affirming the dismissal on demurrer of a bill by the railroad company to enjoin Kepner from further prosecution of a suit in the federal court for the Eastern District of New York seeking recovery of damages under the Federal Employers Liability Act for injuries resulting from an accident in Ohio. The judgment was affirmed here by an equally divided court, 313 U. S. 542; subsequently, a petition for rehearing was granted, the judgment was vacated, and the case was restored to the docket for reargument, 313 U. S. 597.

Messrs. Harry H. Byrer and *Morison R. Waite,* with whom *Messrs. Cassius M. Clay* and *William A. Eggers* were on the brief, for petitioner.

Courts of equity have inherent power to restrain the prosecution of vexatious and harassing litigation, and it is the law of Ohio that its citizens are subject to the exercise of such power by its courts. Pomeroy's Equity Jurisprudence, 3rd Ed., Vol. 4, § 1360; Vol. 6, § 670; *Snook* v.

Snetzer, 25 Ohio St. 516; *New York, C. & St. L. R. Co.* v. *Matzinger,* 136 Ohio St. 271; *Cole* v. *Cunningham,* 133 U. S. 107; *Dehon* v. *Foster,* 4 Allen 545 (Mass.); *Steelman* v. *All Continent Corp.,* 301 U. S. 278, 291; *Boston & M. R. Co.* v. *Whitehead,* 29 N. E. 2d 916, and cases cited.

The Federal Employers' Liability Act does not forbid, either expressly or by implication, this exercise of power by the courts, nor does it so completely cover the field as to preclude the application of state law. *Douglas* v. *N. Y., N. H. & H. R. Co.,* 279 U. S. 377; *Maurer* v. *Hamilton,* 309 U. S. 598; *Reid* v. *Colorado,* 187 U. S. 137, 148; *Federal Trade Commission* v. *Bunte Bros.,* 312 U. S. 349; *United States* v. *Darby,* 312 U. S. 100; *Hines* v. *Davidowitz,* 312 U. S. 52; *Kelly* v. *Washington,* 302 U. S. 1; *Michigan Central R. Co.* v. *Mix,* 278 U. S. 492.

The history of the amendment to § 6 of the Federal Employers' Liability Act demonstrates that Congress did not intend to bar this equitable power, and that the exercise of such power would be in harmony with the purpose of the Act. *Palmer* v. *Webster & Atlas Bank,* 312 U. S. 156; Thornton's Federal Employers' Liability Act, 3rd Ed., Appendix B, pp. 576, 580; Cong. Rec., Vol. 45, Pt. 4, p. 4040.

The restraint of a party to a suit is not tantamount to the restraint of the court itself. *Steelman* v. *All Continent Corp.,* 301 U. S. 278, 290; *Bryant* v. *Atlantic Coast Line R. Co.,* 92 F. 2d 569.

The facts in the present case are sufficient to invoke the equitable powers of a court. *Baltimore & Ohio R. Co.* v. *Kepner,* 137 Ohio St. 409; *Davis* v. *Farmers' Coöperative Co.,* 262 U. S. 312; *Michigan Central R. Co.* v. *Mix,* 278 U. S. 492; *Denver & R. G. W. R. Co.* v. *Terte,* 284 U. S. 284; *New York, C. & St. L. R. Co.* v. *Matzinger,* 136 Ohio St. 271; *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

The weight of authority supports the right to injunction. *Reed's Administratrix* v. *Illinois Central R. Co.,*

182 Ky. 455; *Ex Parte Crandall,* 53 F. 2d 969, cert. den., 285 U. S. 540; *Bryant* v. *Atlantic Coast Line R. Co.,* 92 F. 2d 569.

Whether the conduct of an Ohio citizen is equitable is a question of state law, which an Ohio court having jurisdiction of the citizen is to determine in accordance with that law, unless Congress within its delegated powers has made an enactment inconsistent with the Ohio law. *Milliken* v. *Meyer,* 311 U. S. 457.

Mr. Samuel T. Gaines, with whom *Mr. Edward M. Ballard* was on the brief, for respondent.

The Federal Employers' Liability Act drew to itself the right of action for injuries or death of an employee within its purview. The action must be brought as prescribed in the Act. *Moore* v. *C. & O. Ry. Co.,* 291 U. S. 205; *Breisch* v. *Central Railroad,* 312 U. S. 484; *Seaboard Air Line Ry. Co.* v. *Kenney,* 240 U. S. 489.

The right of respondent to sue in the federal District Court in the district where petitioner is doing business is clear and unqualified, and compels such court to assume jurisdiction. *Moore* v. *C. & O. Ry. Co., supra*; *Southern Ry.* v. *Cochran,* 56 F. 2d 1019; *Rader* v. *B. & O. R. Co.,* 108 F. 2d 980; *Chicago, M. & St. P. Ry. Co.* v. *Schendel,* 292 F. 326; *Atchison, T. & S. F. Ry. Co.* v. *Sowers,* 213 U. S. 55.

Nothing in either the language or the history of § 6 of the Federal Employers' Liability Act sustains the contention that the right to invoke a federal court's jurisdiction therein provided is subject to the equity powers of a state court.

The language is clear, and its obvious meaning controls. *Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, 588, 589; *Kuehner* v. *Irving Trust Co.,* 299 U. S. 445, 449.

The Ohio court had no jurisdiction of the subject of the action after District Court jurisdiction attached.

The grant of concurrent jurisdiction gives plaintiff a choice of the court. As an incident he is entitled to whatever remedial advantage inheres in the particular forum. *Minneapolis & St. Louis R. Co.* v. *Bombolis,* 241 U. S. 211; *Missouri* v. *Taylor,* 266 U. S. 200.

A state court is without power to arrest jurisdiction of the federal court. *Sharon* v. *Terry,* 36 F. 337, 355; *Wallace* v. *McConnell,* 13 Pet. 138, 151; *Terral* v. *Burke Construction Co.,* 257 U. S. 532; *Pennsylvania Casualty Co.* v. *Pennsylvania,* 294 U. S. 189, 197; *Riggs* v. *Johnson County,* 6 Wall. 166.

MR. JUSTICE REED delivered the opinion of the Court.

We have for decision in this case the question whether a state court may validly exercise its equitable jurisdiction to enjoin a resident of the state from prosecuting a cause of action arising under the Federal Employers' Liability Act in a federal court of another state where that Act gave venue, on the ground that the prosecution in the federal court is inequitable, vexatious and harassing to the carrier.

As the issue was deemed a federal question of substance,[1] undecided by this Court, and concerning which there was lack of uniformity in the state court decisions,[2] certiorari was granted, 312 U. S. 671, the decree below affirmed here by an equally divided court, 313 U. S. 542, and the petition for rehearing allowed, 313 U. S. 597.

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[1] Judicial Code, § 237b.

[2] *McConnell* v. *Thomson,* 213 Ind. 16, 8 N. E. 2d 986, 11 N. E. 2d 183; *Reed's Admrx.* v. *Illinois Central R. Co.,* 182 Ky. 455, 206 S. W. 794.

This proceeding originally was brought by the petitioner, an interstate railroad, in the Court of Common Pleas of Hamilton County, Ohio, against the respondent Kepner, an injured resident employee, to enjoin his continued prosecution of a suit in the United States District Court for the Eastern District of New York under the Federal Employers' Liability Act for his injuries. The accident, according to the petition, occurred in Butler County, Ohio, a county adjacent to that of respondent's residence, through both of which counties petitioner's railroad ran. The petition further showed that suitable courts, state and federal, were constantly open and that petitioner and the witnesses were available for process therein. It was stated the federal court chosen was seven hundred miles from the residence of the respondent and numerous witnesses; that to present the case properly required the personal attendance of approximately twenty-five locally available witnesses—the crew, inspectors and the medical attendants—at a cost estimated to exceed the cost of the presentation of the case at a convenient point by $4,000, with no resulting benefit to the injured employee. Petitioner asserted these facts established that the continued prosecution of the federal court action would be an undue burden on interstate commerce and an unreasonable, improper and inequitable burden upon petitioner itself.

The defendant railroad was doing business in the New York district where the damage suit was filed, as appears from a copy of the complaint in the federal case made a part of the petition.

Respondent demurred for failure to state a cause of action and lack of jurisdiction of the subject of the action. The trial court sustained the demurrer and dismissed the action, by an order which was sustained by the Court of Appeals and, on rehearing, by the Supreme

Court of Ohio.[3] The basis for the decision below was that the respondent employee was privileged to enjoy, without interference from a state court, the venue allowed by the Federal Employers' Liability Act.[4]

The statutory provision in regard to venue is in § 6, which so far as pertinent reads as follows:

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." (Apr. 5, 1910, c. 143, § 1, 36 Stat. 291, as amended March 3, 1911, c. 231, § 291, 36 Stat. 1167; 45 U. S. C. § 56.

When the second Employers' Liability Act was enacted, venue of actions under it was left to the general venue statute, 35 Stat. 65, which fixed the venue of suits in the United States courts, based in whole or in part upon the Act, in districts of which the defendant was an inhabitant.[5] Litigation promptly disclosed what Congress considered deficiencies in such a limitation of the right of railroad employees to bring personal injury actions,[6] with the result that the present language was added.[7]

The reason for the addition was said to be the injustice to an injured employee of compelling him to go to the possibly far distant place of habitation of the defendant

[3] 137 Ohio St. 206, 28 N. E. 2d 586 and 137 Ohio St. 409, 30 N. E. 2d 982.

[4] 137 Ohio St. 409, 416, 30 N. E. 2d 982.

[5] First section of the act of March 3, 1875, 18 Stat. 470, as amended by the act of March 3, 1887, 24 Stat. 552, and act of August 13, 1888, 25 Stat. 433.

[6] *Cound* v. *Atchison, T. & S. F. Ry. Co.*, 173 F. 527; *Macon Grocery Co.* v. *Atlantic Coast Line R. Co.*, 215 U. S. 501, 506. Senate Report No. 432, 61st Cong., 2d Sess., p. 4.

[7] April 5, 1910, c. 143, 36 Stat. 291.

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carrier, with consequent increased expense for the transportation and maintenance of witnesses, lawyers and parties, away from their homes.[8] The legislative history throws little light on the reason for the choice of the three standards for determining venue: the residence of the carrier, the place where it is doing business, or the place where the cause of action arose. At one time, the amendatory bill fixed venue as "the district of the residence of either the plaintiff or the defendant, or in which the cause of action arose, or in which the defendant shall be found at the time of commencing such action." [9] Fears were expressed that so wide a choice might result in injustice to the carrier, p. 2257. No doubt this language was actually considered by the Senate Judiciary Committee, as well as the language of the general venue statute for which the Committee was providing an exception. Specific attention was called in the Senate report to the *Macon Grocery* case, interpreting the general venue statute. That statute placed venue in the residence of either party, where the jurisdiction was founded on diversity of citizenship alone. The language finally adopted must have been deliberately chosen to enable the plaintiff, in the words of Senator Borah, who submitted the report on the bill, "to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so." [10]

When petitioner sought an injunction in the Ohio court against the further prosecution of the federal court action in New York, the petition alleged that prosecution of the New York action would entail "an undue burden" on interstate commerce. No objection to the decree below, upon that explicit ground, appears in the petition for

[8] Senate Report No. 432, 61st Cong., 2d Sess., p. 4.

[9] Cong. Rec., 61st Cong., 2d Sess., Vol. 45, Pt. 3, p. 2253.

[10] *Id.*, Pt. 4, p. 4034.

certiorari, either in the specification of errors or reasons for granting the writ. In petitioner's brief on the merits, it is pointed out that this Court held in *Denver & R. G. W. R. Co.* v. *Terte,* 284 U. S. 284, that the disadvantages of litigation far from the scene of the accident are not substantial enough to justify a state court in forbidding the continuation of the litigation in a district where the lines of the carrier run. This accords with *Hoffman* v. *Missouri ex rel. Foraker,* 274 U. S. 21, where it was said the carrier must "submit, if there is jurisdiction, to the requirements of orderly, effective administration of justice, although thereby interstate commerce is incidentally burdened." [11] Since the carrier's exhibit of respondent's New York petition shows an allegation that it is doing business in New York, we assume that business to be such as is contemplated by the venue provisions of § 6. There is therefore no occasion to consider further the suggestion that the suit in New York creates an inadmissible burden upon interstate commerce.

The real contention of petitioner is that, despite the admitted venue, respondent is acting in a vexatious and inequitable manner in maintaining the federal court suit in a distant jurisdiction when a convenient and suitable forum is at respondent's doorstep. Under such circumstances, petitioner asserts power, abstractly speaking, in the Ohio court to prevent a resident under its jurisdiction

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[11] Cf. *International Milling Co.* v. *Columbia Co.,* 292 U. S. 511, 517–21; *St. Louis, B. & M. Ry. Co.* v. *Taylor,* 266 U. S. 200, 207. *Davis* v. *Farmers Co-operative Co.,* 262 U. S. 312, is limited to its particular facts, 292 U. S. 511 at 517; *Michigan Central R. Co.* v. *Mix,* 278 U. S. 492, and *Atchison, T. & S. F. Ry. Co.* v. *Wells,* 265 U. S. 101, turn on the absence or inconsequential character of business done within the states where the railroads were sued. The *Mix* case is differentiated from the *Foraker* and *Taylor* cases because the carrier's lines or contracts did not run or call for performance in the territory over which the court where the objectionable action was filed had jurisdiction.

from doing inequity. Such power does exist.[12] In the *Matzinger* case, the Supreme Court of Ohio exercised this power to prevent the continuation of a personal injury suit in Illinois, by a resident under its jurisdiction, on an Ohio cause of action. Such power has occasionally been exercised by one state over its citizens, seeking to enforce in other states remedies under the Employers' Liability Act, against defendants locally available for the litigation.[13] At times the injunction has been refused.[14]

We read the opinion of the Supreme Court of Ohio to express the view that, if it were not for § 6 of the Employers' Liability Act, the requested injunction would be granted, on the undisputed facts of the petition. Section 6 establishes venue for an action in the federal courts. As such venue is a privilege created by federal statute[15] and claimed by respondent, the Supreme Court of Ohio felt constrained by the Supremacy Clause to treat § 6 as decisive of the issue. It is clear that the allowance or denial of this federal privilege is a matter of federal law, not a matter of state law under *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 72.[16] Its correct decision depends upon a construction of a federal act.[17] Consequently, the action of a state court must be in accord with the federal statute

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[12] *New York, C. & St. L. R. Co.* v. *Matzinger*, 136 Ohio St. 271, 25 N. E. 2d 349; *Cole* v. *Cunningham*, 133 U. S. 107; *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, 123.

[13] *Kern* v. *Cleveland, C., C. & St. L. Ry. Co.*, 204 Ind. 595, 185 N. E. 446; *Reed's Admrx.* v. *Illinois Central R. Co.*, 182 Ky. 455, 206 S. W. 794; *Ex parte Crandall*, 53 F. 2d 969.

[14] *Missouri-Kansas-Texas R. Co.* v. *Ball*, 126 Kan. 745, 271 P. 313; *Mobile & Ohio R. Co.* v. *Parrent*, 260 Ill. App. 284; *Lancaster* v. *Dunn*, 153 La. 15, 95 So. 385.

[15] *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165.

[16] A contrary view as to injunctions against actions in state courts has been expressed. Roberts: Federal Liabilities of Carriers (2d Ed.) Vol. 2, § 962.

[17] *Cohens* v. *Virginia*, 6 Wheat. 264, 379.

and the federal rule as to its application, rather than state statute, rule or policy.[18]

Petitioner presses upon us the argument that the action of Congress gave an injured railway employee the privilege of extended venue, subject to the usual powers of the state to enjoin what in the judgment of the state courts would be considered an improper use of that privilege. This results, says petitioner, because the Act does not in terms exclude this state power.[19] As courts of equity admittedly possessed this power before the enactment of § 6, the argument continues, it is not to be lightly inferred that the venue privilege was in disregard of this policy. But the federal courts have felt they could not interfere with suits in far federal districts where the inequity alleged was based only on inconvenience.[20] There is no occasion to distinguish between the power and the propriety of its exercise in this instance, since the limits of the two are here co-extensive. The privilege was granted because the general venue provisions worked injustices to employees. It is obvious that no state statute could vary the venue;[21] and, we think, equally true that no state court may inter-

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[18] *Calhoun Gold Mining Co.* v. *Ajax Gold Mining Co.*, 182 U. S. 499, 505; *Tullock* v. *Mulvane*, 184 U. S. 497, 505, 512–13; *Cincinnati, N. O. & T. P. Ry. Co.* v. *Rankin*, 241 U. S. 319, 326–27; *Chesapeake & Ohio Ry. Co.* v. *Martin*, 283 U. S. 209, 213; *Chesapeake & Ohio Ry. Co.* v. *Kuhn*, 284 U. S. 44, 47; *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 231; cf. Roberts, *op. cit., supra.*

[19] *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349; *United States* v. *Darby*, 312 U. S. 100; *Hines* v. *Davidowitz*, 312 U. S. 52; *Kelly* v. *Washington*, 302 U. S. 1.

[20] *Chesapeake & Ohio Ry. Co.* v. *Vigor*, 90 F. 2d 7; *Baltimore & Ohio R. Co.* v. *Clem*, 36 F. Supp. 703, overruling *Baltimore & Ohio R. Co.* v. *Bole*, 31 F. Supp. 221.

[21] It was held in *Chicago, M. & St. P. Ry. Co.* v. *Schendel*, 292 F. 326, 327–32, that by virtue of the Supremacy Clause a state statute was unconstitutional which forbade the doing of any act to further litigation in another state, by testimony or otherwise, on a personal injury claim arising locally.

fere with the privilege, for the benefit of the carrier or the national transportation system, on the ground of inequity based on cost, inconvenience or harassment. When the section was enacted it filled the entire field of venue in federal courts.[22] A privilege of venue, granted by the legislative body which created this right of action, cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative—a course followed in securing the amendment of April 5, 1910, for the benefit of employees. This Court held in *Hoffman* v. *Missouri ex rel. Foraker*, 274 U. S. 21, that the burden on interstate commerce would be disregarded where the carrier had lines in the distant state. The importance of unhampered commerce is at least as great as that of a carrier's freedom from harassing incidents of litigation. Whatever burden there is here upon the railroad, because of inconvenience or cost, does not outweigh the plain grant of privilege for suit in New York.[23]

Affirmed.

MR. JUSTICE FRANKFURTER, dissenting:

Disagreement with the views of the majority on the construction of a venue provision does not ordinarily call for expression. But inasmuch as the decision in this case unjustifiably limits long-settled powers of the state courts and thereby brings into disequilibrium the relationship of federal and state courts, I think it proper to express my views.

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[22] Cf. *New York Central R. Co.* v. *Winfield*, 244 U. S. 147, 151.

[23] We do not think petitioner's attempted distinction between a prohibited injunction directed at the court and a permitted one directed at the parties is valid. An order to the parties forbidding prosecution would destroy venue effectually. *Oklahoma Packing Co.* v. *Gas Co.*, 309 U. S. 4, 9. Cf. *Hill* v. *Martin*, 296 U. S. 393, 403. *Steelman* v. *All Continent Corp.*, 301 U. S. 278, relied upon by petitioner, would be pertinent only if there were occasion for the state court to control federal venue. It would then be exercised against the parties.

The decision of the Court seems to be epitomized in this sentence: "A privilege of venue, granted by the legislative body which created this right of action, cannot be frustrated for reasons of convenience or expense." As a general proposition, the suggestion that a privilege of venue granted by the legislative body which creates the right of action "cannot be frustrated for reasons of convenience or expense" would be as novel as it is untenable. To give unique scope to this venue provision different from the significance accorded all other provisions of venue "granted by the legislative body which created" the right is no less novel doctrine. For this departure from the effect customarily given to venue provisions, no warrant is avouched in the specific provisions of the Federal Employers' Liability Act, the general provisions of legislation defining the relationship between federal and state courts, the principles applied in the decisions of this Court, or settled doctrines of equity jurisdiction. None is avouched because none is available.

The opinion does not deny the historic power of courts of equity to prevent a misuse of litigation by enjoining resort to vexatious and oppressive foreign suits. See *e. g.*, *Cole* v. *Cunningham,* 133 U. S. 107, 118–20; *Pere Marquette Ry. Co.* v. *Slutz,* 268 Mich. 388, 256 N. W. 458; *Mason* v. *Harlow,* 84 Kan. 277, 114 P. 218; *Wilser* v. *Wilser,* 132 Minn. 167, 156 N. W. 271; *Northern Pacific Ry. Co.* v. *Richey & Gilbert Co.,* 132 Wash. 526, 232 P. 355; *O'Haire* v. *Burns,* 45 Colo. 432, 101 P. 755; *Miller* v. *Gittings,* 85 Md. 601, 37 A. 372. Nor does it question the familiar doctrine of *forum non conveniens,* under which a court having statutory jurisdiction may decline its facilities to a suit that in justice should be tried elsewhere. See *Canada Malting Co.* v. *Paterson Co.,* 285 U. S. 413, 422–23; *Massachusetts* v. *Missouri,* 308 U. S. 1, 19; *Rogers* v. *Guaranty Trust Co.,* 288 U. S. 123, 130–31. These manifestations of a civilized judicial system are firmly imbedded

in our law. See Foster, *Place of Trial in Civil Actions,* 43 Harv. L. Rev. 1217; Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law,* 29 Col. L. Rev. 1. Nor does the decision give new currency to the discredited notion that there is a general lack of power in the state courts to enjoin proceedings in federal courts. Cf. *Princess Lida* v. *Thompson,* 305 U. S. 456, 466; Warren, *Federal and State Court Interference,* 43 Harv. L. Rev. 345. Nothing in Article III of the Constitution or in the legislation by which Congress has vested judicial power in the federal courts justifies such a doctrine.

And so the basis of the decision of the Court must be found, if anywhere, in the terms of the venue provision of the Federal Employers' Liability Act. The section provides, simply, that an action under the Act "may be brought in a District Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action," that the jurisdiction of the federal courts shall be "concurrent" with that of the state courts, and that no action brought in a state court of competent jurisdiction shall be removed to a federal court. 36 Stat. 291; 45 U. S. C. § 56. The phrasing of the section is not unique: it follows the familiar pattern generally employed by Congress in framing venue provisions. *E. g.,* 28 U. S. C. § 112 (suits based upon diversity of citizenship); 28 U. S. C. § 53 (suits by or against China Trade Act corporations); 28 U. S. C. § 104 (suits for penalties and forfeitures); 28 U. S. C. § 105 (suits for recovery of taxes); 28 U. S. C. § 41 (26) (b) (interpleader). The decision cannot rest, therefore, upon any peculiarities of the language of the provision.

Nor can justification for the Court's conclusion be found in the legislative history of the section or the clearly expressed reasons of policy underlying its enactment. As the House and Senate committee reports show, H. Rept.

No. 513, pp. 6–7, S. Rept. No. 432, pp. 3–4, 61st Cong., 2d Sess., Congress was aware of the hardship by which, under the original Employers' Liability Act of April 22, 1908, 35 Stat. 65, the plaintiff could bring his action only at the railroad's "residence." *Cound* v. *Atchison, T. & S. F. Ry. Co.*, 173 F. 527. The amendment of 1910 greatly enlarged the range of a plaintiff's convenience in bringing suit. It is not disputed that the amendment was intended to open to a plaintiff courts from which he previously was barred. But that is not the question before us. The problem is whether the Act was intended to give a plaintiff an absolute and unqualified right to compel trial of his action in any of the specified places he chooses, thereby not only depriving state courts of their old power to protect against unjustly oppressive foreign suits, but also forbidding federal courts to decline jurisdiction "in the interest of justice" on familiar grounds of *forum non conveniens.* See *Canada Malting Co.* v. *Paterson Co.*, 285 U. S. 413, 422–23. Nothing in the history of the 1910 amendment indicates that its framers contemplated any such vast transformation in the established relationship between federal and state courts and in the duty of the federal courts to decline jurisdiction "in the interest of justice." On the contrary, the expressed considerations of policy underlying the amendment were fundamentally the same as those underlying the equitable power to restrain oppressive suits and the reciprocal doctrine of *forum non conveniens:* It does not comport with equity and justice to allow a suit to be litigated in a forum where, on the balance, unnecessary hardship and inconvenience would be cast upon one party without any compensatingly fair convenience to the other party, but where, on the contrary, the suit might more conveniently be litigated in another forum available equally to both parties.

This doctrine of justice applies with especially compelling force where the conveniences to be balanced are not

merely conveniences of conflicting private interests but where there is added the controlling factor of public interest. The so-called "convenience" of a railroad concerns the important national function of which the railroads are the agency. As in other phases of federal railroad regulation, the interests of carriers, employees, and the public must be balanced. Because of the "direct concern of the public" in maintaining an economic and efficient railroad system, a unanimous Court, speaking through Mr. Justice Brandeis, held that a carrier may not be sued by a plaintiff where, under the circumstances of the particular facts, such suit would impose an unfair burden upon railroads and thereby upon the nation. *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312. The declaration by Congress that a court has jurisdiction and venue is not a command that it must exercise its authority in such a case to the unnecessary injury of a defendant and the public. This doctrine has been consistently followed in a series of unanimous decisions. *Atchison, T. & S. F. Ry. Co.* v. *Wells*, 265 U. S. 101; *Michigan Central R. Co.* v. *Mix*, 278 U. S. 492; *Hoffman* v. *Foraker*, 274 U. S. 21; *Denver & R. G. W. R. Co.* v. *Terte*, 284 U. S. 284.[1] Of course, Congress, if it chose, could subject interstate carriers to the jurisdiction of the state courts, even in the situations in which this Court found that assumption of jurisdiction would be an injustice to the public. But Congress has not expressed a different view of the governing public interest—and these cases stand as unchallenged

[1] *International Milling Co.* v. *Columbia Co.*, 292 U. S. 511, did not restrict but expressly recognized the doctrine of the *Davis* case. In finding the scope of the *Davis* doctrine in the circumstances which gave rise to it, the opinion in the *Milling Co.* case only followed traditional technique in the use of precedents. It made precisely the same differentiation that Mr. Justice Brandeis, who articulated the doctrine in the *Davis* case, made in applying the principle of the case to subsequent situations. See *St. Louis, B. & M. Ry. Co.* v. *Taylor*, 266 U. S. 200, and *Hoffman* v. *Foraker*, 274 U. S. 21. The doctrine itself stands unchallenged. The present decision does not challenge it.

authorities that, notwithstanding the provision of the Federal Employers' Liability Act conferring unqualified "concurrent jurisdiction" upon the state courts, a plaintiff may in some circumstances be barred from bringing his suit in one of the places specified by the Act. In this respect, at least, a plaintiff's "privilege of venue, granted by the legislative body which created this right of action," *can* "be frustrated for reasons of convenience or expense."

The opinion of the Court attaches importance to a phrase taken from Senator Borah's remarks on the floor of the Senate in submitting the bill to amend the Act: "The bill enables the plaintiff to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so." 45 Cong. Rec. 4034. The context of this statement is set out in the footnote.[2]

The intrinsic difficulties of language and the emergence, after enactment, of situations not anticipated by even the

[2] "Mr. President, I wish to discuss very briefly the bill. The bill as it is now pending provides for three amendments to the employers' liability law which is now upon the statute books. The first has reference to the venue . . . The objection which has been made to the existing law, and this objection arises by reason of the decision of some of the courts, is that the plaintiff may sometimes be compelled to go a great distance in order to have his cause of action against the defendant by reason of the fact that now the action must be brought in certain instances in the district in which the defendant is an inhabitant. In other words, the corporation being an inhabitant of the State which creates it, it might follow that the plaintiff would have to travel a long distance in order, under certain conditions, to bring his action against the defendant and come within the terms of the law. So, if this bill should be passed the law will be remedied in that respect, in enabling the plaintiff to bring his action where the cause of action arose or where the defendant may be doing business. The bill enables the plaintiff to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so." 45 Cong. Rec. 4034.

most gifted legislative imagination reveal the doubts and ambiguities in statutes that so often compel judicial construction. To illumine these dark places in legislative composition all the sources of light must be drawn upon. But the various aids to construction are guides of experience, not technical rules of law. See *Boston Sand Co.* v. *United States,* 278 U. S. 41, 48. One of the sources which may be used for extracting meaning from legislation is the deliberative commentary of the legislators immediately in charge of a measure. Contemporary answers by those authorized to give answers to questions raised about the meaning of pending legislation obviously go a long way to elucidating doubtful legislative purpose. But this rule of good sense does not mean that every loose phrase, even of the proponent of a measure, is to be given the authority of an encyclical. The language of a chairman of a committee, like the language of all people, is merely a symbol of thought. A speaker's casual, isolated general observation should not be tortured into an expression of disregard for an established, far-reaching policy of the law. Especially in the case of Senator Borah, such imputation should not be made. As is well known, he eyed most jealously the absorption of state authority by extension of federal power. It would have been easy to vest the enforcement of the Federal Employers' Liability Act entirely in the federal courts. Instead, not only was concurrent jurisdiction given to the state courts in the enforcement of this federal right, but removal of a state action to the federal courts was prohibited. Instead of being deemed hostile to the purposes of the Federal Employers' Liability Act and not to be entrusted with its administration, the state courts were accepted as the most active agencies for its enforcement. And yet, although nowhere in the course of the whole legislative history of the Act in question—the hearings, the reports in both houses, the debates on the floor—is there the slightest intimation that the problem before us entered the mind of any legis-

lator, we are asked to attribute to Senator Borah the uprooting of a doctrine which is an old and fruitful part of the fabric of the law of the states as well as the law of the land, by a general observation which has no relation to this doctrine and to which respectful meaning can be given without such distortion.

To read the venue provision of the Act as do the majority of the Court, is to translate the permission given a plaintiff to enter courts previously closed to him into a withdrawal from the state courts of power historically exercised by them, and into an absolute direction to the specified federal and state courts to take jurisdiction. The implications of such a construction extend far beyond the situation we now have here, of an attempt by a state court to enjoin an action brought in a federal court sitting in another state. It seems to be generally held that the grant to the state courts of jurisdiction concurrent with the federal courts does not deprive one state court of the power to enjoin an oppressive suit under the Act in a foreign state court.[3] Moreover, this Court has expressly held that the venue provision of the Employers' Liability Act does not prevent a state court from declining jurisdiction as a *forum non conveniens*. *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377. To be sure, under the guise of applying local doctrines of equity jurisdiction, a state court cannot defeat the proper assertion of a federal right.

[3] See *Reed's Admrx.* v. *Illinois Central R. Co.*, 182 Ky. 455, 206 S. W. 794; *Chicago, M. & St. P. Ry. Co.* v. *McGinley*, 175 Wis. 565, 185 N. W. 218; *State ex rel. New York, C. & St. L. R. Co.* v. *Nortoni*, 331 Mo. 764, 55 S. W. 2d 272; *Kern* v. *Cleveland, C., C. & St. L. R. Co.*, 204 Ind. 595, 185 N. E. 446, with which compare *McConnell* v. *Thomson*, 213 Ind. 16, 8 N. E. 2d 986, 11 N. E. 2d 183; cf. *Ex parte Crandall*, 53 F. 2d 969. The lower federal courts have usually declined to enjoin suits under the Act brought in other federal courts. See *Rader* v. *Baltimore & Ohio R. Co.*, 108 F. 2d 980, 985–86; *Chesapeake & Ohio Ry. Co.* v. *Vigor*, 90 F. 2d 7; *Southern Ry. Co.* v. *Cochran*, 56 F. 2d 1019, 1020.

Resort to this Court may always be had to lay bare such an unwarranted frustration. *American Railway Express Co.* v. *Levee,* 263 U. S. 19; *Davis* v. *Wechsler,* 263 U. S. 22. But such supervisory power by this Court over the determination of federal rights by state courts does not imply the denial of power in the state courts to make such determinations in the first instance. *Second Employers' Liability Cases,* 223 U. S. 1, 56–57; *Claflin* v. *Houseman,* 93 U. S. 130, 136–37; *Robb* v. *Connolly,* 111 U. S. 624, 637; cf. Warren, *Federal Criminal Laws and State Courts,* 38 Harv. L. Rev. 545, 596–97. The long history of leaving the effective enforcement of federal rights to state courts has proceeded on recognition of the power of the state courts to exercise in the first instance their settled doctrines of law and equity. The opinion of the Court ignores these settled principles. In an area demanding the utmost judicial circumspection, dislocating uncertainty is thereby introduced.

If the privilege afforded a plaintiff to bring suit under the Employers' Liability Act in one place rather than in another is to be regarded as an absolute command to the federal courts to take jurisdiction regardless of any considerations of justice and fairness, why is not the same effect to be given the comparable general venue provisions of § 51 of the Judicial Code, 28 U. S. C. § 112? Nothing in the language or the history of the venue provision of the Act differentiates it from the numerous other venue provisions of the Judicial Code. Is the settled doctrine of *forum non conveniens* to be deemed impliedly repealed by every such venue provision? Surely, it is much more consonant with reason and right to read venue provisions in the familiar context of established law rather than to impute to Congress an unconsidered, profound alteration in the relationship between the federal and the state

courts and in the relations of the federal courts *inter se*. Cf. *Gay* v. *Ruff*, 292 U. S. 25.

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

INDIANAPOLIS ET AL. *v.* CHASE NATIONAL BANK, TRUSTEE, ET AL.*

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

Nos. 10 and 11. Argued February 6, 7, 1941. Reargued October 15, 16, 1941.—Decided November 10, 1941.

1. To sustain federal jurisdiction on the ground of diversity of citizenship, there must exist an actual, substantial controversy, on one side of which the parties must all be citizens of States different from those of which the parties on the other side are citizens. P. 69.
2. Diversity jurisdiction can not be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who are defendants; and it is the duty of this Court, as well as of the lower courts, to look beyond the pleadings and arrange the parties according to their sides in the dispute. P. 69.
3. Whether there exists the necessary collision of interests to sustain diversity jurisdiction, must be ascertained from the principal purpose of the suit and the primary and controlling matter in dispute. P. 69.
4. Upon the facts of this case, which was a suit brought, in a federal court of Indiana, by a New York bank against two Indiana gas companies and an Indiana city, this Court holds that the "primary and controlling matter in dispute" is whether a lease, whereby one of the gas companies conveyed all of its gas plant property to the other, was binding upon the city, to which the property had been afterwards conveyed by the lessee corporation pursuant to its franchise; that, with respect to that dispute, one of the gas companies and the city ("citizens" of the same State) are on opposite sides; and that, there-

*Together with No. 12, *Chase National Bank, Trustee,* v. *Citizens Gas Co. et al.;* and No. 13, *Chase National Bank, Trustee,* v. *Indianapolis Gas Co. et al.,* also on writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit.

fore, federal jurisdiction, which depends on diversity of citizenship, is lacking. Pp. 70, 74.

5. This Court's earlier denial of certiorari to review a judgment of the Circuit Court of Appeals reversing a judgment of the District Court which dismissed this suit for want of jurisdiction, could not confer on the federal courts a jurisdiction which Congress has denied. P. 75.
6. The policy of the statute conferring diversity jurisdiction upon the district courts calls for its strict construction. P. 76.

113 F. 2d 217, reversed.

CERTIORARI, 311 U. S. 636, 637, to review the reversal of a judgment which held a lease invalid. A petition for certiorari to review the case in an earlier phase, 96 F. 2d 363, was denied, 305 U. S. 600.

Mr. Howard F. Burns, with whom *Messrs. John Adams* and *Harvey J. Elam* were on the brief, for the Chase National Bank, at both hearings.

The Circuit Court of Appeals properly refused to realign Indianapolis Gas with Chase as a party plaintiff.

It is inconceivable that a party against whom plaintiff is entitled to recover a judgment for approximately $1,700,000 can be aligned with the plaintiff under any circumstances.

The City's argument is based entirely on the fact that the City, as successor lessee, has been held primarily liable and Indianapolis Gas secondarily liable for the amount of the judgment, and that the City is well able to pay the judgment out of the funds of the public charitable trust. A parity of reasoning would require a realignment whenever a creditor sues a principal and surety on a debt.

The situation here is substantially the same as when a mortgagor sells the mortgaged property to a third person, who agrees to pay the mortgage debt. The mortgagor becomes the surety and the grantee of the mortgaged property becomes the principal debtor. *Union*

Mutual Life Ins. Co. v. *Hanford,* 143 U. S. 187; *Birke* v. *Abbott,* 103 Ind. 1; *Todd* v. *Oglebay,* 158 Ind. 595.

The relationship of principal and surety is similarly involved where, as here, the mortgagor merely leases the property to a third person, who in turn agrees to pay the interest on the mortgage as rent. *Central Trust Co.* v. *Berwind-White Coal Co.,* 95 F. 391.

When there has been an assumption of the mortgage obligations, either by a vendee or a lessee, and the mortgagee sues to recover the debt, he ordinarily joins as defendants both the original mortgagor and the vendee or lessee who has assumed the mortgage obligations. The mortgagor may be vitally interested in having an adjudication that his vendee or lessee did assume the mortgage and that he, the mortgagor, is merely a surety on the obligation; but that does not require a realignment of the mortgagor with the mortgagee. The mortgagee has a bona fide claim for relief against both defendants and it is wholly immaterial that one of them is liable only as surety.

The plaintiff here has a bona fide claim for unpaid interest against Indianapolis Gas, Citizens Gas, and the City, and they are all properly aligned as defendants, even though some of them may be primarily and others only secondarily liable.

The City has not cited a single case in which the plaintiff had even one substantial controversy with a defendant and such defendant was realigned with the plaintiff for jurisdictional purposes. The fact that plaintiff and such defendant may be in accord as to some of the other issues in the case is wholly immaterial. To be sure, realignment is required where there is no bona fide prayer for relief against a particular defendant, as in *City of Dawson* v. *Columbia Trust Co.,* 197 U. S. 178, but that is not the situation in the case at bar.

Sutton v. *English,* 246 U. S. 199, supports federal jurisdiction of this case. See also *Republic National Bank &*

Trust Co. v. *Massachusetts Bonding & Ins. Co.*, 68 F. 2d 445, 447; *Detroit Tile & Mosaic Co.* v. *Mason Contractors' Assn.*, 48 F. 2d 729, 731; *Franz* v. *Franz*, 15 F. 2d 797, 799; *Feidler* v. *Bartleson*, 161 F. 30, 35.

In each of those cases there was at least one controversy between the plaintiff and the defendant sought to be realigned, and this single controversy prevented such realignment, despite the fact that plaintiff and such defendant were in accord as to some of the other controversies. The rule of law applied in these cases and in the case at bar on the first appeal—that a defendant against whom plaintiff asks relief and with whom plaintiff has distinct conflicts of interests cannot be realigned with the plaintiff in determining federal jurisdiction—has been universally recognized. The federal courts have continued to apply this rule since the decision of the jurisdictional question in this case in 1938. See *Rex Co.* v. *International Harvester Co.*, 107 F. 2d 767, 768, citing *Sutton* v. *English* and the first decision of the Court of Appeals in the case at bar in support.

The City's contention that the question as to the validity of the lease is the dominant controversy in this case and must govern the question of realignment, without regard to any other controversies, is based on the proposition that plaintiff and Indianapolis Gas are on the same side of that controversy. The fact is that plaintiff asks precisely the same relief against Indianapolis Gas on this issue that it asks against the City and Citizens Gas, namely, that the lease be held binding on each. The fallacy in the City's argument is its assumption that a defendant can destroy the controversy upon which federal jurisdiction depends by admitting its liability, or even by consenting to have its liability enforced. The law is well settled to the contrary. *Re Metropolitan Railway Receivership*, 208 U. S. 90.

Mr. William H. Thompson, with whom *Messrs. Perry E. O'Neal, Patrick J. Smith*, and *Edward H. Knight* were on

the brief, for the City of Indianapolis et al., at both hearings.

The suit was brought by Chase as mortgagee, i. e., trustee, under a deed of trust securing an issue of bonds of Indianapolis Gas. Chase sought a decree declaring that the ninety-nine year lease between Indianapolis Gas, lessor, and Citizens Gas, lessee, was binding upon and enforceable against the City.

The Circuit Court of Appeals correctly held that Indianapolis Gas was an indispensable party. *Chase National Bank* v. *Citizens Gas Co.*, 96 F. 2d 363.

The controlling controversy is whether the pleaded lease has become enforceable against the City. No other cause of action is alleged against the City except claims for damages which are dependent upon the determination of the validity of the lease.

The City contends that the lease is invalid and unenforceable against it; Chase maintains that the lease is valid and binding against the City; Indianapolis Gas maintains that the lease is valid and binding against the City. Chase and Indianapolis Gas thus have a similar and identical interest against the City on the question of the validity of the lease.

The City has been held bound by the lease and required to pay the obligations of Indianapolis Gas under the mortgage. No matter what the form of the judgment may be, no one can realistically suppose that Indianapolis Gas has been harmed by the entry of this judgment or that it will be required to pay a single penny as a result of it. On the contrary, it will have obtained exactly what it sought from the commencement of this litigation: a decree requiring the City to make the payments under the lease.

The other subsidiary relief asked against Indianapolis Gas by Chase has either not been prosecuted beyond the allegation in the complaint and prayers, is dependent

upon a decision respecting the validity of the lease, or is relief against which Indianapolis Gas is completely insulated.

If the interests of Chase and Indianapolis Gas were not in accord, Indianapolis Gas would not have opposed review by this Court of a judgment against it for more than $1,000,000.

By arranging the parties according to their real interest in the case—*viz.*, the enforceability of the 99 year lease against the City—it is clear that the interests of Indianapolis Gas and of Chase are identical. They should be realigned as parties plaintiff. Diversity of citizenship would thus be destroyed, and the sole ground of jurisdiction of the federal District Court would be lost. Compare *City of Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 181; *Niles-Bement-Pond Co.* v. *Iron Moulders Union*, 254 U. S. 77, 81.

Mr. William G. Sparks, with whom *Mr. Paul Y. Davis* was on the brief, for the Citizens Gas Co.

Mr. William R. Higgins for the Indianapolis Gas Co., at both hearings. *Mr. Louis B. Ewbank* was with him on the brief and at the first hearing.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a suit instituted by the Chase National Bank, a New York corporation, in the federal District Court for the Southern District of Indiana, naming as defendants the Indianapolis Gas Company, the Citizens Gas Company of Indianapolis (Indiana corporations), and the City of Indianapolis. (For brevity's sake the parties will be referred to as Chase, Indianapolis Gas, Citizens Gas, and the City, respectively.) The power of the District Court to entertain this litigation was sustained by the Circuit

Court of Appeals for the Seventh Circuit under the provision of the Judicial Code conferring upon the district courts jurisdiction "Of all suits of a civil nature . . . where the matter in controversy exceeds . . . three thousand dollars, and . . . is between citizens of different States . . ." 36 Stat. 1091; 28 U. S. C. § 41 (1). The correctness of this jurisdictional ruling must be determined before the merits of Chase's claims can be considered. The specific question is this: Does an alignment of the parties in relation to their real interests in the "matter in controversy" satisfy the settled requirements of diversity jurisdiction?

As is true of many problems in the law, the answer is to be found not in legal learning but in the realities of the record. Though variously expressed in the decisions, the governing principles are clear. To sustain diversity jurisdiction there must exist an "actual," *Helm* v. *Zarecor,* 222 U. S. 32, 36, "substantial," *Niles-Bement-Pond Co.* v. *Iron Moulders Union,* 254 U. S. 77, 81, controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. *Strawbridge* v. *Curtiss,* 3 Cranch 267. Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to "look beyond the pleadings and arrange the parties according to their sides in the dispute." *Dawson* v. *Columbia Trust Co.,* 197 U. S. 178, 180. Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary "collision of interests," *Dawson* v. *Columbia Trust Co., supra,* at 181, exists, is therefore not to be determined by mechanical rules. It must be ascertained from the "principal purpose of the suit," *East Tennessee, V. & G. R.* v. *Grayson,* 119 U. S. 240, 244, and the "primary and controlling matter in dispute," *Merchants' Cotton Press Co.* v. *Insurance Co.,*

151 U. S. 368, 385. These familiar doctrines governing the alignment of parties for purposes of determining diversity of citizenship have consistently guided the lower federal courts [1] and this Court.[2]

And so we turn to the actualities of this litigation.

Chase is the trustee under a mortgage deed, to secure a bond issue, executed by Indianapolis Gas in 1902. In 1906 Citizens Gas was formed to compete with Indianapolis Gas in the distribution of light, heat, and power to the people of Indianapolis. Its franchise provided that after the expiration of twenty-five years and the performance of certain specified conditions, the company should be wound up and its property conveyed to the City subject to the company's "outstanding legal obligations." The competition between the two gas companies continued until 1913, when Indianapolis Gas leased all of its gas plant property to Citizens Gas for a term of ninety-nine years. Citizens Gas agreed to pay as rental (a) the interest on the lessor's outstanding bonded indebtedness, and (b) annual sums equal to a six per cent return on Indianapolis Gas's common stock. For twenty-two years thereafter Citizens Gas operated the mortgaged property and paid the interest on the bonds. In 1935, pursuant to its franchise, Citizens Gas conveyed its entire property, including that covered by its lease from Indianapolis Gas, to the City. But the City refused to regard itself bound by this lease. On March 2,

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[1] *E. g., Pittsburgh, C. & St. L. Ry. Co.* v. *Baltimore & Ohio R. Co.*, 61 F. 705; *Cilley* v. *Patten*, 62 F. 498; *Board of Trustees* v. *Blair*, 70 F. 414; *Allen-West Commission Co.* v. *Brashear*, 176 F. 119; *Lindauer* v. *Compania Palomas*, 247 F. 428; *DeGraffenreid* v. *Yount-Lee Oil Co.*, 30 F. 2d 574.

[2] In addition to the cases cited in the text, see *Removal Cases*, 100 U. S. 457, 468–70; *Pacific R. Co.* v. *Ketchum*, 101 U. S. 289, 298–99; *Corbin* v. *Van Brunt*, 105 U. S. 576; *Evers* v. *Watson*, 156 U. S. 527, 532; *Doctor* v. *Harrington*, 196 U. S. 579; *Venner* v. *Great Northern Ry. Co.*, 209 U. S. 24; *Steele* v. *Culver*, 211 U. S. 26, 29; *Lee* v. *Lehigh Valley Coal Co.*, 267 U. S. 542; *Sutton* v. *English*, 246 U. S. 199.

1936, the City and Indianapolis Gas agreed that, pending the settlement of the "presently existing controversy" between them as to whether the lease was valid and binding upon the City, the latter would deposit in escrow sums equal to the interest and dividend payments falling due. The agreement expressly provided that it was made without prejudice to either party's "position or rights."

Chase thereupon filed a bill of complaint in the District Court, naming as defendants Indianapolis Gas, Citizens Gas, and the City. It prayed that the lease from Indianapolis Gas to Citizens Gas be declared valid and binding upon the defendants, and as such be deemed part of the security for the performance of the mortgage obligations; that the City be ordered to perform all of the lessee's obligations in the lease and to pay directly to the plaintiff all of the interest payments as they shall become due; that judgment for overdue interest be entered against the defendants "liable therefor"; and that the plaintiff be awarded costs and attorneys' fees. The City and Citizens Gas specifically denied that the lease was valid and binding upon them; they alleged, further, that the controversy existed solely between Indianapolis Gas and the City, "citizens" of the same state. In its answer, Indianapolis Gas denied that it had "ever contended or admitted that the said ninety-nine year lease was not and is not a valid and binding obligation" upon the defendants.

Finding "no collision between the interests of the plaintiff and the interests of the Indianapolis Gas Company," the District Court realigned the latter as a party plaintiff, and finding identity of citizenship between some of the plaintiffs and the remaining defendants, dismissed the suit for want of jurisdiction. The Circuit Court of Appeals reversed, one judge dissenting, 96 F. 2d 363, and certiorari was denied, 305 U. S. 600.

On remand to the District Court, Chase filed a supplemental bill alleging default as to interest payments falling

due and praying judgment against the defendants in the amount of the unpaid coupons. It alleged that "neither The Indianapolis Gas Company nor Citizens Gas Company, nor both of them, have property sufficient to pay the interest in default on the Bonds, other than the property now in the possession and under the control of the City of Indianapolis." This was admitted by Indianapolis Gas. The District Court held on the merits that the lease was not enforceable against either Citizens Gas or the City; that the former had no power under its franchise to bind the latter to the lease, and that by conveying the leased property to the City, Citizens Gas thereby discharged itself of its lessee obligations. Accordingly, the Court ordered that judgment be entered only against Indianapolis Gas for the amount of the unpaid interest.

Asserting that the District Court erred in not holding the lease valid and enforceable against the defendants, both Chase and Indianapolis Gas appealed. The Circuit Court of Appeals sustained their position and again reversed, 113 F. 2d 217. The court held, further, that Chase was entitled to a judgment for unpaid interest against the parties in the following order of liability: the City, Citizens Gas, and Indianapolis Gas. We granted certiorari, 311 U. S. 636, because of the important jurisdictional issue involved in the litigation.

The facts leave no room for doubt that on the merits only one question permeates this litigation: Is the lease whereby Indianapolis Gas in 1913 conveyed all its gas plant property to Citizens Gas valid and binding upon the City? This is the "primary and controlling matter in dispute." The rest is window-dressing designed to satisfy the requirements of diversity jurisdiction. Everything else in the case is incidental to this dominating controversy, with respect to which Indianapolis Gas and the City,

"citizens" of the same state, are on opposite sides.[3] That the case presents "only one fundamental issue" and that that is the obligation of the City under the lease, Chase admits and indeed insists upon in its brief on the merits. Chase and Indianapolis Gas have always been united on this issue: both have always contended for the validity of the lease and the City's obligation under it. The opinion of the District Court lays bare the heart of this controversy:

"There can be no doubt that both plaintiff and the defendant, The Indianapolis Gas Company, have at all times asserted that the lease in question is valid and is binding upon the City, as Trustee. Neither is there any doubt as to their interest in sustaining the validity of such lease at the time of the institution of this action, prior hereto, and at all times subsequent thereto, and that many conferences have been held by and between them, through their attorneys, and many letters have passed between them relat-

[3] It is contended that, notwithstanding their indissoluble bond on the controlling issue, there are "sufficient matters in controversy" between Chase and Indianapolis Gas to preclude their alignment on the same side. Chase, of course, did not bring this suit in order to obtain a declaration that, regardless of the validity of the lease, Indianapolis Gas is still ultimately responsible for the interest payments on its bonded indebtedness. That was not really in issue, and by its answer, Indianapolis Gas took it out of the case. The further argument is made that, by entering into the escrow agreement with the City, Indianapolis Gas has asserted a claim to the interest payments adverse to that of Chase and the bondholders. But the facts are against this contention. The agreement deals merely with the disposition of the interest falling due during the pendency of the litigation. Moreover, the lease between Indianapolis Gas and Citizens Gas contains no provisions requiring payment of the interest direct to Chase or the bondholders. Nor can diversity jurisdiction be rested upon so flimsy a basis as Chase's prayer for reimbursement of costs and attorneys' fees. The tail flies with the kite.

ing to this subject. . . . Later, when the parties [*i. e.*, Indianapolis Gas and the City] were unable to adjust their differences and arrive at an agreement, it was decided by The Indianapolis Gas Company and the plaintiff that a suit should be instituted. The common stockholders of that company, of course, had a vital interest in the question of the validity of the lease because, if the lease is valid, they are assured of a six per cent return upon their stock for many years. If, however, a foreclosure suit should have been begun, or if the lease is invalid, no such return is assured. It was natural, therefore, that the Gas Company should take an active interest in the litigation and attempt to guide it along the course that would be most advantageous to it and to its stockholders."

Plainly, therefore, Chase and Indianapolis Gas are, colloquially speaking, partners in litigation. The property covered by the lease is now in the City's possession; Chase is simply acting to protect the bondholders' security. As to Indianapolis Gas, if the lease is upheld, it will continue to receive a six per cent return on its capital, and the burden of paying the interest on its bonded indebtedness will be not upon it but upon the City. What Chase wants, Indianapolis Gas wants, and the City does not want. Yet, the City and Indianapolis Gas were made to have a common interest against Chase when, as a matter of fact, the interests of the City and of Indianapolis Gas are opposed to one another. Therefore, if regard be had to the requirements of jurisdictional integrity, Indianapolis Gas and Chase are on the same side of the controversy not only for their own purposes but also for purposes of diversity jurisdiction. But such realignment places Indiana "citizens" on both sides of the litigation and precludes assumption of jurisdiction based upon diversity of citizenship. We are thus compelled to the conclusion that the

District Court was without jurisdiction.[4] And, of course, this Court, by its denial of certiorari when the case was here the first time, could not confer the jurisdiction which Congress has denied.

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[4] Compare *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, a suit by a Pennsylvania mortgagee of a Georgia waterworks company to restrain a Georgia city from building a new waterworks and to compel specific performance of the city's contract with the waterworks company. The latter was joined as a defendant, on the theory that it was a party to the contract sought to be enforced. The Court held that the bill should be dismissed for lack of jurisdiction: ". . . the court will look beyond the pleadings and arrange the parties according to their sides in the dispute. When that is done it is obvious that the Water Works Company is on the plaintiff's side." 197 U. S. at 180. *Ayres* v. *Wiswall,* 112 U. S. 187, and *Coney* v. *Winchell,* 116 U. S. 227, are not applicable here. They hold merely that in a foreclosure suit the mortgagee may join the mortgagor and his assignee as defendants; they did not involve any controversy between the mortgagor and the "assignee" as to whether the assignment is binding upon the latter.

Sutton v. *English,* 246 U. S. 199, clearly holds that the parties must be aligned according to their "attitude towards the actual and substantial controversy." 246 U. S. at 204. The plaintiffs, who included all of the heirs of Mary Jane except Cora, sought to establish their right to certain property claimed to have belonged to Mary Jane. The claimants could not recover unless they proved that a residuary bequest to Cora was invalid—and, with respect to this issue, their position was completely adverse to Cora's. "But, as already pointed out, even could complainants succeed in showing that Mary Jane Hubbard at the time of her death was entitled to the community property, her will giving all the residue of her property to Cora D. Spencer still stands in the way of their succeeding to it as heirs-at-law, and hence their prayer to have that will annulled with respect to the residuary clause is essential to their right to any relief in the suit." 246 U. S. at 207. If the plaintiffs prevailed on this issue of the validity of the residuary gift to Cora, their interests and hers would then be the same with respect to the remaining issues in the case. But the Court held that in relation to the "actual and substantial controversy," Cora and the plaintiffs were on opposite sides, thereby sustaining diversity jurisdiction. In *Sutton* v. *English,* alignment of the parties with respect

This is not a sacrifice of justice to technicality. For the question here is not whether Chase and Indianapolis Gas may pursue what they conceive to be just claims against the City, but whether they may pursue them in the federal courts in Indiana, rather than in its state courts. The fact that Chase prefers the adjudication of its claims by the federal court is certainly no reason why we should deny the plain facts of the controversy and yield to illusive artifices. Settled restrictions against bringing local disputes into the federal courts cannot thus be circumvented.

These requirements, however technical seeming, must be viewed in the perspective of the constitutional limitations upon the judicial power of the federal courts,[5] and of the Judiciary Acts in defining the authority of the federal courts when they sit, in effect, as state courts. See *Madisonville Traction Co.* v. *Mining Co.*, 196 U. S. 239, 255, and *Ex parte Schollenberger*, 96 U. S. 369, 377. The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of "business that intrinsically belongs to the state courts," in order to keep them free for their distinctive federal business. See Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 510; *Shamrock Oil Corp.* v. *Sheets*, 313 U. S. 100, 108–09; *Healy* v. *Ratta*, 292 U. S. 263, 270. "The policy of the statute [conferring diversity jurisdiction upon the district courts] calls for its strict construction. The power reserved to the states, under the

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to their real interests sustained diversity; such alignment here precludes jurisdiction. That case and this are applications of the same principle.

[5] Cf. *Strawbridge* v. *Curtiss*, 3 Cranch 267; *California* v. *Southern Pacific Co.*, 157 U. S. 229, 261; *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 71.

Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy* v. *Ratta, supra,* at 270. In defining the boundaries of diversity jurisdiction, this Court must be mindful of this guiding Congressional policy. See *Hepburn & Dundas* v. *Ellzey,* 2 Cranch 445; *New Orleans* v. *Winter,* 1 Wheat. 91; *Morris* v. *Gilmer,* 129 U. S. 315, 328–29; *Coal Company* v. *Blatchford,* 11 Wall. 172; *Shamrock Oil Corp.* v. *Sheets,* 313 U. S. 100; and compare *Old Grant* v. *M'Kee,* 1 Pet. 248; *Elgin* v. *Marshall,* 106 U. S. 578; *Healy* v. *Ratta,* 292 U. S. 263; *McNutt* v. *General Motors Acceptance Corp.,* 298 U. S. 178.

Reversed.

MR. JUSTICE JACKSON:

The CHIEF JUSTICE, MR. JUSTICE ROBERTS, MR. JUSTICE REED and I are unable to concur in this disposition of these writs, in view of what we consider to be the controlling facts of this controversy.

Chase is trustee under a mortgage executed in 1902 by Indianapolis Gas to secure a bond issue. The mortgage covered a public utility gas plant and distribution system, together with after-acquired property, including intangibles.

In 1913, Indianapolis Gas turned the mortgaged utility system over to Citizens Gas, a competitor, under a lease for a term of ninety-nine years. Citizens Gas undertook, among other things, to pay the interest "as the same shall from time to time fall due" on the bonds secured by the mortgage, and also to pay certain sums, subject to some variation by reference to the price received for gas, to the stockholders of Indianapolis Gas. Citizens Gas unified

this leased plant with its own, and in 1935 conveyed to the City the entire property in conformity to statute which it is contended obligates the City to assume the obligations of the lease. The City took possession of the property but refused to accept the obligations of the lease. The City and Indianapolis Gas then agreed that, pending settlement of the controversy thus precipitated, sums payable under the lease as interest should be deposited in escrow, instead of being paid to Chase. Accordingly, there was default in the payment to the trustee of interest on the bonds.

For jurisdictional purposes, Indianapolis Gas, the mortgage debtor, and the City, whose possession of the property under the circumstances was alleged to result in an assumption of the debt, as well as Citizens Gas, the intermediate owner (which seems of no consequence to the issues under discussion), were all citizens of the State of Indiana, while Chase, the trustee, was a citizen of New York. Under these circumstances, Chase began an action in the federal District Court for the Southern District of Indiana, joining Indianapolis Gas, Citizens Gas, and the City as defendants. It asked that the interest of Indianapolis Gas in the lease be adjudged a part of its security for the performance of the mortgage obligations; that the lease be declared valid and binding upon all the defendants; that the City be ordered to pay directly to the trustee all of the interest payments as they fell due; that judgment for overdue interest be entered against the defendants liable therefor, including Indianapolis Gas; and that plaintiff be awarded costs and attorneys' fees.

This Court now destroys federal jurisdiction of the case by a transposition of parties, the radical nature of which appears most clearly from the judgments rendered below. It forces into the position of co-plaintiff one party which the District Court adjudged entitled to recover over a million dollars, and another which the District Court ad-

judged solely liable to pay that sum. This same adversity was found by the Circuit Court of Appeals, which held the one entitled to receive, and the other obligated to pay, this sum with increase due to the lapse of time. It modified the judgment only by including two additional judgment debtors on whom it fixed primary and secondary liability, but continued the judgment against Indianapolis Gas with a tertiary liability for its satisfaction. The subtlety by which a judgment debtor is transfigured into a creditor for jurisdictional purposes deserves analysis, if for no other reason than because of its novelty.

The Court cannot resort to a decision of the merits of the case, over which it holds itself to be without jurisdiction, in order to justify its characterization of some of the trustee's claims as "window dressing" and "artifice." The measure of jurisdiction should be taken from the pleadings, unless the claims are frivolous on their face. That is not the case here. In ultimate effect, Chase alleged a cause of action and sought judgment against the City upon its personal undertaking to assume and pay the indebtedness upon the mortgage given by Indianapolis Gas to the plaintiff. It also alleged a cause of action and sought judgment against Indianapolis Gas for the amount of the coupon interest. Both demands were in excess of $3,000. If the plaintiff had asserted these demands in two separate actions, no one would doubt that both were within the jurisdiction of the District Court. In each, there is an adequate diversity of citizenship, and each involves the requisite jurisdictional amount, and each is "actual" and "substantial" enough to support the jurisdiction, if this means anything more than that a demand exceeding $3,000 must be involved. A United States District Court is not without jurisdiction to render a judgment exceeding $3,000 on confession if there is the requisite diversity of citizenship. *Re Metropolitan Railway Receivership*, 208 U. S. 90 at 108. The trustee's right to judgment against the mort-

gagor, even though uncontested, is a matter of substance, for the judgment is the important—indeed indispensable—means of pursuing the mortgaged property into the hands of the City, in the event that it should turn out in the suit against the City that it had not become personally liable for any part of the mortgage debt.

Jurisdiction of the federal courts is indeed a variable and illusory thing, if the jurisdiction which a District Court admittedly has of two separate causes of action is lost when they are united in one, agreeably to the federal rules of procedure, because the one defendant as a surety seeks to enforce its equitable right to be exonerated by the other, who is alleged to be the principal debtor.

The doctrine of realignment permits and requires a nominal defendant to be treated as a plaintiff for the purpose of defining the real controversy, where no real cause of action is asserted against him by the plaintiff; but it does not admit of such treatment of a defendant against whom the plaintiff asserts a cause of action within the jurisdiction of the court. The plaintiff cannot rightly be deprived of the benefit of that jurisdiction, conferred upon him by laws enacted pursuant to the Constitution of the United States, because the court may think that such a cause of action is relatively less important than that asserted against another defendant, or because one action "dominates" the other, or because one is more "actual" or "substantial" than the other. The statute itself sets up the criterion of substantiality by fixing the jurisdictional amount at $3,000. Moreover, in this case, whether either of the rights asserted is more substantial than the other depends on the outcome of the litigation, which can hardly be used to determine jurisdiction which must exist at the beginning of the litigation.

If we examine this controversy in detail, it appears that the conflicts between the trustee and its mortgagor were

not feigned or merely formal. While the mortgage and the debt, which created the opposition inherent in the relation of mortgagor and mortgagee or between debtor and creditor, were undenied, Chase was asking that its lien be judicially construed to cover not merely the physical property described therein but also the entire interest of Indianapolis Gas in the lease, which required payments to stockholders over and above the interest payments for the bondholders. Furthermore, Chase asked the Court to set aside the escrow agreement by which Indianapolis and the City had assumed to exclude Chase from dominion over the escrow funds. Chase demanded that Indianapolis Gas be denied future control over such funds and that they be paid directly to itself. These were conflicts as to the extent of its interest in, and control over, any cause of action against the City. They existed between Chase and the defendant Indianapolis Gas, and concerned them alone.

There was also an issue as to the aggregate amount of the trustee's claim, which all defendants had a common interest in minimizing. The trustee claimed to be entitled to interest at 6%, after default, on coupons which bore a 5% interest rate, and it also claimed interest on overdue interest. This Court has held that where the only issue concerns the amount of the debt, as to which a mortgagor agrees with the plaintiff, but the issue is contested only by another mortgagor who has assumed the entire mortgage debt, the mortgage and the debt are the real subject matter of the controversy; that the decree when the amount is ascertained must run against all debtors; and that the uncontesting mortgagor is a necessary party on the side opposite the mortgagee. *Ayres* v. *Wiswall,* 112 U. S. 187.

There were other issues on which the defendants were in sharp conflict between themselves. Indianapolis Gas

and Chase both served their respective interests by contending against the City that its acts had the legal effect of binding it to the terms of the lease. But their common attitude in relation to this issue sprang from different legal origins. The rights of Chase had their source and their measure in the mortgage. The mortgage might or might not, depending upon the outcome of the litigation, be construed to give Chase a right to enforce for its own benefit the lease terms as against the City. Indianapolis Gas, on the other hand, derived no rights against the City from that instrument and was not, like Chase, limited by it. Indianapolis Gas's rights had no other measure than that found in the terms of the lease itself.

We would be diligent, no less than the majority, to prevent imposition on the jurisdiction of the federal courts by means of "window dressing" or "artifice." We find in this case nothing that warrants either characterization, and we think that the precedents invoked to support today's action reveal the gap which divides the doctrine of realignment, as heretofore applied by this Court, from the application made of it today.

The majority opinion leans heavily on *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178. Mr. Justice Holmes in that case said: ". . . it is obvious that the Water Works Company is on the plaintiff's side and was made a defendant solely for the purpose of reopening in the United States Court a controversy which had been decided against it in the courts of the State." And he said again: ". . . when the arrangement of the parties is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist, the device cannot be allowed to succeed." And so say we. But there is not the slightest indication of this kind of connivance in the case before us.

In *Helm* v. *Zarecor*, 222 U. S. 32, this Court refused to align with the plaintiffs a corporation although its board

and officers were in entire agreement with the position of complainants on the merits of the case. Another of the cases invoked is *Niles-Bement Co.* v. *Iron Moulders Union,* 254 U. S. 77. Here a New Jersey corporation sought to break a strike by filing a bill in an Ohio District Court against labor unions, individual strikers, and an Ohio corporation, all citizens of Ohio. The New Jersey plaintiff owned a controlling interest in the Ohio defendant, the two had common officers and directors, and no relief whatever was asked against the Ohio company, which the bill alleged was being delayed in delivery of goods because of the strike. The Court refused to allow such an imposition on its jurisdiction. In *Sutton* v. *English,* 246 U. S. 199, this Court held it to be error to align one of the defendants with the plaintiff for jurisdictional purposes where her interest was adverse to plaintiff on one out of four issues, although with plaintiff as to three of the four.

We take the statement in the opinion of the Court, that its basis is "not in legal learning but in the realities of the record," to be another way of saying that it disagrees with the lower court's view of the facts rather than with its view of the law. Review of facts is not the conventional function of this Court, and resort to it at this stage of this litigation is somewhat less than fair to the courts below as well as to the litigants.

Three years ago this Court refused to review the decision of the Circuit Court of Appeals that this controversy was within the federal jurisdiction. *Indianapolis* v. *Chase National Bank,* 305 U. S. 600. Of course, a denial of certiorari is not to be taken as a ruling on the merits of any question presented. However, where the case is again brought here after some years of litigation, jurisdiction ought not to be overturned on light or inconsequential grounds, or on disagreements with the court below on matters of fact. To do so here is likely to result in further and, as we see it, needless delay in settling the status of

an important utility and the obligations and rights of a populous municipality. We think it the duty of the Court to end this controversy by proceeding to judgment on the merits, and that nothing in this record justifies ousting these parties from the federal courts. If, as the opinion intimates, the forefathers are thought to have been unwise in creating a federal jurisdiction based on diversity of citizenship, we should think the remedy of those so minded would be found in Congressional withdrawal of such jurisdiction, rather than in the confusing process of judicial constriction.

We would follow the words of the jurisdictional statute when it is sought to restrict its application, quite as faithfully as when the effort is to enlarge it by recourse to doctrines which conflict with its words. Compare *Healy* v. *Ratta,* 292 U. S. 263, 270.

CUNO ENGINEERING CORP. *v.* AUTOMATIC DEVICES CORP.

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

No. 37. Argued October 22, 23, 1941.—Decided November 10, 1941.

1. Claims 2, 3, and 11 of the Mead patent, No. 1,736,544, for improvements in lighters (commonly used in automobiles) for cigars, cigarettes, and pipes, *held* invalid for want of invention. P. 88.
2. Mead's addition to the so-called wireless or cordless lighter of a thermostatic control—which, after the plug was set "on" and the heating coil had reached the proper temperature, automatically returned the plug to its "off" position—was not invention but a mere exercise of the skill of the calling, and an advance plainly indicated by the prior art. P. 89.
3. That Mead's combination performed a new and useful function did not make it patentable. The new device, however useful, must reveal the flash of creative genius, not merely the skill of the calling. P. 90.

117 F. 2d 361, reversed.

CERTIORARI, 313 U. S. 553, limited to the question whether claims 2, 3, and 11 of the Mead patent No. 1,736,544 are valid. In a suit for infringement, the judgment of the District Court that the claims were not infringed, 34 F. Supp. 146, was reversed by the Circuit Court of Appeals, which held them valid and infringed.

Messrs. Robert Starr Allyn and *Carlton Hill,* with whom *Messrs. Hyland R. Johns* and *Roberts B. Larson* were on the brief, for petitioner.

Mr. Drury W. Cooper, with whom *Messrs. Henry M. Huxley* and *Thomas J. Byrne* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is an action in equity brought by respondent for infringement, *inter alia,* upon claims 2, 3, and 11 of patent No. 1,736,544, granted November 19, 1929, on the application of H. E. Mead, filed August 24, 1927, for a cigar lighter. The District Court held these claims not infringed. 34 F. Supp. 146. The Circuit Court of Appeals reversed, holding them valid and infringed. 117 F. 2d 361. We granted the petition for certiorari, limited to the question whether claims 2, 3, and 11 of the Mead patent are valid, because of a conflict between the decision below and *Automatic Devices Corp.* v. *Sinko Tool & Manufacturing Co.,* 112 F. 2d 335, decided by the Circuit Court of Appeals for the Seventh Circuit.

The claims in question [1] are for improvements in light-

[1] "2. In a device of the class described, a removable heating member having an electrical heating unit, a socket for receiving and holding said heating member, electrical current supply terminals, means for moving said heating member to a position for establishing an energizing

ers, commonly found in automobiles, for cigars, cigarettes and pipes. There were earlier lighters of the "reel type." The igniter unit was connected with a source of current by a cable which was wound on a spring drum so that the igniter unit and cable could be withdrawn from the socket and be used for lighting a cigar or cigarette. As the removable plug was returned to the socket, the wires were reeled back into it. The circuit was closed either by manual operation of a button or by withdrawal of the igniter from its socket. In 1921, the Morris patent (No. 1,376,154) was issued for a so-called "wireless" or "cordless" lighter. This lighter eliminated the cables and the mechanism for winding and unwinding them, it provided for heating the ignited unit without removing it from its socket, and it eliminated all electrical and mechanical connection of the igniter unit with the socket once it was removed therefrom for use. Several types of the "wireless" or "cordless" lighter appeared.[2] Morris represented a type in which the circuit was open when the plug rested

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circuit to said heating unit, and means responsive to the temperature of said heating unit for interrupting said energizing circuit.

"3. In a lighting device for cigars and the like, a removable heating member having an electric heater, a support for receiving and holding said heating member, current supply terminals on said support, said heating member being movable on said support to a position where said heating unit is energized from said terminals and means responsive to the temperature of said heating unit for controlling the heating thereof.

"11. In an electric lighter of the class described, a base member, a heater member movably mounted on said base member, an electric heater on said heater member, electrical supply terminals on said base member, said heater member being movable between an energized position where a circuit is established from said terminals to said heater, and an off position where said circuit is interrupted, and automatic means for withdrawing said heater member from the on position to the off position upon heating of said heater."

[2] Some of these are reviewed in *Casco Products Corp.* v. *Sinko Tool & Mfg. Co.*, 116 F. 2d 119.

in the socket and closed when the plug was pushed farther into the socket against the resistance of a spring. In Zecchini (No. 1,437,701) the operator pressed and held down a push-button to close the circuit. In Metzger (No. 1,622,-334) the operator closed the circuit by depressing and rotating the plug. In each the operator was obliged to hold the plug, or the circuit-closing part, in place until the heating coil became hot enough for use. After he concluded that it had become hot enough (by observation or guesswork), he removed the plug, using it like a match or hot coal, and then replaced it in the socket. Thus, these lighters were said to require rather continual attention on the part of the person using them, so that there would be no over-heating or burning out of the heating coil.

This inconvenience and hazard were eliminated, according to respondent,[3] by the automatic feature of the Mead patent. Mead added to the so-called "wireless" or "cordless" lighter a thermostatic control responsive to the temperature of the heating coil. In operation it automatically returned the plug to its "off" position after the heating coil had reached the proper temperature. To operate Mead's device, the knob on the igniter plug was turned to a point where an electrical connection was established from the battery through the heating coil. There the plug remained temporarily latched. When the heating coil was sufficiently hot for use, the bimetallic elements in the thermostat, responsive to the temperature condition of the heating coil, caused the igniter plug to be released and to be moved by operation of a spring to open-circuit position. The plug might then be manually removed for use in the manner of a match, torch, or ember.

[3] A patent holding company which holds the Mead patent under *mesne* assignments. No issue, however, is raised under the assignment statute.

When replaced in the socket after use, it was held in open-circuit position until next needed.

Petitioner makes several objections to the validity of the claims: that they do not comply with the standards for full, clear and concise description prescribed by 35 U. S. C. § 33, R. S. § 4888; that they are indefinite and broader than any disclosed invention; and that they are for a device so imperfect and unsuccessful that a construction of the claims broad enough to include it is not permissible. See *Deering* v. *Winona Harvester Works,* 155 U. S. 286, 295. We do not, however, stop to consider these objections. For it is our opinion that the Mead device was not the result of invention but a "mere exercise of the skill of the calling," an advance "plainly indicated by the prior art." *Altoona Publix Theatres* v. *American Tri-Ergon Corp.,* 294 U. S. 477, 486.

Thermostatic controls of a heating unit, operating to cut off an electric current energizing the unit when its temperature had reached the desired point, were well known to the art when Mead made his device. They had been employed in a wide variety of electrical designs since Hammarstrom, in 1893 (No. 493,380), showed a bimetallic thermostat to break a circuit when it got overcharged. A few examples will suffice. Harley, in 1907 (No. 852,326), included such a thermostat in an electric heater for vulcanizing, so as to limit automatically the temperature attainable. Andrews, in 1912 (No. 1,025,852), showed a bimetallic thermostat in an electrical flat iron, designed to open the circuit at a predetermined temperature. In 1919, Newsom (No. 1,318,168), showed an electric coffee cooker in which a thermostat, actuated by the temperature within the receptacle, operated to open and close the circuit intermittently. Stahl, in 1921 (No. 1,372,207), showed an electric switch automatically released by operation of a thermostat. Hurxthal, in 1925 (No. 1,540,628), showed an electric bread toaster with a

thermostat for stopping the toasting when the bread reached a given degree of temperature. Copeland (No. 1,844,206), filed April 18, 1927, before Mead, showed an electric lighter for cigars and cigarettes with thermostatic control. It differed from Mead in several respects. Thus, in Copeland's device a cigar was inserted in a tube at the end of which was a heating coil. By pressing the cigar against the heating coil (or in another form, by pressing a push-button) a spring was overset and the circuit closed. When the desired temperature of the heating unit was reached, a thermostatic bar pushed back the spring and opened the circuit. Thus, in the Copeland device the cigar (or the push-button) was the "means for moving" the "heating member" of the Mead claims so as to establish the energizing electric heating circuit. The advance of Mead over Copeland was the use of the removable plug bearing the heating unit, as in Morris, to establish the automatically controlled circuit of Copeland.

And so the question is whether it was invention for one skilled in the art and familiar with Morris and Copeland, and with the extensive use of the automatic thermostatic control of an electric heating circuit, to apply the Copeland automatic circuit to the Morris removable heating unit in substitution for a circuit manually controlled.

To incorporate such a thermostatic control in a so-called "wireless" or "cordless" lighter was not to make an "invention" or "discovery" within the meaning of the patent laws. As we have shown, both the thermostatically controlled heating unit and the lighter with a removable plug bearing the heating unit were disclosed by the prior art. More must be done than to utilize the skill of the art in bringing old tools into new combinations. *Hailes* v. *Van Wormer,* 20 Wall. 353, 368; *Pickering* v. *McCullough,* 104 U. S. 310, 318; *Thatcher Heating Co.* v. *Burtis,* 121 U. S. 286, 294; *Concrete Appliances Co.* v. *Gomery,* 269 U. S. 177, 184–185; *Powers-Kennedy Contracting Corp.* v. *Con-*

crete Mixing & Conveying Co., 282 U. S. 175, 186; *Carbice Corp.* v. *American Patents Dev. Co.*, 283 U. S. 420. Respondent, however, contends that wholly new functions were involved in Mead's conception, *viz.*, relieving the operator of the necessity of manually holding the plug in closed-circuit position, and automatically and permanently opening the circuit when the heating coil was at the temperature predetermined for its proper use. And respondent argues, Mead's new combination had an entirely different mode of operation from any "wireless" lighter then in existence and from any thermostatically controlled electric device.[4]

We may concede that the functions performed by Mead's combination were new and useful. But that does not necessarily make the device patentable. Under the statute (35 U. S. C. § 31; R. S. § 4886) the device must not only be "new and useful," it must also be an "invention" or "discovery." *Thompson* v. *Boisselier*, 114 U. S. 1, 11. Since *Hotchkiss* v. *Greenwood*, 11 How. 248, 267, decided in 1851, it has been recognized that if an improvement is to obtain the privileged position of a patent more ingenuity must be involved than the work of a mechanic skilled in the art. *Hicks* v. *Kelsey*, 18 Wall. 670; *Slawson* v. *Grand Street R. Co.*, 107 U. S. 649; *Phillips* v. *Detroit*, 111 U. S. 604; *Morris* v. *McMillin*, 112 U. S. 244; *Saranac Automatic Machine Corp.* v. *Wirebounds Patents Co.*, 282

[4] Respondent argues that Mead's combination was different from any prior thermostatic device because, in the latter, the operation of the thermostat was placed either under the control of some other thing, such as the sole plate of an electric iron, or under the control of an auxiliary resistance. The point is that in Mead's combination the effective operation of the thermostat was placed under the sole control of the temperature of the working resistance. We agree, however, with the court below that any such difference was merely one of detail of design, on which Mead's invention cannot rest. In any case, it is the temperature created in the vicinity of the thermostat that is effective. The manner in which it is transmitted to the thermostat does not rise to the dignity of a patentable device.

U. S. 704; *Honolulu Oil Corp.* v. *Halliburton,* 306 U. S. 550. "Perfection of workmanship, however much it may increase the convenience, extend the use, or diminish expense, is not patentable." *Reckendorfer* v. *Faber,* 92 U. S. 347, 356–357. The principle of the *Hotchkiss* case applies to the adaptation or combination of old or well known devices for new uses. *Phillips* v. *Detroit, supra; Concrete Appliances Co.* v. *Gomery, supra; Powers-Kennedy Contracting Corp.* v. *Concrete Mixing & Conveying Co., supra; Electric Cable Joint Co.* v. *Brooklyn Edison Co.,* 292 U. S. 69; *Altoona Publix Theatres* v. *American Tri-Ergon Corp., supra; Textile Machine Works* v. *Louis Hirsch Textile Machines, Inc.,* 302 U. S. 490; *Toledo Pressed Steel Co.* v. *Standard Parts, Inc.,* 307 U. S. 350. That is to say, the new device, however useful it may be, must reveal the flash of creative genius, not merely the skill of the calling. If it fails, it has not established its right to a private grant on the public domain.

Tested by that principle, Mead's device was not patentable. We cannot conclude that his skill in making this contribution reached the level of inventive genius which the Constitution (Art. I, § 8) authorizes Congress to reward. He merely incorporated the well-known thermostat into the old "wireless" lighter to produce a more efficient, useful, and convenient article. Cf. *Electric Cable Joint Co.* v. *Brooklyn Edison Co., supra.* A new application of an old device may not be patented if the "result claimed as new is the same in character as the original result" (*Blake* v. *San Francisco,* 113 U. S. 679, 683), even though the new result had not before been contemplated. *Pennsylvania R. Co.* v. *Locomotive Engine Safety Truck Co.,* 110 U. S. 490, 494, and cases cited. Certainly, the use of a thermostat to break a circuit in a "wireless" cigar lighter is analogous to, or the same in character as, the use of such a device in electric heaters, toasters, or irons, whatever may be the difference in detail of design. In-

genuity was required to effect the adaptation, but no more than that to be expected of a mechanic skilled in the art.

Strict application of that test is necessary lest in the constant demand for new appliances the heavy hand of tribute be laid on each slight technological advance in an art. The consequences of the alternative course were forcefully pointed out by Mr. Justice Bradley in *Atlantic Works* v. *Brady,* 107 U. S. 192, 200: "Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith." Cf. Mr. Justice Campbell dissenting in *Winans* v. *Denmead,* 15 How. 330, 344, 345, 347; Hamilton, Patents and Free Enterprise, Mon. No. 31; Investigation of Concentration of Economic Power, Temporary National Economic Committee, 76th Cong., 3d Sess., ch. VIII (1941).

Such considerations prevent any relaxation of the rule of the *Hotchkiss* case as respondent would seem to desire.

Reversed.

MR. JUSTICE FRANKFURTER concurs in the result.

MR. CHIEF JUSTICE STONE:

I concur in the result.

I agree that the use of the well known thermostatically controlled heating circuit exemplified by Copeland, with the removable wireless heating unit plug of Morris, in substitution for the manually controlled circuit which had

previously been used with the plug, exhibited no more than the skill of the art. The doubt which the court below resolved in favor of patentability because Copeland's invention was "still-born" should, I think, have been resolved in favor of petitioners, because Mead was likewise still-born so far as its substantial commercial success is concerned.

The commercially successful structure for which respondent claims the protection of the Mead patent, and which the court below thought satisfied a felt need, is not the structure described by Mead. Both embody the combination of a thermostatically controlled heating circuit with a heating unit borne on a removable wireless plug and used as a means to close the circuit. But they differ structurally in a number of particulars.

To mention only the more important, Mead showed a rotatable socket which is turned by manually rotating the plug when placed in the socket, so as to close the heating circuit. A laterally extending pin projecting from the side of the plug, in the Mead structure, engages with a spring latch outside the socket to hold the plug and socket in the circuit-closing position to which they have been rotated, until the latch is released by the thermostatic control, thus permitting the plug and the socket, which is activated by a spring, to rotate back to the open circuit position. The base required for the accommodation of the rotating socket and its externally operated mechanism was large and cumbersome. Respondent's commercial structure, like the alleged infringing device, utilizes a fixed socket within which the thermostatic circuit control is located and into which the heat-unit-carrying plug may be inserted without necessity of rotating it as in the case of the rotating plug with the projecting pin shown by Mead. The thermostatically controlled circuit is closed by pressing the plug further into the socket, the plug being restored to an open circuit position by a spring carried on

the plug, when the latch maintaining the closed circuit is thermostatically released.

The commercially exploited device, because of the differences in its structure from that shown by Mead, is the more compact and easily operated. Its utility as a lighter to be located on the dash of an automobile, which is said to be the merit of the Mead invention, is obvious. If the improvements resulting in such utility involved invention, it is not the invention of Mead. If they exhibited only the skill of the art, their success cannot be relied on to establish invention by Mead, who did not show or make them. The case is therefore not one for the application of the doctrine that commercial success or the manifest satisfaction of a felt need will turn the scale in favor of invention.

MR. JUSTICE FRANKFURTER joins in this opinion.

AUTOMATIC DEVICES CORP. *v.* SINKO TOOL & MANUFACTURING CO.

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

No. 6. Argued October 22, 1941.—Decided November 10, 1941.

Decided on the authority of *Cuno Engineering Corp.* v. *Automatic Devices Corp., ante,* p. 84.

112 F. 2d 335, affirmed.

CERTIORARI, 312 U. S. 711, limited to the question whether claims 2, 3, and 11 of the Mead patent No. 1,736,544 are valid. In a suit for infringement, a judgment of the District Court holding the claims valid and infringed was reversed by the Circuit Court of Appeals, which held them invalid and not infringed.

Mr. Drury W. Cooper, with whom *Messrs. Henry M. Huxley* and *Thomas J. Byrne* were on the brief, for petitioner.

Messrs. Russell Wiles and *Bernard A. Schroeder,* with whom *Mr. George A. Chritton* was on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a companion case to *Cuno Engineering Corp.* v. *Automatic Devices Corp., ante,* p. 84. The court below held that claims 2, 3, and 11 of the Mead patent (No. 1,736,544) were invalid and not infringed. 112 F. 2d 335. We granted the petition for certiorari limited to the question of validity of those claims. For the reasons stated in *Cuno Engineering Corp.* v. *Automatic Devices Corp., supra,* the judgment is

Affirmed.

FEDERAL LAND BANK OF ST. PAUL *v.* BISMARCK LUMBER CO. ET AL.

CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA.

No. 76. Argued October 23, 1941.—Decided November 10, 1941.

1. As construed by the highest court of the State, the purchaser is liable for the sales tax imposed by North Dakota Laws of 1937, c. 249, and this construction is controlling. P. 99.
2. Section 26 of the Federal Farm Loan Act of 1916 exempts a federal land bank from the tax imposed by North Dakota Laws of 1937, c. 249, in respect of purchases, made by the bank from a retail dealer, of materials for the improvement of property theretofore acquired by the bank in the course of its operations. P. 99.
3. In the provision of § 26 that every federal land bank, "including the capital and reserve or surplus therein and the income derived therefrom," shall be exempt from state taxation, the words quoted do not delimit the scope of the exemption. P. 99.
4. Nothing in the legislative history of § 26, nor of similar exemption clauses in other statutes, requires a result contrary to that here reached. P. 100.

5. A tax upon the sale of materials to be used in improving real estate is not a tax upon the real estate; and therefore the tax here involved is not within the exception from the exemption. P. 101.
6. The exercise by the Federal Government of a power delegated to it by the Constitution is governmental; and when Congress constitutionally creates a corporation through which the Federal Government lawfully acts, the activities of such corporation are governmental. P. 102.
7. Federal land banks are created constitutionally; they are federal instrumentalities engaged in the performance of an important governmental function. P. 102.
8. Congress constitutionally may immunize from state taxation the lending functions (or activities incidental thereto) of federal land banks. P. 103.
9. It is for Congress to determine whether immunity from one type of tax, rather than another, is wise. P. 104.

70 N. D. 607; 297 N. W. 42, reversed.

CERTIORARI, 313 U. S. 556, to review the affirmance of a judgment against the bank for the amount of a state sales tax.

Mr. Warner W. Gardner, with whom *Assistant Solicitor General Fahy* and *Messrs. Mastin G. White, Robert K. McConnaughey,* and *Russell D. Burchard* were on the brief, for petitioner.

Mr. P. O. Sathre, Assistant Attorney General of North Dakota, with whom *Mr. Alvin C. Strutz,* Attorney General, was on the brief, for respondents.

MR. JUSTICE MURPHY delivered the opinion of the Court.

We are asked to decide whether, in view of § 26 of the Federal Farm Loan Act of July 17, 1916 (c. 245, 39 Stat. 360, 380; 12 U. S. C. §§ 931–933),[1] petitioner is subject to

[1] "Sec. 26. That every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held, pur-

the Sales Tax Act of North Dakota,[2] the pertinent sections of which are set forth in the margin.[3]

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chased, or taken by said bank or association under the provisions of section eleven and section thirteen of this Act. First mortgages executed to Federal land banks, or to joint stock land banks, and farm loan bonds issued under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation.

"Nothing herein shall prevent the shares in any joint stock land bank from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the bank is located; but such assessment and taxation shall be in manner and subject to the conditions and limitations contained in section fifty-two hundred and nineteen of the Revised Statutes with reference to the shares of national banking associations.

"Nothing herein shall be construed to exempt the real property of Federal and joint stock land banks and national farm loan associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

[2] North Dakota Laws of 1937, c. 249.

[3] "§ 2. TAX IMPOSED. There is hereby imposed, beginning the first day of May, 1937, and ending June 30th, 1939, a tax of two per cent (2%) upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this Act, sold at retail in the State of North Dakota to consumers or users; . . ." (Laws of 1939, c. 234, § 1, extends the period of the tax through June 30, 1941, and S. B. No. 40, approved March 14, 1941, extends the tax through June 30, 1943.)

"§ 3. EXEMPTIONS. There are hereby specifically exempted from the provisions of this Act and from computation of the amount of tax imposed by it, the following:

"(a) The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State. . . .

"§ 6. Retailers shall add the tax imposed under this Act, or the average equivalent thereof, to the sales price or charge and when added such taxes shall constitute a part of such price or charge, shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts. . . .

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Petitioner, the Federal Land Bank of St. Paul, was created pursuant to the Federal Farm Loan Act, *supra*. In the course of its operations it acquired by foreclosure proceedings certain farm properties in Burleigh County, North Dakota.[4] To effect necessary repairs and improvements to the buildings and fences on these properties, petitioner purchased lumber and other building materials of an aggregate value of $408.26 from the Bismarck Lumber Company, a retail dealer. The Lumber Company demanded the sum of $8.02 from petitioner, representing the total amount of the state sales tax on the various purchases. This, petitioner refused to pay. On March 9, 1938, petitioner filed a complaint in the District Court of Burleigh County against the Lumber Company and the State Tax Commissioner,[5] alleging the foregoing facts and praying for an adjudication of non-liability for the sales tax on the ground that petitioner is exempt under § 26 of the Federal Farm Loan Act, *supra*, and the federal Constitution. To this complaint respondents demurred. In sustaining the demurrer the trial court held that the sales to petitioner were subject to the tax, that the Lumber Company was required to collect the tax, and that petitioner was under a legal duty to pay it. Accordingly,

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"§ 7. UNLAWFUL ACTS. It shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this Act will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it or any part thereof will be refunded."

[4] Section 13 of the Federal Farm Loan Act (39 Stat. 360, 372) gives federal land banks the power "To acquire and dispose of . . . Parcels of land acquired in satisfaction of debts or purchased at sales under judgments, decrees, or mortgages held by it."

[5] Owen T. Owen was named as the original defendant. He resigned the office of Tax Commissioner on December 26, 1938. His successor, respondent Gray, who took office on May 18, 1939, was substituted by order of this Court on May 26, 1941.

judgment was entered against petitioner in the amount of the tax. The Supreme Court of North Dakota affirmed the judgment of the trial court. *Federal Land Bank* v. *Bismarck Lumber Co.*, 70 N. D. 607, 297 N. W. 42. The case is here because it presents a question of importance in the administration of the Federal Farm Loan Act.

We are confronted with two questions:

First. Does § 26 include within its ban a state sales tax such as this? We hold that it does.

Second. Can Congress constitutionally immunize from state taxation activities in furtherance of the lending functions of federal land banks? We hold that it can.

I. It is clear that the North Dakota statute makes the purchaser, petitioner here, liable for the sales tax. Section 6 of the Act requires the retailer to add the tax to the sales price and declares the tax to be a debt from the consumer to the retailer. Section 7 makes it unlawful for the retailer to hold out that he will absorb or refund the tax in whole or in part. The Supreme Court of North Dakota has held that the sales tax is laid upon the purchaser. *Jewel Tea Co.* v. *State Tax Commissioner,* 70 N. D. 229, 293 N.W. 386. This holding was reaffirmed in the decision below. These determinations of the incidence of the tax by the state court are controlling, and respondents concede the point.

The unqualified term "taxation" used in § 26 clearly encompasses within its scope a sales tax such as the instant one, and this conclusion is confirmed by the structure of the section. In reaching an opposite conclusion the court below ignored the plain language, "That every Federal land bank . . . shall be exempt from Federal, State, municipal, and local taxation," and seized upon the phrase, "including the capital and reserve or surplus therein and the income derived therefrom," as delimiting the scope of the exemption. The protection of § 26 cannot thus be frittered away. We recently had occasion, under other

circumstances, to point out that the term "including" is not one of all-embracing definition, but connotes simply an illustrative application of the general principle. *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 189; see also *Helvering* v. *Morgan's, Inc.,* 293 U. S. 121, 125. If the broad exemption accorded to "every Federal land bank" were limited to the specific illustrations mentioned in the participial phrase introduced by "including," there would have been no necessity to except from the purview of § 26 the real estate held by the land banks.

The additional exemptions granted to farm loan bonds and first mortgages executed to the land banks are proper additions to the general exemption of § 26. The bonds may be held by private persons, and, of course, the general exemption of § 26 would not extend to them. Likewise, the general exemption would protect mortgages executed to the land banks and held by them, but it would not survive a transfer.

Nothing in the legislative history of § 26 commands a contrary result; [6] and a broad construction is indicated by Congress's intention to advance credit to farm borrowers at the lowest possible interest rate. The legislative history of similar exemption clauses in other statutes supports our interpretation of § 26.[7]

[6] The committee reports emphasize the tax exempt character of the farm loan bonds. S. Rpt. No. 144, 64th Cong., 1st Sess., p. 7; H. Rpt. No. 630, 64th Cong., 1st Sess., p. 8; H. R. Doc. No. 494, 64th Cong., 1st Sess., p. 11. The lengthy debates in the Senate over the constitutionality of § 26 may be explainable in part on the ground that the broad exemption thereby created would deprive the States of a large source of potential revenue. See 53 Cong. Rec. 6851–6854, 6961–6970, 7245–7247, 7305–7318, 7372–7378.

[7] Most enlightening is the recent amendment (Act of June 10, 1941, c. 190, 55 Stat. 248) to § 10 of the Reconstruction Finance Corporation Act (47 Stat. 5, 9), which declares that exemption includes sales taxes. The committee reports make it clear that Congress sought only to confirm its original understanding of the scope of the exemption by

It cannot be seriously contended that the tax falls within the real estate exception to § 26. Obviously, a tax upon the sale of building materials to be used on the real estate of a federal land bank is not a tax upon that real estate.

II. The principal argument of respondents, and the major ground of the decision below, is that Congress cannot constitutionally immunize the lending functions, or the activities incidental thereto, of federal land banks, from state taxation. It runs in this fashion: Congress has authority to extend immunity only to the governmental functions of the federal land banks; the only governmental functions of the land banks are those performed by acting as depositaries and fiscal agents for the federal government [8] and providing a market for government bonds;[9] all other functions of the land banks are private; petitioner here was engaged in an activity incidental to its business of lending money, an essentially private function; therefore § 26 cannot operate to strike down a sales tax upon purchases made in furtherance of petitioner's lending functions.

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this amendment. H. Rpt. No. 514, 77th Cong., 1st Sess., p. 2; S. Rpt. No. 292, 77th Cong., 1st Sess., p. 2. See also 87 Cong. Rec. 4255–4256, 4616, 4626–4629 (pamph.).

When Congress moved to avoid the effect of our decision in *Baltimore National Bank* v. *State Tax Commission,* 297 U. S. 209, that the Reconstruction Finance Corporation was taxable on its national bank shares, the committee reports explain that § 10 "was intended to give as wide immunity as possible to the functions and activities of the corporation." H. Rpt. No. 1995, 74th Cong., 2d Sess., pp. 1–2; H. Rpt. No. 2199, 74th Cong., 2d Sess.; S. Rpt. No. 1545, 74th Cong., 2d Sess.

See also the committee report on the Federal Reserve Act, in which the standard exemption clause first appeared, H. Rpt. No. 69, 63d Cong., 1st Sess., p. 39, and the report on the bill creating the Federal Savings and Loan Insurance Corporation. H. Rpt. No. 1922, 73d Cong., 2d Sess., p. 4.

[8] § 6, 39 Stat. 360, 365.

[9] § 5, 39 Stat. 360, 364. § 13, 39 Stat. 360, 372.

The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental. *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, 477. It also follows that, when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental. *Pittman* v. *Home Owners' Loan Corp.,* 308 U. S. 21, 32; *Graves* v. *New York ex rel. O'Keefe, supra,* 477.

The federal land banks are constitutionally created, *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180, and respondents do not urge otherwise. Through the land banks the federal government makes possible the extension of credit on liberal terms to farm borrowers. As part of their general lending functions, the land banks are authorized to foreclose their mortgages and to purchase the real estate at the resulting sale.[10] They are "instrumentalities of the federal government, engaged in the performance of an important governmental function." *Federal Land Bank* v. *Priddy,* 295 U. S. 229, 231; *Federal Land Bank* v. *Gaines,* 290 U. S. 247, 254. The national farm loan associations,[11] the local co-operative organizations of borrowers through which the land banks make loans to individuals, are also federal instrumentalities. *Knox National Farm Loan Assn.* v. *Phillips,* 300 U. S. 194, 202; *Federal Land Bank* v. *Gaines, supra,* 254.

Congress has the power to protect the instrumentalities which it has constitutionally created. This conclusion follows naturally from the express grant of power to Congress "to make all laws which shall be necessary and proper

[10] § 13, 39 Stat. 360, 372.

[11] § 7, 39 Stat. 360, 365.

for carrying into execution all powers vested by the Constitution in the Government of the United States. Const. Art. I, § 8, par. 18." *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21, 33, and cases cited. We have held on three occasions that Congress has authority to prescribe tax immunity for activities connected with, or in furtherance of, the lending functions of federal credit agencies. *Smith* v. *Kansas City Title & Trust Co., supra; Federal Land Bank* v. *Crosland*, 261 U. S. 374; *Pittman* v. *Home Owners' Loan Corp., supra.*[12] The first two of these cases dealt with the very § 26 now in issue. They are conclusive here.

In support of their argument respondents rely on *Smith* v. *Kansas City Title & Trust Co., supra,* and *Federal Land Bank* v. *Priddy, supra.* In the *Smith* case we held that farm loan bonds, which might be secured by first mortgages accumulated in the course of the land banks' lending activities,[13] could be exempted from state taxation. In the *Priddy* case, merely as an aid to the proper construction of § 4 of the Federal Farm Loan Act, giving the land banks the right to sue and be sued "as fully as natural persons," we noted that the land banks possessed some of the characteristics of private business corporations.[14] Their character as federal instrumentalities was specifically affirmed and the broad tax immunity granted to them was not questioned. Manifestly, these cases do not support respondents' constitutional theories.

We cannot accede to the suggestion that the *Smith* and *Crosland* cases can be distinguished, as they were by the state court, on the ground that a sales tax upon purchases made by petitioner in furtherance of its lending functions, unlike the taxes in those cases, bears so remotely upon

[12] See also *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664, 667, 668; *Colorado National Bank* v. *Bedford,* 310 U. S. 41, 50, 51.

[13] § 18, 39 Stat. 360, 375.

[14] See also *R. F. C.* v. *Menihan Corp.,* 312 U. S. 81, 83.

petitioner's functions as to be beyond the power of Congress to prohibit. We have found that the instant tax is within the scope of § 26; and that section is a valid enactment. It is not our function to speculate whether the immunity from one type of tax, as contrasted with another, is wise. That is a question solely for Congress, acting within its constitutional sphere, to determine. *Pittman* v. *Home Owners' Loan Corp., supra,* 33; *Smith* v. *Kansas City Title & Trust Co., supra,* 213.

Reversed.

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

COMMERCIAL MOLASSES CORP. *v.* NEW YORK TANK BARGE CORP.

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

No. 14. Reargued October 16, 1941.—Decided November 17, 1941.

1. In the case of an unexplained sinking of a vessel under circumstances which may give rise to an inference of unseaworthiness, the party on whom the burden of proof rests must do more than make a case upon the whole evidence so evenly balanced that the trier of fact is unable to resolve doubts as to the validity of the inference. Pp. 105, 114.
2. Where the owner of a vessel has not assumed the common carrier's special undertaking to deliver the cargo safely, the burden of proving a breach of the shipowner's duty to furnish a seaworthy vessel rests upon the bailor. P. 110.
3. The burden of proof in such a case does not shift with the evidence, but remains with the bailor, who must prove his case by a preponderance of all the evidence. P. 110.

114 F. 2d 248, affirmed.

This case came here on certiorari, 311 U. S. 643, to review the affirmance of a judgment dismissing petitioner's claim in a proceeding in admiralty brought originally by

the respondent for a limitation of liability. The judgment was affirmed here by an equally divided court, 313 U. S. 541; subsequently, a petition for rehearing was granted, the judgment was vacated, and the case was restored to the docket for reargument, 313 U. S. 596.

Mr. T. Catesby Jones, with whom *Messrs. Leonard J. Matteson* and *Ezra G. Benedict Fox* were on the brief, for petitioner.

Mr. Robert S. Erskine, with whom *Messrs. Cletus Keating, L. de Grove Potter,* and *Richard Sullivan* were on the brief, for respondent.

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

This is a proceeding in admiralty originating in the District Court upon a petition by respondent, as chartered owner of the tank barge "T. N. No. 73," for limitation of liability for damage to petitioner's shipment of molasses resulting from the sinking of the barge in New York harbor.

Petitioner, the sole claimant in the limitation proceeding, filed, in behalf of the insurer, its claim for loss of the molasses on the barge, which sank on Oct. 23, 1937, while taking on the shipment from the S. S. "Althelsultan." The barge sank in smooth water, without contact with any other vessel or external object to account for the sinking. By the contract of affreightment with petitioner's predecessor in interest, extended to cover the year 1937, respondent undertook to transport the molasses by barges in New York harbor from vessels or tidewater refineries to the shipper's customers; and agreed that the barges are "tight, staunch, strong and in every way fitted for the carriage of molasses within the limits above mentioned and [respondent] will maintain the barges in such condition during the life of this contract." The contract also con-

tained an undertaking on the part of the shipper of the molasses to effect insurance on cargoes for the account of respondent, the breach of which, it is contended, operated to relieve respondent from liability for any unseaworthiness of the barge.

The "T. N. No. 73" was a steel tank barge with four cargo tanks, two forward and two aft, separated by bulkheads, one extending fore and aft and the other athwartship. It had a rake fore and aft beginning 23 inches below the deck, affording space for fore and aft peak tanks. The customary method of stowing the barge was to pump the molasses into the forward tanks until the barge had a specified freeboard, then into the stern tanks until the stern had another specified freeboard, then back into the forward tanks until the barge was trimmed fore and aft.

In the case of the present shipment, the customary procedure was followed and the molasses was first pumped into the forward and then into the after tanks at a rate of from 3 to 3½ tons a minute. When the stern had approximately the desired freeboard the mate of the barge went forward to open the valves of the discharge pipes connecting with the forward tanks so as to fill them sufficiently to trim the barge fore and aft. On his way he stopped for a short time, the length of which was not precisely fixed, to carry on a conversation with some of the men on the vessel lying alongside. When he reached the valves for the forward tanks and before the valves for the after tanks had been closed, the barge sank by the stern. Only a small part of the molasses was saved, and the value of that lost largely exceeded the value of the barge after salvage operations.

Respondent attributed the sinking to overloading of the after tanks resulting from the mate's delay in shifting the flow of the molasses from the stern to the forward tanks. If, as alleged, over-filling of the stern tanks caused the loss without the privity or knowledge of respondent, it could

limit liability. R. S. § 4283, 46 U. S. C. § 183; *La Bourgogne,* 210 U. S. 95, 122; *The George W. Pratt,* 76 F. 2d 902. But it was unnecessary to decide any question of limiting liability unless petitioner, the sole claimant, succeeded in establishing its claim.

On the issues thus presented the District Court heard a great deal of testimony by witnesses who testified to all the circumstances attending the loading and sinking of the barge, and by experts as to its theoretical load capacity and the probable disposition of its load at the time the barge sank. There was also much evidence bearing on the seaworthiness of the vessel. This included the testimony of a representative of the cargo interests who had inspected the barge just before she began to receive the molasses and had found the tanks dry and clean, and who admitted he had found no evidence of leakage. There was also testimony by a diver who had examined the barge while she was on the bottom, and of others who had examined her condition after she had been raised and placed in dry dock.

After a careful review of all the evidence, the trial judge found that it was not sufficient to establish the fact that the sinking was caused by overloading the after tanks. He also found as a fact that upon all the evidence "the cause of the accident has been left in doubt." From all this he concluded that respondent was chargeable upon its warranty of seaworthiness by reason of the "presumption" of unseaworthiness arising from the unexplained sinking of the barge, which would deprive the owner of the right to limit liability. But, as he thought the insurance clause in the contract of affreightment required petitioner to effect cargo insurance for account of respondent, which it had failed to do, he dismissed petitioner's claim. 1939 A. M. C. 673.

The Court of Appeals affirmed, 114 F. 2d 248, but for a different reason than that assigned by the trial judge for

his decision. It held that the burden was on petitioner to prove that respondent had furnished an unseaworthy barge. The court sustained the trial court's finding, which it interpreted as meaning "that the evidence as to whether or not the barge sank because of unseaworthiness was so evenly matched that the judge could come to no conclusion upon the issue." But it held that the "presumption of unseaworthiness," which would arise from the evidence of the sinking of the barge in smooth water without any other apparent or probable cause, did not survive the further proof which left in doubt the issue of the cause of the loss. The court accordingly held that petitioner had not sustained its burden. It thus became unnecessary to consider what burden would rest on the barge owner if he were seeking to limit liability on an admittedly valid claim. We granted certiorari, 311 U. S. 643, to resolve an alleged conflict of the decision below with those of other circuit courts of appeals. *Pacific Coast S. S. Co.* v. *Bancroft-Whitney Co.*, 94 F. 180; *The John Twohy*, 279 F. 343; *Loveland Co.* v. *Bethlehem Steel Co.*, 33 F. 2d 655; *Gardner* v. *Dantzler Lumber & Export Co.*, 98 F. 2d 478; cf. *The Edwin I. Morrison*, 153 U. S. 199, and because of the importance in the maritime law of the principle involved.

With respect to the burden of proof, this case is to be distinguished from those in which the burden of proving seaworthiness rests upon the vessel when it is a common carrier or has assumed the obligation of a common carrier. The present contract of affreightment was for private carriage in New York harbor: *The Fri*, 154 F. 333; *The G. R. Crowe*, 294 F. 506; *The Wildenfels*, 161 F. 864; *The C. R. Sheffer*, 249 F. 600; *The Lyra*, 255 F. 667; *The Nordhvalen*, 6 F. 2d 883, and thus gave to respondent the status of a bailee for hire of the molasses. *Southern Ry. Co.* v. *Prescott*, 240 U. S. 632, 640; *Kohlsaat* v. *Parkersburg & M. Sand Co.*, 266 F. 283; *Alpine*

Forwarding Co. v. *Pennsylvania Railroad Co.*, 60 F. 2d 734; *Gerhard & Hey, Inc.* v. *Cattaraugus T. Co.*, 241 N. Y. 413, 150 N. E. 500. Cf. *The Nordhvalen, supra,* 887. Hence, we are not concerned with the rule that one who has assumed the obligation of a common carrier can relieve himself of liability for failing to carry safely only by showing that the cause of loss was within one of the narrowly restricted exceptions which the law itself annexes to his undertaking, or for which it permits him to stipulate. The burden rests upon him to show that the loss was due to an excepted cause and that he has exercised due care to avoid it, not in consequence of his being an ordinary "bailee" but because he is a special type of bailee who has assumed the obligation of an insurer. *Schnell* v. *The Vallescura,* 293 U. S. 296, 304, and cases cited. See *Coggs* v. *Bernard,* 2 Ld. Raym. 909, 918.

For this reason, the shipowner, in order to bring himself within a permitted exception to the obligation to carry safely, whether imposed by statute or because he is a common carrier or because he has assumed it by contract, must show that the loss was due to an excepted cause and not to breach of his duty to furnish a seaworthy vessel. *The Edwin I. Morrison, supra,* 211; *The Majestic,* 166 U. S. 375; *Schnell* v. *The Vallescura, supra; The Beeche Dene,* 55 F. 525. Cf. 39 Stat. 539, 49 U. S. C. § 88; Uniform Bill of Lading Act, § 12. See IX Wigmore on Evidence (3rd ed.) § 2508 and cases cited. And in that case, since the burden is on the shipowner, he does not sustain it, and the shipper must prevail if, upon the whole evidence, it remains doubtful whether the loss is within the exception. *The Folmina,* 212 U. S. 354, 363; *Schnell* v. *The Vallescura, supra,* 306, 307. A similar rule is applied under the Harter Act, which gives to the owner an excuse for unseaworthiness, if he has exercised due care to make his vessel seaworthy, for there the burden rests upon him to show that

he has exercised such care. *The Wildcroft,* 201 U. S. 378; *The Southwark,* 191 U. S. 1, 12; *May* v. *Hamburg-Amerikanische Gesellschaft,* 290 U. S. 333, 346.

But, as the court below held, the bailee of goods who has not assumed a common carrier's obligation is not an insurer. His undertaking is to exercise due care in the protection of the goods committed to his care and to perform the obligation of his contract including the warranty of seaworthiness when he is a shipowner. In such a case the burden of proving the breach of duty or obligation rests upon him who must assert it as the ground of the recovery which he seeks, *Southern Ry. Co.* v. *Prescott, supra; Kohlsaat* v. *Parkersburg & M. Sand Co., supra; The Transit,* 250 F. 71, 72, 75; *The Nordhvalen, supra; Delaware Dredging Co.* v. *Graham,* 43 F. 2d 852, 854; *Alpine Forwarding Co.* v. *Pennsylvania R. Co., supra,* 736; *Gerhard & Hey, Inc.* v. *Cattaraugus & Co., supra;* Story on Bailments (8th ed.) §§ 501, 504, 410, 410a; Wigmore, *op. cit., supra,* § 2508 and cased cited, as it did upon petitioner here when it alleged the breach of warranty as the basis of its claim. Petitioner apparently does not challenge the distinction which for more than two centuries, since *Coggs* v. *Bernard, supra,* has been taken between common carriers and those whom the law leaves free to regulate their mutual rights and obligations by private arrangements suited to the special circumstances of cases like the present. Nor do we see any adequate grounds for departing from it now or for drawing distinctions between a private bailment of merchandise on a barge in New York harbor and of goods stored in a private warehouse on the docks. Neither bailee is an insurer of delivery of the merchandise; both are free to stipulate for such insurance or for any lesser obligation, in which case the bailor cannot recover without proof of its breach.

The burden of proof in a litigation, wherever the law has placed it, does not shift with the evidence, and in de-

termining whether petitioner has sustained the burden the question often is, as in this case, what inferences of fact he may summon to his aid. In answering it in this, as in others where breach of duty is the issue, the law takes into account the relative opportunity of the parties to know the fact in issue and to account for the loss which it is alleged is due to the breach. Since the bailee in general is in a better position than the bailor to know the cause of the loss and to show that it was one not involving the bailee's liability, the law lays on him the duty to come forward with the information available to him. *The Northern Belle,* 9 Wall. 526, 529; *Gulf, C. & S. F. Ry. Co.* v. *Ellis,* 54 F. 481, 483; *Pacific Coast S. S. Co.* v. *Bancroft-Whitney Co.,* 94 F. 180; *The Nordhvalen, supra,* 886. If the bailee fails, it leaves the trier of fact free to draw an inference unfavorable to him upon the bailor's establishing the unexplained failure to deliver the goods safely. *Southern Ry. Co.* v. *Prescott, supra;* cf. *The America,* 174 F. 724.

Whether we label this permissible inference with the equivocal term "presumption" or consider merely that it is a rational inference from the facts proven, it does no more than require the bailee, if he would avoid the inference, to go forward with evidence sufficient to persuade that the non-existence of the fact, which would otherwise be inferred, is as probable as its existence. It does not cause the burden of proof to shift, and if the bailee does go forward with evidence enough to raise doubts as to the validity of the inference, which the trier of fact is unable to resolve, the bailor does not sustain the burden of persuasion which upon the whole evidence remains upon him, where it rested at the start. *Southern Ry. Co.* v. *Prescott, supra; Kohlsaat* v. *Parkersburg & M. Sand Co., supra; Tomkins Cove Stone Co.* v. *Bleakley Co.,* 40 F. 2d 249; *Pickup* v. *Thames Insurance Co.,* 3 Q. B. D. 594. Cf. *Del Vecchio* v. *Bowers,* 296 U. S. 280; Wigmore, *op. cit., supra,* §§ 2485, 2490, 2491, and cases cited.

Proof of the breach of warranty of seaworthiness stands on no different footing. The trier of fact may in many situations infer the breach from the unexplained circumstance that the vessel, whether a common or private carrier, sank in smooth water. See *The Edwin I. Morrison, supra; Work* v. *Leathers,* 97 U. S. 379, 380; *The Harper No. 145,* 42 F. 2d 161; *The Jungshoved,* 290 F. 733; *Barnewall* v. *Church,* 1 Caines 217, 234; *Walsh* v. *Washington Marine Insurance Co.,* 32 N. Y. 427, 436; *Zillah Transportation Co.* v. *Aetna Ins. Co.,* 175 Minn. 398, 221 N. W. 529; and cases cited below, 114 F. 2d 248, 251; Scrutton on Charter Parties and Bills of Lading (14th ed.) 105. Whether in such circumstances the vessel has the status of a private bailee is of significance only in determining whose is the burden of persuasion. Wherever the burden rests, he who undertakes to carry it must do more than create a doubt which the trier of fact is unable to resolve. *The Edwin I. Morrison, supra,* 212; *The Folmina, supra,* 363; *Schnell* v. *The Vallescura, supra.* The English courts, after some obscurity of treatment, see *Watson* v. *Clark,* 1 Dow 336, have reached the same conclusion. *Pickup* v. *Thames Insurance Co.,* 3 Q. B. D. 594; *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co.,* [1901] A. C. 362, 366; *Lindsay* v. *Klein,* [1911] A. C. 194, 203, 205; see *Constantine S. S. Line* v. *Imperial Smelting Corp.,* [1941] 2 All Eng. 165, 191–92.

Proof of the sinking of the barge aided petitioner, but did not relieve it from sustaining the burden of persuasion when all the evidence was in. This Court, in the case of private bailments, has given like effect to the rule that the unexplained failure of the bailee to return the bailed goods is prima facie evidence of his breach of duty, *Southern Ry. Co.* v. *Prescott, supra,* 640, and cases cited; see *Chesapeake & Ohio Ry. Co.* v. *Thompson Mfg. Co.,* 270 U. S. 416, 422; and the lower federal courts have applied, correctly we

think, the same rule with respect to proof of unseaworthiness by the shipper where the vessel has not assumed the obligation of a common carrier. *Kohlsaat* v. *Parkersburg & M. Sand Co., supra,* 285; *Robert A. Munroe Co.* v. *Chesapeake Lighterage Co.,* 283 F. 526; *The Nordhvalen, supra; Tomkins Cove Stone Co.* v. *Bleakley Co., supra; Delaware Dredging Co.* v. *Graham, supra,* 854. This is but a particular application of the doctrine of *res ipsa loquitur,* which similarly is an aid to the plaintiff in sustaining the burden of proving breach of the duty of due care but does not avoid the requirement that upon the whole case he must prove the breach by the preponderance of evidence. *Sweeney* v. *Erving,* 228 U. S. 233.

The Edwin I. Morrison, 153 U. S. 199, calls for no different result. There this Court reversed the findings of the lower court on the ground that the explanation offered for damage to the cargo by seawater taken in through a defective bilge pump hole, was only a conjecture supported by no direct testimony and was not sufficient to sustain the burden of the shipowner to prove that the vessel was seaworthy, saying (p. 212): "If the determination of this question is left in doubt, that doubt must be resolved against" the shipowner. See *The Dunbritton,* 73 F. 352, 358; *The Alvena,* 74 F. 252, 255. The court below had found that the bill of lading signed by the master-owner undertook to deliver the shipment in "good order and condition," the "dangers of the sea excepted." No exception was taken to this finding, and in this Court the shipper's contention that such was the contract was not challenged by the owner. The opinion must be taken as proceeding, as in *The Folmina* and *Schnell* v. *The Vallescura, supra,* on the ground that the case was one in which the obligation assumed was that of a common carrier on whom the burden rests of proving that the cargo loss is not due to un-

seaworthiness. The expressions in the opinion, as to the burden of proof which the shipowner must carry in order to bring him within the exception of perils of the sea, have been cited, in the only instances when approved by this Court, as relating to the burden of proof on those who have assumed the obligations of common carriers. See *The Majestic, supra,* 386; *The Folmina, supra,* 363; *Schnell* v. *The Vallescura, supra,* 305.

Here petitioner relied on the inference to be drawn from the unexplained sinking of the barge to sustain its burden of proving unseaworthiness. But the evidence did not stop there. To rebut the inference, respondent came forward with evidence fully disclosing the circumstances attending the sinking. Inspection of the barge before the loading began and after she sank, and again after she was raised, failed to disclose any persuasive evidence of unseaworthiness. The method and circumstances of her loading at least tended to weaken the inference which might otherwise have been drawn that the sinking was due to unseaworthiness rather than fault in stowing the cargo. Upon an examination of all the evidence of which the sinking, without any proven specific cause, was a part, the two courts below have found that no inference as to the cause of sinking can be drawn. Petitioner has thus failed to sustain the burden resting on it.

Affirmed.

MR. JUSTICE BLACK, dissenting:

It has long been recognized that "courts of admiralty are not governed by the strict rules of the common law, but act upon enlarged principles of equity." *O'Brien* v. *Miller,* 168 U. S. 287, 297. Where, as here, the result of a case in admiralty is made to turn upon the distinction between a common and private carrier, one may well ask whether more respect has been paid to technical niceties of the common law than befits the admiralty

tradition. Cf. *The Confiscation Cases,* 20 Wall. 92, 105–106, 107. I do not deny that in many situations the distinction may be important nor that legislatures and courts may be compelled from time to time to resurvey the changing line of separation. But here, I am convinced, the distinction is irrelevant to a just disposition of the case before us.

In the opinion just announced, the burden of proving seaworthiness is tied up with a common carrier's obligations as an insurer. But in *Schnell* v. *The Vallescura,* 293 U. S. 296, although the defendant was a common carrier on whom it was held such a burden lies, no suggestion that the Court rested its result upon the peculiar obligation of the defendant as an insurer can be found in the opinion. And so far as appears from the briefs and arguments of counsel as well as the majority opinion here, it would seem that this Court has never before given the insurer's liability of common carriers as the reason for the heavy burden of proof they bear in admiralty cases of this type. On the contrary, the basis usually given for the rule is the one explicitly stated in *Schnell* v. *The Vallescura, supra,* at page 304:

"The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability."

It is difficult to see any persuasive reason for concluding that the rule as thus explained is any less appropriately applied to private carriers than to common

carriers. In both cases the shipper normally has no representative on board the ship, the master and crew being employees of the carrier, with the result that the difficulties encountered by the shipper in seeking to find out how the loss occurred are equally great. See Carver, *Carriage of Goods by Sea* (8th ed.) 9.

I have found no language in the opinions of this Court, in cases holding the burden of proof of seaworthiness rests on a common carrier, that even suggests, not to say compels, the inference that a different result would have been reached if the carrier had been a private one. Hence, if the question of this case were one of original impression, I should see no obstacle to a holding that would give to the shipper here, who clearly had no easier access to evidence than did the shipper in the *Vallescura* case, the benefits of a similar allocation of the burden of proof.

But the question is not one of original impression. In *The Edwin I. Morrison,* 153 U. S. 199, this Court held that the burden was on a *private* carrier to prove seaworthiness in a controversy distinguishable in no significant respect from that now before us. The opinion of the Court here has suggested that the finding by the Circuit Court in the *Morrison* case that the bill of lading stated that the carrier would deliver the shipment "in good order and condition" amounted to a finding that the carrier had by contract assumed additional obligations, *i. e.,* those of a common carrier. Hence, the Court sees in that decision nothing more than the reiteration of the proposition that a *common carrier* has the burden of proving seaworthiness and finds in it no indication of what the burden of a private carrier should be.

It may seriously be questioned whether the finding that the bill of lading contained the casual phrase just quoted can properly be interpreted as a finding of a contract to assume the peculiar liabilities (whatever they may have

been) of a common carrier. But even on the assumption that the Court's interpretation of the finding is correct, its interpretation of the basis of decision in the *Morrison* case seems clearly erroneous. Nowhere in that opinion is there the smallest suggestion that the carrier was regarded as having bargained itself into a position of special liability. If the Court had believed a distinction must be made between private and common carriers, I should suppose it would have been explicit in stating that this carrier, although a private carrier, had assumed the obligations of a common carrier by contract. I think it inconceivable that it would have left a fact of such significance to be deduced from an inconspicuous phrase in the findings of the Circuit Court set out in a footnote to the "Statement of the Case" seven pages before the opinion itself begins. *The Edwin I. Morrison, supra,* 203, n. 1.

In *The Lottawanna,* 21 Wall. 558, 571, Mr. Justice Bradley stated: "If . . . with the new lights that have been thrown upon the whole subject of maritime law and admiralty jurisdiction, a more rational view of the question demands an adverse ruling in order to preserve harmony and logical consistency in the general system, the court might, perhaps, if no evil consequences of a glaring character were likely to ensue, feel constrained to adopt it. But if no such necessity exists, we ought not to permit any consideration of mere expediency or love of scientific completeness, to draw us into a substantial change of the received law." In the "received law" of this Court, at least since 1894, when the *Morrison* case was decided, no distinction has been drawn between private and common carriers with reference to the burden of proving seaworthiness. If such a distinction had existed, the "new lights" shed by the awareness of ever increasing complexity in modern shipping, a complexity equally incomprehensible to the shipper whether he deals with a private or common carrier, could, perhaps not without propriety, have been taken by this Court as a reason for erasing it. But the contrary proce-

dure, of establishing a distinction which neither was present in our received law nor is demanded "to preserve harmony and logical consistency," seems wholly unjustifiable.

Accordingly, it is my opinion that the judgment below should be reversed.

MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE BYRNES concur in this opinion.

TOUCEY *v.* NEW YORK LIFE INSURANCE CO.*

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

No. 16. Reargued October 17, 1941.—Decided November 17, 1941.

Section 265 of the Judicial Code forbids a federal court to enjoin a proceeding *in personam* in a state court on the ground that the claim in controversy has been previously adjudicated by the federal court. P. 129.

112 F. 2d 927 and 115 F. 2d 1, reversed.

No. 16 came here on certiorari, 311 U. S. 643, to review the affirmance of a decree of injunction, 112 F. 2d 927. The decision below was affirmed here by an equally divided Court, 313 U. S. 538; subsequently, a rehearing was granted, 313 U. S. 596.

No. 19 is here on certiorari, 312 U. S. 670, to review the affirmance of a decree of injunction, 115 F. 2d 1.

Samuel R. Toucey submitted, *pro se.*

Mr. Richard S. Righter, with whom *Messrs. Samuel W. Sawyer* and *Horace F. Blackwell, Jr.* were on the brief, for respondent in No. 16.

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*Together with No. 19, *Phoenix Finance Corp.* v. *Iowa-Wisconsin Bridge Co.*, also on writ of certiorari, 312 U. S. 670, to the Circuit Court of Appeals for the Eighth Circuit—argued March 13, 1941, reargued October 17, 20, 1941.

The action of the District Court in enjoining the prosecution of the state court action, pursuant to respondent's supplemental bill, was proper and in accordance with the well-recognized power of federal courts of equity to effectuate and perfect their own final decrees.

The remedy by supplemental bill is of ancient origin. Story's Eq. Jur., c. 23, § 874; Eden, Treatise on the Law of Injunctions, 1839; *Kershaw* v. *Thompson,* 4 Johns. Ch. 609; *Dove* v. *Dove,* Dickens 617, 1 Bro. 375, 1 Cox 101; Story's Eq. Jur. § 1291; 4 Kent Comm. Lect. 58, pp. 191–192 (3rd ed.); *Schenck* v. *Conover,* 13 N. J. Eq. 220.

The remedy by supplemental bill has not been confined to actions involving the possession of real estate or other property. *Shepherd* v. *Towgood,* Tur. & Rus. 379; *Buffum's Case,* 13 N. H. 14; *Ludlow* v. *Lansing,* 4 Johns. Ch. 613.

This Court has repeatedly held that where a federal court has made a final decree in equity and where one of the parties, or one in privity with him, attempts or threatens a course of action which will nullify the decree or lessen or impair its effect, the federal court will, upon the filing of a supplemental bill, award its injunction. *Root* v. *Woolworth,* 150 U. S. 401; *Julian* v. *Central Trust Co.,* 193 U. S. 93; *Riverdale Cotton Mills* v. *Alabama & Georgia Mfg. Co.,* 198 U. S. 188; *French* v. *Hay,* 22 Wall. 250; *Gunter* v. *Atlantic Coast Line,* 200 U. S. 273; *Looney* v. *Eastern Texas R. Co.,* 247 U. S. 214; *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U. S. 356; *Independent Coal & Coke Co.* v. *United States,* 274 U. S. 640; *Local Loan Co.* v. *Hunt,* 292 U. S. 234; *Dugas* v. *American Surety Co.,* 300 U. S. 414.

The lower federal courts have followed these decisions in a variety of cases.

Section 265 of the Judicial Code does not, under the circumstances of the present case, prevent a federal court from staying proceedings in an action *in personam* pend-

ing in a state court, where the purpose and effect of the state court proceeding are to relitigate issues finally adjudicated by a prior federal court decree.

This section must be construed in the light of § 262 which authorizes the federal courts to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law.

The purpose of § 265 is to prevent needless friction and unseemly conflict between federal and state courts. *Oklahoma Packing Co.* v. *Oklahoma Gas Co.*, 309 U. S. 4; *Hale* v. *Bimco Trading Co.*, 306 U. S. 375; *Essanay Film Co.* v. *Kane*, 258 U. S. 358.

There are several well-defined classes of cases which this Court has held do not come within the prohibition of the statute and in which the federal courts have enjoined proceedings in state courts. Some of these are:

1. Suits to enjoin the institution or prosecution in the state court of proceedings to enforce a local statute which is repugnant to the Constitution. *Ex parte Young*, 209 U. S. 123; *Truax* v. *Raich*, 239 U. S. 33; *Missouri* v. *Chicago, B. & Q. R. Co.*, 241 U. S. 533.

2. Suits to enjoin the institution or prosecution of a state court action, the result of which would be to cast an undue burden upon interstate commerce. *Atchison, T. & S. F. Ry. Co.* v. *Wells*, 265 U. S. 101; *Riehle* v. *Margolies*, 279 U. S. 218; *Hill* v. *Martin*, 296 U. S. 393.

3. Suits to enjoin the institution or prosecution of a state court action where the latter would interfere with the custody of a *res* previously acquired by the federal court, or where the federal court has the prior custody of property, in whatever form, by receivership, equitable foreclosure or other appropriate proceedings. *Covell* v. *Heyman*, 111 U. S. 176; *Julian* v. *Central Trust Co.*, 193 U. S. 93; *Riverdale Cotton Mills* v. *Alabama & Georgia Mfg. Co.*, 198 U. S. 188; *Kline* v. *Burke Construction Co.*, 260 U. S. 226.

4. Suits to enjoin the enforcement of a judgment obtained in the state court by fraud, without service of legal process, and without notice. *Arrowsmith* v. *Gleason,* 129 U. S. 86; *Simon* v. *Southern Ry. Co.,* 236 U. S. 115.

5. Suits to enjoin further proceedings in state courts in cases which have been removed to federal courts. *French* v. *Hay,* 22 Wall. 250; *Dietzsch* v. *Huidekoper,* 103 U. S. 494; *Madisonville Traction Co.* v. *St. Bernard Mining Co.,* 196 U. S. 239.

6. Suits upon supplemental bills to enjoin the institution or prosecution of state court actions, the object or effect of which is to relitigate and readjudicate issues settled by the final decrees of the federal courts, or which would otherwise tend to nullify those decrees or lessen or impair their effect. *Root* v. *Woolworth,* 150 U. S. 401; *Julian* v. *Central Trust Co.,* 193 U. S. 93; *Riverdale Cotton Mills* v. *Alabama & Georgia Mfg. Co.,* 198 U. S. 188; *Gunter* v. *Atlantic Coast Line,* 200 U. S. 273; *Looney* v. *Eastern Texas R. Co.,* 247 U. S. 214; *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U. S. 356; *Independent Coal & Coke Co.* v. *United States,* 274 U. S. 640; *Local Loan Co.* v. *Hunt,* 292 U. S. 234; *Dugas* v. *American Surety Co.,* 300 U. S. 414.

The present case falls perfectly within the sixth classification. See *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175.

The necessity for exceptions to the literal language of § 265 is illustrated in: *Dietzsch* v. *Huidekoper,* 103 U. S. 494; *French* v. *Hay,* 22 Wall. 250; *Arrowsmith* v. *Gleason,* 129 U. S. 86; *Julian* v. *Central Trust Co.,* 193 U. S. 93; *Looney* v. *Eastern Texas R. Co.,* 247 U. S. 214.

These cases emphasize the principle that the exceptions which this Court has recognized from the operation of the statute are for the purpose of avoiding conflict rather than of creating it. See *Gunter* v. *Atlantic Coast Line,* 200 U. S. 273, 292; *Local Loan Co.* v. *Hunt,* 292 U. S. 234; *Dugas* v. *American Surety Co.,* 300 U. S. 414, 428.

The existence of these well defined exceptions to the operation of the statute was particularly noted by Justice Brandeis in *Riehle* v. *Margolies*, 279 U. S. 218, 223, and *Hill* v. *Martin*, 296 U. S. 393. See *Oklahoma Packing Co.* v. *Oklahoma Gas Co.*, 309 U. S. 4, 8.

If it were held that injunctions could not issue in supplemental proceedings to protect the integrity of prior decrees in equity of the federal courts, it would follow that these courts would also be powerless to enjoin the enforcement of void local statutes, to enjoin proceedings which cast an undue burden on interstate commerce, and to enjoin state court proceedings which would interfere with the federal court's possession of a *res* or of property held in receivership or under equitable foreclosure. The federal courts could no longer protect actions which had been validly removed to them from the state courts. On the contrary, the state tribunals could proceed with such cases, thus, in effect, nullifying the removal statute, since there is no act of Congress which expressly authorizes injunctions where cases have been removed. Hence, the effect, if the salutary exception to the rule exemplified in the present case were abrogated, is incalculable, and would not only cripple the normal function of the federal courts, destroy a great body of law which the unanimous decisions of this Court have built up over a period of many years, but would lead to that very conflict between the federal and state courts which the statute under consideration seems to have been designed to eliminate. The exceptions to the statute which we have mentioned, as this Court has said, are designed not to frustrate the statute but to carry out the purpose for which it was enacted.

To construe § 265 to prohibit the injunction issued in this case would create grave doubts respecting its constitutionality under § 2 of Article III of the Constitution. Section 265 should be so construed as to avoid these

doubts, in harmony with the uniform and unanimous decisions of this Court.

See *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66; *Hill* v. *Martin*, 296 U. S. 393; *Smith* v. *Apple*, 264 U. S. 274.

It is entirely conceivable that Congress might properly deprive the District Courts of the United States of those powers equitable in nature which they have heretofore exercised, including the power to issue injunctions provided for by § 277 of the Judicial Code (§ 263, Title 28, U. S. C.), provided Congress at the same time constituted other inferior courts having those equity powers, as the Constitution requires. It is not conceivable, however, that, without creating other courts invested with those powers, Congress could, in the face of the constitutional mandate, entirely deprive a federal District Court of its powers as a court of equity. This power is of ancient origin and inhered in courts of equity long before the Constitution was adopted. *Irvine* v. *Marshall*, 20 How. 558, 564; *Michaelson* v. *United States*, 266 U. S. 42, 64, 65; *Crowell* v. *Benson*, 285 U. S. 22.

It may be that Congress can limit the power of injunction by eliminating a particular type of controversy from its effect, as this Court has held with respect to the Norris-LaGuardia Act restricting the right of injunction in labor disputes. *Lauf* v. *Shinner & Co.*, 303 U. S. 323. But the present situation is of a different kind. Section 265 literally construed does not limit the use of the injunction to a particular class of controversies but purports to abolish its use in every class of controversies where to use it will effect a stay of proceedings in a state court. If a court of equity is deprived of the power to carry out and effectuate its own decrees, it in effect ceases to be a court of equity.

That § 265 can readily be so construed as to effectuate its purpose without creating a doubt respecting its consti-

tutionality is obvious from the many cases in which exceptions to its effect have been recognized. That such an interpretation as this Court and inferior courts have heretofore given the statute ought to be respected is clear from the recent pronouncements of this Court upon the subject of statutory construction. *United States* v. *American Trucking Assns.*, 310 U. S. 534; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435.

Mr. James R. Morford, with whom *Mr. Casper Schenk* was on the brief, for petitioner in No. 19.

Mr. Fred A. Ontjes, with whom *Mr. Wm. C. Green* was on the brief, for respondent in No. 19.

The decrees and orders of the District Court and of the Circuit Court of Appeals in the foreclosure cause constitute adjudications against Phoenix of the several issues involved in the supplemental and ancillary proceedings.

The Delaware Superior Court erred in undertaking to review the findings of the federal court and its conclusions were erroneous.

The injunction orders against Phoenix do not violate principles of equity jurisdiction. The fact that the defense of *res judicata* can be urged in the Delaware court does not furnish any reason why injunctive relief should not be granted. Story, Equity Jurisprudence (14th ed.), §§ 1194, 1209, 1227.

The permanent prohibitory and mandatory injunction against Phoenix did not violate § 265 of the Judicial Code.

The federal court first acquired jurisdiction. The federal court had appointed a receiver and taken into legal custody all of the property of the bridge company of every description; it had rendered its opinion, findings of fact and conclusions of law and final decree, reserving jurisdiction to deal with all matters arising under the receivership and in connection with adjustment and payment

of taxes and counsel's fees before any of the Delaware actions were commenced. This action is still pending in the United States District Court for the Northern District of Iowa, with the receiver in charge of all of the bridge company's property.

Judicial Code § 265 is not a jurisdictional statute, but a mere limitation upon the general equity powers of the federal courts, preventing relief by injunction in the cases covered by it. *Smith* v. *Apple,* 264 U. S. 274; *Patton* v. *Marshall,* 173 F. 350.

Section 265 of the Judicial Code must be construed in connection with § 262, and if a federal court has first obtained jurisdiction of a case it can take such action as may be necessary to maintain its authority and enforce its decrees. *Lanning* v. *Osborne,* 79 F. 657, 662; *Julian* v. *Central Trust Co.,* 193 U. S. 93; *French* v. *Hay,* 22 Wall. 250–253; *Dietzsch* v. *Huidekoper,* 103 U. S. 494.

Section 265 does not deprive a district court of the jurisdiction otherwise conferred by the federal statutes, but merely goes to the question of equity in the particular bill, making it the duty of the court, in the exercise of its jurisdiction, to determine whether the specific case presented is one in which the relief by injunction is prohibited by this section or may nevertheless be granted. *Sovereign Camp* v. *O'Neill,* 266 U. S. 292; *Smith* v. *Apple,* 264 U. S. 274.

Section 265 applies only where the proceedings are first commenced in state courts. *Hamilton* v. *Walsh,* 23 F. 420; *Lanning* v. *Osborne,* 79 F. 657; *Jewel Tea Co.* v. *Lee's Summit,* 198 F. 532, affirmed 217 F. 965; *Kansas City Gas Co.* v. *Kansas City,* 198 F. 500; *Looney* v. *Eastern Texas R. Co.,* 247 U. S. 214; *Bethke* v. *Grayburg Oil Co.,* 89 F. 2d 527, cert. denied 302 U. S. 730; *Local Loan Co.* v. *Hunt,* 292 U. S. 234; *Garner* v. *Second National Bank,* 67 F. 833; *St. Louis Mining & Milling Co.* v. *Montana Mining Co.,* 148 F. 450.

The federal court has unquestioned power to effectuate its decrees and to prevent relitigation of the same matter. *Root* v. *Woolworth,* 150 U. S. 401; *Sarson* v. *Maccia,* 108 A. 109, 111; *French* v. *Hay,* 22 Wall. 250. See also: *Hickey* v. *Johnson,* 9 F. 2d 498; *Sterling* v. *Gredig,* 5 F. Supp. 329; *Hesselberg* v. *Aetna Life Ins. Co.,* 102 F. 2d 23; *Toucey* v. *New York Life Ins. Co.,* 102 F. 2d 16, 33; *Swift* v. *Black Panther,* 244 F. 20; *Wilson* v. *Alexander,* 276 F. 875; *Julian* v. *Central Trust Co.,* 193 U. S. 93; *Riverdale Cotton Mills* v. *Alabama-Georgia Mfg. Co.,* 198 U. S. 189; *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175; *Kern* v. *Huidekoper,* 103 U. S. 494; *Munro* v. *Raphael,* 288 U. S. 485; *Gunter* v. *Atlantic Coast Line R. Co.,* 200 U. S. 273; *Slaughter* v. *Slaughter,* 48 F. 2d 210; *St. Louis-San Francisco R. Co.* v. *McElvain,* 253 F. 123.

Mr. Justice Frankfurter delivered the opinion of the Court.

These cases were argued in succession and are dealt with in a single opinion because the controlling question in both is the same: Does a federal court have power to stay a proceeding in a state court simply because the claim in controversy has previously been adjudicated in the federal court?

No. 16. In 1935, Toucey brought suit against the New York Life Insurance Company in a Missouri state court. He alleged that in 1924 the company issued him a life insurance policy providing for monthly disability benefits and for the waiver of premiums during disability; that he became disabled in April, 1933, and that the defendant fraudulently concealed the disability provisions from him; that the defendant unlawfully cancelled the policy for nonpayment of premiums; that in September, 1935, he discovered the existence of the disability provisions; that he then applied to the company for reinstatement of the policy and for the payment of disability benefits, and that the company refused.

The suit was removed to the federal District Court for the Western District of Missouri, the plaintiff being a citizen of Missouri, the defendant a New York corporation, and the amount in controversy exceeding $3,000. All of the material allegations of the bill were denied. The district court dismissed the bill, finding that there was no fraud on the defendant's part and that the plaintiff was not disabled within the meaning of the policy. No appeal was taken.

In 1937, an action at law was brought against the insurance company in the Missouri state court by one Shay, a resident of the District of Columbia. He alleged that he was Toucey's assignee and that Toucey's disability entitled him to judgment. It does not appear that the insurance company filed an answer or any other pleading. Instead, a "supplemental bill" was filed in the Western District of Missouri, setting forth the history of the litigation between the parties, alleging that the assignment to Shay was made in order to avoid federal jurisdiction, and praying that Toucey be enjoined from bringing any suit for the purpose of readjudicating the issues settled by the federal decree and from further prosecuting the Shay suit.

A preliminary injunction was granted, and affirmed by the Circuit Court of Appeals for the Eighth Circuit. 102 F. 2d 16. The court held that Toucey's claim in the prior suit rested upon proof of his disability, and that this issue, necessarily involved in the Shay proceeding, had been conclusively determined in the insurance company's favor. Section 265 of the Judicial Code, 36 Stat. 1162, 28 U. S. C. § 379, was construed not to deprive a federal court of the power to enjoin state court proceedings where an injunction is "necessary to preserve to litigants the fruits of, or to effectuate the lawful decrees of the federal courts." Certiorari was denied, 307 U. S. 638, and the injunction was made permanent. Toucey

appealed and the Circuit Court of Appeals again affirmed, 112 F. 2d 927. In view of the importance of the questions presented, we granted certiorari. 311 U. S. 643. The decision below was affirmed by an equally divided Court, 313 U. S. 538, and the case is now before us on rehearing, 313 U. S. 596.

No. 19. The Iowa-Wisconsin Bridge Company, a Delaware corporation, in 1932 executed a deed of trust conveying all of its property, principally a bridge across the Mississippi River between Iowa and Wisconsin, to secure a $200,000 bond issue. In 1933, the trustees, an Iowa corporation and a Wisconsin citizen, filed a bill of foreclosure in the federal District Court for the Northern District of Iowa. One of the Bridge Company's stockholders intervened as a party defendant, alleging that the bonds and mortgage were fraudulent and without consideration. Upon his motion, the Phoenix Finance Corporation, a Delaware corporation which held almost 90% of the bonds, was joined as a plaintiff. The Bridge Company's answer challenged the validity of the indenture and alleged that the bonds were issued without consideration. Phoenix denied all allegations of fraud.

The case was tried before a master, whose modified conclusions were adopted by the court. Finding that the mortgage and bonds were fraudulently issued and that almost all the bonds were without consideration, the court denied foreclosure. The Circuit Court of Appeals for the Eighth Circuit affirmed, 98 F. 2d 416, and certiorari was denied, 305 U. S. 650.

Phoenix thereafter instituted five separate suits against the Bridge Company in the Delaware state courts, seeking recovery on various notes and contracts claimed to have constituted the consideration for the bonds. The Bridge Company thereupon filed a "supplemental bill" in the Northern District of Iowa, asserting that the issues involved in the state court suits had been made *res*

judicata by the federal decree, and praying, *inter alia,* that Phoenix be enjoined from further prosecuting the state suits. (In one of the suits, the state court rejected the *res judicata* plea, *Phoenix Finance Corp.* v. *Iowa-Wisconsin Bridge Co.,* 40 Del. 500, 14 A. 2d 386, and an appeal is now pending in the Supreme Court of Delaware.) The district court found that Phoenix was bound by the former decree, and that the prohibition of § 265 was no bar to an injunction. The Circuit Court of Appeals affirmed, 115 F. 2d 1, and because of the relation of the questions presented to those in No. 16, we brought the case here. 312 U. S. 670.

The courts below have thus decided that the previous federal judgments are *res judicata* in the state proceedings, and that therefore, notwithstanding the prohibitory provisions of § 265, the federal courts may use their injunctive powers to save the defendants in the state proceedings the inconvenience of pleading and proving *res judicata.*[1]

First. Section 265—"a limitation of the power of the federal courts dating almost from the beginning of our history and expressing an important Congressional policy—to prevent needless friction between state and federal courts," *Oklahoma Packing Co.* v. *Gas Co.,* 309 U. S. 4, 8-9—is derived from § 5 of the Act of March 2, 1793, 1 Stat. 335: ". . . nor shall a writ of injunction be granted [by any court of the United States] to stay proceedings in any court of a state . . ." In its present form, 36 Stat. 1162, 28 U. S. C. § 379, the provision reads as follows: "The writ of injunction shall not be

[1] Pleading a federal decree as *res judicata* in a state suit raises a federal question reviewable in this Court under § 237 (b) of the Judicial Code, 43 Stat. 937, 28 U. S. C. § 344 (b). *Dupasseur* v. *Rochereau,* 21 Wall. 130; *Deposit Bank* v. *Frankfort,* 191 U. S. 499; *Virginia-Carolina Chemical Co.* v. *Kirven,* 215 U. S. 252; *Stoll* v. *Gottlieb,* 305 U. S. 165, 167.

granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." [2]

The history of this provision in the Judiciary Act of 1793 is not fully known. We know that on December 31, 1790, Attorney General Edmund Randolph reported to the House of Representatives on desirable changes in the Judiciary Act of 1789. Am. State Papers, Misc., vol. 1, No. 17, pp. 21–36. The most serious question raised by Randolph concerned the arduousness of the circuit duties imposed on the Supreme Court justices. But the Report also suggested a number of amendments dealing with procedural matters. A section of the proposed bill submitted by him provided that "no injunction in equity shall be granted by a district court to a judgment at law of a State court." *Id.*, p. 26. Randolph explained that this clause "will debar the district court from interfering with the judgments at law in the State courts; for if the plaintiff and defendant rely upon the State courts, as far as the judgment, they ought to continue there as they have begun. It is enough to split the same suit into one at law, and another in equity, without adding a further separation, by throwing the common law side of the question into the State courts, and the equity side into the federal courts." *Id.*, p. 34. The Report was considered by the House sitting as a Committee of the Whole, and then was referred to successive special committees for further consideration. No action was taken until after Chief Justice Jay and his associates wrote the President that their cir-

[2] Formulated as a contraction of the federal courts' equity jurisdiction, the Act of 1793 "limits their general equity powers in respect to the granting of a particular form of equitable relief; that is, it prevents them from granting relief by way of injunction in the cases included within its inhibitions." *Smith* v. *Apple*, 264 U. S. 274, 279. See *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 74.

cuit-riding duties were too burdensome. American State Papers, Misc., vol. 1, No. 32, p. 51. In response to this complaint, which was transmitted to Congress, the Act of March 2, 1793, was passed, containing in § 5, *inter alia,* the prohibition against staying state court proceedings.

Charles Warren in his article *Federal and State Court Interference,* 43 Harv. L. Rev. 345, 347, suggests that this provision was the direct consequence of Randolph's report. This seems doubtful, in view of the very narrow purpose of Randolph's proposal, namely, that federal courts of equity should not interfere with the enforcement of judgments at law rendered in the state courts. See Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts,* 42 Yale L. J. 1169, 1171, n. 14.

There is no record of any debates over the statute. See 3 Annals of Congress (1791–93). It has been suggested that the provision reflected the then strong feeling against the unwarranted intrusion of federal courts upon state sovereignty. *Chisholm* v. *Georgia,* 2 Dall. 419, was decided on February 18, 1793, less than two weeks before the provision was enacted into law. The significance of this proximity is doubtful. Compare Warren, *Federal and State Court Interference,* 43 Harv. L. Rev. 345, 347–48, with *Gunter* v. *Atlantic Coast Line,* 200 U. S. 273, 291–92. Much more probable is the suggestion that the provision reflected the prevailing prejudices against equity jurisdiction. The *Journal of William Maclay* (1927 ed.), chronicling the proceedings of the Senate while he was one of its members (1789–1791), contains abundant evidence of a widespread hostility to chancery practice. See especially, pp. 92–94, 101–06 (debate on the bill that became Judiciary Act of 1789). Moreover, Senator Ellsworth (soon to become Chief Justice of the United States), the principal draftsman of both the 1789 and 1793 Judiciary Acts, often indicated a dislike for equity jurisdiction. See Brown, *Life of Oliver Ellsworth* (1905 ed.) 194; *Journal of William Maclay* (1927 ed.) 103–04; Warren, *New*

Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 96–100.[3]

Regardless of the various influences which shaped the enactment of § 5 of the Act of March 2, 1793, the purpose and direction underlying the provision are manifest from its terms: proceedings in the state courts should be free from interference by federal injunction. The provision expresses on its face the duty of "hands off" by the federal courts in the use of the injunction to stay litigation in a state court.[4]

Second. The language of the Act of 1793 was unqualified: ". . . nor shall a writ of injunction be granted to stay proceedings in any court of a state . . ." 1 Stat. 335. In the course of one hundred and fifty years, Congress has made few withdrawals from this sweeping prohibition:

(1) *Bankruptcy proceedings.* This is the only legislative exception which has been incorporated directly into § 265: ". . . except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." 36 Stat. 1162. This provision, based upon § 21 of the Bankruptcy Act of 1867, 14 Stat. 526, was inserted in the Act of 1793 by the Revisers. R. S. § 720;

[3] The last clause of § 5 of the Act of 1793, outlawing the familiar *ex parte* injunction, affords another illustration of hostility to chancery practice: "nor shall such writ [of injunction] be granted in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same." 1 Stat. 335.

[4] Section 262 of the Judicial Code, 36 Stat. 1162, 28 U. S. C. § 377, is derived from § 14 of the Judiciary Act of 1789, 1 Stat. 81, which provided that the "courts of the United States shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by the statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." The general powers thus given to the federal courts were obviously limited by the subsequent enactment of the specific prohibitory provisions of the Act of 1793.

see Proposed Draft of Revision of U. S. Statutes (1872), vol. 1, pp. 418.

(2) *Removal of actions.* The Removal Acts, ever since the Act of September 24, 1789, 1 Stat. 73, 79, have provided that whenever any party entitled to remove a suit shall file with the state court a proper petition for removal and a bond with good and sufficient surety, it shall then be the duty of the state court to accept such petition and bond "and proceed no further in the cause." Section 265 has always been deemed inapplicable to removal proceedings. *Dietzsch* v. *Huidekoper,* 103 U. S. 494; *Madisonville Traction Co.* v. *Mining Co.,* 196 U. S. 239. The true rationale of these decisions is that the Removal Acts qualify *pro tanto* the Act of 1793. Subsequent decisions have clarified the loose ground advanced in *French* v. *Hay,* 22 Wall. 250, 253. See *Kline* v. *Burke Construction Co.,* 260 U. S. 226; Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts,* 42 Yale L. J. 1169, 1174–75; compare *Bryant* v. *Atlantic Coast Line R. Co.,* 92 F. 2d 569, 571.

(3) *Limitation of shipowners' liability.* The Act of 1851 limiting the liability of shipowners provides that after a shipowner transfers his interest in the vessel to a trustee for the benefit of the claimants, "all claims and proceedings against the owner or owners shall cease." 9 Stat. 635, 636. Being a "subsequent statute" to the Act of 1793, this provision operates as an implied legislative amendment to it. *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.,* 109 U. S. 578, 599; see Admiralty Rule 51, 254 U. S., appendix, p. 26.

(4) *Interpleader.* The Interpleader Act of 1926, 44 Stat. 416, amended the 1917 Interpleader Act, 39 Stat. 929, to provide as follows: "Notwithstanding any provision of the Judicial Code to the contrary, said [district] court shall have power to issue its process for all such claimants and to issue an order of injunction against each of them, enjoining them from instituting or prose-

cuting any suit or proceeding in any State court or in any other Federal court . . ." See *Dugas* v. *American Surety Co.*, 300 U. S. 414, 428; *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 74.

(5) *Frazier-Lemke Act.* The filing of a petition for relief under this Act subjects the farmer and his property, wherever located, to the "exclusive jurisdiction" of the federal court. And except with the consent of the court, specified proceedings against the farmer or his property "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 . . ." 47 Stat. 1473. See *Kalb* v. *Feuerstein*, 308 U. S. 433.

Third. This brings us to applications of § 265 apart from these statutory qualifications. The early decisions of this Court applied the Act of 1793 as a matter of course.[5] However, a line of cases beginning with *Hagan*

[5] The first case arising under the provision was *Diggs & Keith* v. *Wolcott*, 4 Cranch 179 (1807), where the appellants brought an action at law on various promissory notes in a state court. While this action was still pending, the defendant filed a bill in the state chancery court for cancellation of the notes. The latter suit was removed to the federal circuit court which cancelled the notes and enjoined the further prosecution of the state action at law. The report of the proceeding in this Court states merely that "the court being of opinion that a circuit court of the United States had not jurisdiction to enjoin proceedings in a state court, reversed the decree." In his *Commentaries on American Law* (1826) vol. 1, p. 386, Chancellor Kent, stating that the decision in the case "is not to be contested," refers to it as illustrative of a situation "in which any control by the federal over the state courts, other than by means of the established appellate jurisdiction, has equally been prevented." *Peck* v. *Jenness*, 7 How. 612, 625, holding that a federal court sitting in bankruptcy could not discharge the lien of a prior attachment made under state law, was the first case which expressly relied upon the Act of 1793. In *Orton* v. *Smith*, 18 How. 263, 266, the Court held it error to enjoin a state action to establish title to certain land. "The courts of the United States have no such power over suitors in a state court."

v. *Lucas,* 10 Pet. 400, holds that the court, whether federal or state, which first takes possession of a *res* withdraws the property from the reach of the other. *Taylor* v. *Carryl,* 20 How. 583, 597; *Freeman* v. *Howe,* 24 How. 450. See *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 235: "The rank and authority of the [federal and state] courts are equal but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions *in rem* and does not exist in actions *in personam,* involving a question of personal liability only, the rule applies in the former but does not apply in the latter."

The Act of 1793 expresses the desire of Congress to avoid friction between the federal government and the states resulting from the intrusion of federal authority into the orderly functioning of a state's judicial process. The reciprocal doctrine of the *res* cases is but an application of the reason underlying the Act. Contest between the representatives of two distinct judicial systems over the same physical property would give rise to actual physical friction. The rule has become well settled, therefore, that § 265 does not preclude the use of the injunction by a federal court to restrain state proceedings seeking to interfere with property in the custody of the court.[6] *Farmers' Loan & Trust Co.* v. *Lake Street R. Co.,* 177

[6] The extent to which a federal court's exclusive control over the *res* may require use of the injunction to effectuate its decrees *in rem* is illustrated by *Riverdale Mills* v. *Manufacturing Co.,* 198 U. S. 188; *Julian* v. *Central Trust Co.,* 193 U. S. 93; and *Local Loan Co.* v. *Hunt,* 292 U. S. 234, 241. Cf. *Ex parte Baldwin,* 291 U. S. 610, 615.

U. S. 51, 61; *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 229, 235; *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, 88–89; see Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 359–66. And where a state court first acquires control of the *res*, the federal courts are disabled from exercising any power over it, by injunction or otherwise. *Palmer* v. *Texas*, 212 U. S. 118.

Another group of cases is said to constitute an exception to § 265, namely, where federal courts have enjoined litigants from enforcing judgments fraudulently obtained in the state courts. *Marshall* v. *Holmes*, 141 U. S. 589; *Simon* v. *Southern Railway Co.*, 236 U. S. 115; *Essanay Film Co.* v. *Kane*, 258 U. S. 358; *Atchison, T. & S. F. Ry. Co.* v. *Wells*, 265 U. S. 101; *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175. In the *Simon* case, Mr. Justice Lamar undertook to rationalize this class of cases by regarding a state court "proceeding" as completed once judgment is secured, with the result that an injunction against levying execution does not stay a judicial "proceeding." 236 U. S. at 124. But this construction of § 265 was rejected in *Hill* v. *Martin*, 296 U. S. 393, 403: "That term [proceedings] is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings; and is independent of the doctrine of *res judicata*. It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective." However, the opinion cites the *Wells Fargo* and *Essanay Film* cases in a footnote dealing with "the recognized exceptions to § 265." 296 U. S. 403, n. 19. The foundation of these cases is thus very doubtful. However, we need not under-

take to reëxamine them here since, in any event, they do not govern the cases at bar.[7]

Fourth. We come, then, to the so-called "relitigation" cases, the first of which is *Dial* v. *Reynolds,* 96 U. S. 340. The facts of the case are simple: Cooper was indebted to Staatsman. To secure these debts he executed a mortgage deed of trust under which Dial was trustee. Asserting title in himself to the property covered by the mortgage, Reynolds brought ejectment against Cooper in the federal court. On writ of error this Court set aside a judgment in Reynolds' favor and held title to be in Cooper. *Cooper* v. *Reynolds,* 10 Wall. 308, 321. Reynolds thereafter dismissed his ejectment action in the federal court and brought a new action against Cooper in a Tennessee state court based upon the claim thus previously litigated. Dial and Staatsman, joining Cooper as a party defendant, filed suit in the federal court to foreclose the mortgage and to enjoin Reynolds from further prosecuting his action in the state court. The lower court sustained Reynolds' demurrer, and this Court affirmed. It held that the "gravamen" of the bills was an injunction to prevent Reynolds from proceeding in the state court. "Such an injunction, except under the Bankrupt Act, no court of the United States can grant. With this exception, it is expressly forbidden by law." 96 U. S. at 341.[8]

[7] For similar reasons we need not here consider cases like *Ex parte Young,* 209 U. S. 123, and *Gunter* v. *Atlantic Coast Line,* 200 U. S. 273, with which compare *Hale* v. *Bimco Trading Co.,* 306 U. S. 375, 378.

[8] The Court also held that in a foreclosure proceeding the complainant cannot join a third person who claims adversely to the mortgagor and mortgagee, and that consequently there was a misjoinder of parties. 96 U. S. at 341. These grounds for decision were, of course, alternative, and either alone was sufficient to dispose of the case. However, they were entirely separate and distinct, and there

Looney v. *Eastern Texas R. Co.*, 247 U. S. 214, was not a "relitigation" case. The Texas federal district court, in a suit brought by various carriers, granted a preliminary injunction restraining the state Attorney General from proceeding to assess fines and penalties upon them for complying with an order of the Interstate Commerce Commission. The Attorney General nevertheless instituted proceedings in a state court to enjoin the carriers from complying with the Commission's order, and a supplemental bill was filed in the federal court to stay the proceedings. The district court issued the injunction, and this Court dismissed an appeal under § 266, holding that the injunction below was not based upon the unconstitutionality of the Texas state statutes, but was granted merely to protect its jurisdiction until the suit brought by the carriers was finally settled. The case obviously does not rule ours. *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356, held that a federal district court, having rendered a decree in a class suit brought in behalf of all the members of a certain class of beneficiaries in a fraternal association, may enjoin members of the class, found to be bound by the decree, from prosecuting suits in the state courts which would relitigate questions settled by such decree. The opinion of Mr. Justice Day contains no reference to either the Act of March 2, 1793, or to *Dial* v. *Reynolds*. The opinion is devoted almost entirely to a discussion of whether the former decree is *res judicata* in the state suits. Having determined this question in the affirmative, the Court disposed of the remaining—§ 265—question in one sentence, citing only one case in support of its conclusion, *Looney* v. *Eastern*

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is no basis for any inference that the Court might have upheld an injunction if Reynolds had been properly joined. Nor need we consider common-law refinements in actions for ejectment, for the Court went explicitly on its duty to obey the Act of 1793.

Texas R. Co., supra, which, as we have seen, was not a relitigation case.[9] 255 U. S. at 367.

Fifth. We find, therefore, that apart from Congressional authorization, only one "exception" has been imbedded in § 265 by judicial construction, to wit, the *res* cases. The fact that one exception has found its way into § 265 is no justification for making another. Furthermore, the *res* exception, having its roots in the same policy from which sprang § 265, has had an uninterrupted and firmly established acceptance in the decisions. The rule of the *res* cases was unequivocally on the books when Congress reënacted the original § 5 of the Act of 1793, first by the Revised Statutes of 1874 and later by the Judicial Code in 1911.

In striking contrast are the "relitigation cases." Loose language and a sporadic, ill-considered decision cannot be held to have imbedded in our law a doctrine which so patently violates the expressed prohibition of Congress.[10]

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[9] *Root* v. *Woolworth,* 150 U. S. 401, is erroneously regarded as illustrating a "relitigation" exception to § 265. The case holds merely that courts of equity have jurisdiction to "effectuate their own decrees by injunctions or writs of assistance in order to avoid the relitigation of questions once settled between the same parties." 150 U. S. at 411–12. The Court did not uphold a federal injunction against a state suit to relitigate a claim already settled by a previous federal decree—no such state suit had been brought. Consequently, there was no occasion to consider the applicability of § 265. The "first come, first served" rationale of cases like *Prout* v. *Starr,* 188 U. S. 537, was discarded in *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 235. Cf. *Haines* v. *Carpenter,* 91 U. S. 254, 257.

[10] There is no warrant for the assumption that, in the proposals for the Judicial Code of 1911, Congress had before it the "relitigation" exception as settled doctrine, and that by § 265 gave it legislative confirmation. The Report of the Special Joint Committee on Revision and Codification of the Laws of the United States annotated the Act of 1793 with citations to twenty-six decisions of this Court. Sen. Rept. No. 388, 61st Cong., 2d Sess., p. 470. Yet no reference was made to four of the five decisions of this Court prior to the

We are not dealing here with a settled course of decisions, erroneous in origin but around which substantial interests have clustered. Only a few recent and episodic utterances furnish a tenuous basis for the exception which we are now asked explicitly to sanction. Whatever justification there may be for turning past error into law when reasonable expectations would thereby be defeated, no such justification can be urged on behalf of a procedural doctrine in the distribution of judicial power between federal and state courts. It denies reality to suggest that litigants have shaped their conduct in reliance upon some loose talk in past decisions in the application of § 265 or, more concretely, upon erroneous implications drawn from *Looney* v. *Eastern Texas R. Co., supra,* and *Supreme Tribe of Ben-Hur* v. *Cauble, supra.* Compare *Helvering* v. *Hallock,* 309 U. S. 106, 119–20.

It is indulging in the merest fiction to suggest that the doctrine which for the first time we are asked to pronounce with our eyes open and in the light of full consideration, was so obviously and firmly part of the texture of our law that Congress in effect enacted it through its silence. There is no occasion here to regard the silence of Congress as more commanding than its own plainly

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Judicial Code which are supposed to justify the "relitigation" doctrine: *Root* v. *Woolworth,* 150 U. S. 401; *Prout* v. *Starr,* 188 U. S. 537; *Riverdale Mills* v. *Manufacturing Co.,* 198 U. S. 188; *Gunter* v. *Atlantic Coast Line,* 200 U. S. 273. (As we have already seen, "removal" cases like *French* v. *Hay,* 22 Wall. 250, and *Dietzsch* v. *Huidekoper,* 103 U. S. 494, rest upon an entirely different footing.) None of the reports submitted to Congress contains any discussion of § 5 of the Act of 1793 and the decisions construing it. See H. Rept. No. 818, 61st Cong., 2d Sess., referring to H. Doc. No. 783, 61st Cong., 2d Sess.; Sen. Rept. No. 388, 61st Cong., 2d Sess.; Final Report of the Commission to Revise and Codify the Laws of the United States (1906), pp. 29, 244. Nor do the debates disclose any consideration of the question. See 45 Cong. Rec., pts. III and IV, and 46 Cong. Rec., pts. I–V, *passim.*

and unmistakably spoken words. This is not a situation where Congress has failed to act after having been requested to act or where the circumstances are such that Congress would ordinarily be expected to act. The provisions of § 265 have never been the subject of comprehensive legislative reëxamination. Even the exceptions referable to legislation have been incidental features of other statutory schemes, such as the Removal and Interpleader Acts. The explicit and comprehensive policy of the Act of 1793 has been left intact. To find significance in Congressional nonaction under these circumstances is to find significance where there is none.

Section 265 is not an isolated instance of withholding from the federal courts equity powers possessed by Anglo-American courts. As part of the delicate adjustments required by our federalism, Congress has rigorously controlled the "inferior courts" in their relation to the courts of the states. The unitary system of the courts of England is saved these problems.

The guiding consideration in the enforcement of the Congressional policy was expressed by Mr. Justice Campbell, for the Court, in *Taylor* v. *Carryl*, 20 How. 583, 597:

"The legislation of Congress, in organizing the judicial powers of the United States, exhibits much circumspection in avoiding occasions for placing the tribunals of the States and of the Union in any collision."

We must be scrupulous in our regard for the limits within which Congress has confined the authority of the courts of its own creation.

Reversed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of No. 19.

MR. JUSTICE REED, dissenting:

The controlling issue in both the *Toucey* and the *Phoenix Finance* cases is the power of a federal court to pro-

tect those who have obtained its decrees against an effort to force relitigation of the same causes of action in the state courts. Questions of *res judicata* seem inapposite for the conclusion. We are not concerned in either case with the effect of the decrees if and when they might be pleaded in the state actions. Since federal jurisdiction in each case depended upon diversity, their effect as a pleaded bar to recovery in the state suits would depend upon the faith and credit by law or usage given like judgments of courts of the state containing the federal district.[1] But when the preliminary question is the meaning and application of the federal decree as a basis for a conclusion as to whether or not the decree shall be enforced by further steps, it is entirely a federal question. It is immaterial from that point of view whether the federal jurisdiction was bottomed originally on diversity, or the Constitution or laws of the United States. The power to give effect to the judgments of federal courts rests with Congress.[2] It has exercised that power for general purposes by Judicial Code § 262.[3]

As originally enacted, § 265 was a single line in a two page act concerning practice in the federal courts, Act of March 2, 1793, c. 22, § 5, 1 Stat. 334. The act's disconnected provisions were amendments to the statute establishing Judicial Courts of the United States. The short section in which § 265 appeared on the one hand enlarged

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[1] R. S. § 905; 28 U. S. C. § 687; *Hancock National Bank* v. *Farnum*, 176 U. S. 640.

[2] *Embry* v. *Palmer*, 107 U. S. 3, 9; *Atchison, T. & S. F. Ry. Co.* v. *Sowers*, 213 U. S. 55, 64.

[3] "The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." (R. S. § 716; Act of Mar. 3, 1911, c. 231, § 262, 36 Stat. 1162.)

equity powers of judges of this Court by authorizing them to issue writs of *ne exeat* and injunction, and on the other restricted the use of restraining orders without notice. Left to the four corners of the act, for lack of legislative materials, for deductions as to the purpose and intention of the enacting Congress, and faced with the absolute prohibition of its words, it might well be concluded that the intention was to bar an injunction running against the court itself as distinguished from the parties.[4] The fact that courts of equity had long exercised the power to entertain bills to carry their decrees into execution by injunction against the parties adds strength to such a supposition.[5] Such needed powers would not be lightly withdrawn.

We are not relegated to such speculations, however. This provision in one form or another has been embodied in our statute law since 1793. It was continued by the adoption of the Revised Statutes of 1878 and the Judicial Code of 1911. It and the cases interpreting it have been woven into the fabric of our law through the decades. What changes would have been made in its form to meet the needs of our expanding jurisprudence, were it not for the flexibility supplied by judicial interpretation, we can only conjecture. Certainly when the Code of 1911 restated its terms, the Congress took into consideration what had by that time come to be its accepted interpretation. Granted that § 265 is not a sentence or section of a legislative scheme whose meaning is to be sought in the purpose of the entire enactment or series of enactments,[6]

[4] Cf. *Steelman* v. *All Continent Corp.*, 301 U. S. 278, 290; Warren, *Federal and State Court Interference*, (1930) 43 Harv. L. Rev. 345, 372.

[5] Story, Equity Pleadings (10th Ed.) § 429; Mitford, Pleadings in Chancery (1780) p. 38; Cooper, Equity Pleading, (1809) pp. 98, 99; *Booth* v. *Leycester*, 1 Keen 579 (1837); *Kershaw* v. *Thompson*, 4 Johns. Ch. 609 (N. Y. 1820).

[6] Cf. *United States* v. *American Trucking Assns.*, 310 U. S. 534, 543.

we are nevertheless led by the judicial history intervening since its passage to look beyond the literal language and give weight to those decisions which had added to its content before the reënactment in the Judicial Code. In the Senate Report of the Special Joint Committee on Revision and Codification no change in language was suggested. Yet the Committee, as indicative of the then state of the law, cited numerous cases which are relitigation cases and are analyzed or referred to later in this opinion.[7] We are all the more persuaded to believe that the Code of 1911 intended to accept this early legislation with its judicial gloss because of the alternative offered. This alternative is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of *res judicata* which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication.[8] We, too, desire that the difficulties innate in the federal system of government may be smoothed away without a clash of sovereignties, but we find no cause for alarm in affirming a court which forbids parties bound by its decree to fight the battle over on another day and field.[9] We should not, in reaching for theoretical symmetry, hamper the efficiency and needlessly break the continuity of our judicial methodology. A decree forbidding a defeated party from setting up any right, anywhere, based upon

[7] *French* v. *Hay*, 22 Wall. 250; *Dietzsch* v. *Huidekoper*, 103 U. S. 494; *Julian* v. *Central Trust Co.*, 193 U. S. 112; *Sharon* v. *Terry*, 36 F. 337; *Garner* v. *Second National Bank*, 67 F. 833; *Central Trust Co.* v. *Western N. C. R. Co.*, 89 F. 24; *James* v. *Central Trust Co.*, 98 F. 489; *Chicago, R. I. & P. Ry. Co.* v. *St. Joseph Union Depot Co.*, 92 F. 22; *State Trust Co.* v. *Kansas City, P. & G. R. Co.*, 110 F. 10.

[8] *Dietzsch* v. *Huidekoper*, 103 U. S. 494, 498.

[9] Cf. *Princess Lida* v. *Thompson*, 305 U. S. 456, 466.

claims adjudged, is the usual form where injunctions are appropriate for determining controversies.[10]

The courts properly are hesitant to depart from literalism in interpreting a statute.[11] Strong equities do induce departure from the ordinary course where the purpose of the Congress appears plain.[12] It is hard to conceive of a statute, new or old, which has a meaning totally disassociated from supporting legislation or the body of adjudications within its ambit. This statute is in a posture much more favorable for the interpretation that it authorizes injunctions against relitigation in state courts than were the statutes construed in any of the cases cited in the preceding note for the interpretation given them. In fact, we conclude that its restatement in the Code of 1911, with the decisions now to be examined in existence, necessitates the interpretation here advocated. Additional decisions since 1911 and the failure of Congress to repudiate this interpretation add something of substance to this argument.

There exists no divergence of view in regard to the power of federal courts to enjoin proceedings in state courts where the state action may embarrass or interfere with the federal court's prior control over a *res* which is in its possession.[13] That is an exception to § 265. Equally firmly embedded is the power, long exercised as compatible with § 265, of carrying into execution by injunction against state actions the equitable decrees which have settled rights or claims between the parties to the federal litigation. This might be said to be auxiliary to the protective jurisdiction over property in the possession

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[10] E. g., *In re Chiles*, 22 Wall. 157, 166; *Sharon* v. *Terry*, 36 F. 337, 345.

[11] Cf. *Southern Railway Co.* v. *Painter*, *post*, p. 155.

[12] *United States* v. *American Trucking Assns.*, 310 U. S. 534; *United States* v. *Guaranty Trust Co.*, 280 U. S. 478; *Miller* v. *Nut Margarine Co.*, 284 U. S. 498; *Allen* v. *Regents*, 304 U. S. 439.

[13] *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 229.

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of a court. Inasmuch, however, as the cases hereafter cited concern rights arising from claims already adjudicated, and since, in the cases where a *res* was at one time involved, the property was no longer in the possession of the court issuing the injunction, the theory of preventing an unseemly clash over physical possession has no basis. The principle for which the following authorities stand is that a court has the right to execute its decrees to avoid relitigation and forced reliance on *res judicata*. The proceedings, as will be made to appear later, which were supplemented by the orders prohibiting state suits here under review, fall well within the limits of this hitherto well recognized conception.

As early as 1893 this Court declared, in *Root* v. *Woolworth*, 150 U. S. 401, 411, that the "jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance in order to avoid the relitigation of questions once settled between the same parties, is well settled." Root, the party enjoined by the original decree, asserted rights which would require relitigation of settled issues. Accordingly he was enjoined on supplemental bill, *inter alia*, "from bringing any action or actions touching the title to or possession of the said premises . . ." Until dissolved, that injunction forbade proceedings in state and federal courts alike. Although § 265 was not discussed, the case is cited as a convenient summary of the then law, and because it promptly became a precedent for enforcement of decrees even when the problem of § 265 was raised. The authority of this case has not been doubted until now.

Prout v. *Starr*, 188 U. S. 537, 544, forbade a state suit in violation of a federal court stipulation for a decree, treated the stipulation as a decree, and enjoined an action *in personam* in the state court for the collection of penalties under an unconstitutional statute. The state action was in violation of the original federal decree. This Court said: "The jurisdiction of the Circuit Court could not be

defeated or impaired by the institution, by one of the parties, of subsequent proceedings, whether civil or criminal, involving the same legal questions, in the state court."

In 193 U. S. appeared the case of *Julian* v. *Central Trust Company*. A railroad property in North Carolina had been sold under foreclosure proceedings in the federal circuit court. The decree was that the property be sold free of all claims of parties and the judicial sale was confirmed to the Southern Railway Company. Some years later a cause of action arose which was prosecuted to judgment in a state court against the original mortgagor without notice to or claim against the purchaser, the Southern. In the face of a threat to sell the property formerly conveyed by the federal decree, the circuit court enjoined the state proceedings. This Court said, pp. 112, 114: "In such case we are of opinion that a supplemental bill may be filed in the original suit with a view to protecting the prior jurisdiction of the Federal court and to render effectual its decree. . . . In such cases where the Federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding sec. 720, Rev. Stat., [§ 265 J. C.] restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. . . . It is conceded that the Federal right could be set up in the state court from which the execution issued, and, if denied, the ultimate rights of the parties can be determined upon writ of error to this court. In the view we have taken of this case the Federal court had not lost its jurisdiction to protect the purchaser at its sale upon direct proceedings such as are now before us." [14]

[14] The doctrine of the *Julian* case finds illustrations in the lower federal courts. While it is true that those courts were enforcing foreclosure, that purpose had been accomplished and the enjoined state suits sought relitigation of closed issues. *James* v. *Central Trust Co.*, 98 F. 489 (1899), modifying *Central Trust Co.* v. *Western N. C. R. Co.*, 89 F. 24 (1898); *State Trust Co.* v. *Kansas City, P. & G. R. Co.*, 110 F. 10 (1901); *Central Trust Co.* v. *Western North Carolina R. Co.*, 112 F. 471 (1901); *Alton Water Co.* v. *Brown*, 166 F. 840 (1908).

Riverdale Mills v. *Manufacturing Co.*, 198 U. S. 189, followed the established doctrine. The Riverdale Mills acquired property by judicial sale in the federal court. A state proceeding later was begun by parties to the federal foreclosure alleging the invalidity of the sale and seeking possession of the property. Riverdale then filed an ancillary bill in the original foreclosure suit for an injunction against prosecution of the state suit. Against the claimed protection of R. S. § 720 (§ 265 J. C.), p. 193, it was held here that a federal court may "protect the title which it has decreed as against every one a party to the original suit and prevent that party from relitigating the questions of right which have already been determined." P. 195.

It is quite clear that the Court in both the *Julian* and the *Riverdale* cases was intent not on protecting a *res*, since that had long passed from its hands, but on avoiding relitigation by executing its decrees. This appears particularly from their reliance upon *French* v. *Hay*, 22 Wall. 250; *Dietzsch* v. *Huidekoper*, 103 U. S. 494; and *Sharon* v. *Terry*, 36 F. 337. In the *French* case no *res* was involved. It was a federal injunction against the enforcement of a judgment of a state court obtained in a state action after removal of a related but separate state suit. The reasoning proceeded upon the protection of federal judgments, not on the language of the removal statute. The same is true of *Dietzsch*. There a state suit on a replevin bond was enjoined by the federal court because it grew out of a failure to return property awarded in replevin in a state court after the removal of the original replevin suit to the federal court which issued the injunction. It was there said, p. 497: "A court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a State court."

The Court today lays aside *Gunter* v. *Atlantic Coast Line,* 200 U. S. 273 (1906), as inapplicable. The case in our view may be properly cited as a relitigation decision. It forcefully declares, albeit by alternative ruling, for the position here taken. A federal court had enjoined a state tax on the ground of unconstitutionality. The state was a party. Years later the state brought an action in the state court for the tax which the decree prohibited. An ancillary bill sought and obtained an injunction from the federal court. This Court said, p. 292, "Indeed, the proposition that the Eleventh Amendment, or section 720 of the Revised Statutes, control a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, is not open for discussion. *Dietzsch* v. *Huidekoper,* 103 U. S. 494; *Prout* v. *Starr,* 188 U. S. 537; *Julian* v. *Central Trust Co.,* 193 U. S. 93, 112." It cannot fairly be said, we think, that this was not a holding that a federal court has the duty to protect its parties against relitigation. This seems quite certain when we examine the cases cited which are discussed heretofore in this opinion.

The *Terry* case, cited under the *Riverdale Mills* case, *supra,* is a good illustration of the permeation of our law by the principle of protection of federal decrees by injunctions against prosecuting state suits which relitigate settled issues. In *Sharon* v. *Terry,* a former decree had determined the fraudulent character of a marriage contract, and had enjoined all efforts to establish rights under any of its provisions. Notwithstanding this decree, a party thereafter sought and obtained a judgment of the highest court of the state determining the marriage contract valid. There was no plea of *res judicata* in the state proceedings. After the entry of the state judgment, the personal representative of the winning party in the federal suit revived that proceeding and obtained a

renewal of the injunction over the specific objection that R. S. § 720 (§ 265 J. C.) barred the order. 36 F. 337, 365.

The opinion was by Justice Field of this Court, on circuit, and stated: "The decree of the federal court, when revived, may be used to stay any attempted enforcement of the judgment of the state court." P. 364. It is true that the opinion shows that the circuit court was of the view that prior jurisdiction of an *in personam* cause gave the federal court authority to issue an injunction against state proceedings. P. 366. But the decision was directly on the point of enforcement of a decree. When the case came to this Court it was affirmed without consideration of § 265 on the ground that the propriety of the revivor was the only matter for decision, 131 U. S. 40.

In the later case of *Missouri Pacific Ry. Co.* v. *Jones*, 170 F. 124 (1909), a federal court had decided that a state statute fixing railroad rates was unconstitutional, and had entered decrees for the railroads accordingly. Thereafter, a county attorney commenced a suit in the state court against the companies to restrain collection of any but the statutory rate. On supplemental bill by the railroads the federal court enjoined him from prosecuting that suit, and relitigating the rate controversy. Similarly, in *St. Louis Mining & Milling Co.* v. *Montana Mining Co.*, 148 F. 450 (1906), the unsuccessful party in the federal suit was enjoined from proceeding further in the state court to relitigate matters already decided.[15] The fact that the federal proceeding was ancillary to an action to try title seems to have had no part in the decision.[16]

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[15] Cf. *Garner* v. *Second National Bank*, 67 F. 833 (1895).

[16] There are instances of the recognition of the power to prevent relitigation despite R. S. § 720 though the power was not actually exercised. *Chicago, R. I. & P. Ry.* v. *St. Joseph Union Depot Co.*, 92 F. 22, 25 (1898); *Guardian Trust Co.* v. *Kansas City Southern*

These cases were all handed down before the adoption of the Judicial Code in 1911. They are catalogued to show that the power of the federal courts to make their decrees effective was accepted as consonant with the general prohibition of § 265. Pomeroy taught that this was the law in 1905.[17] The rule was applied after 1911 when occasion arose. By *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356, 367, it was decided in 1921 almost without discussion that a federal court which had entered a decree as to rights in a fraternal benefit association in a class suit might enjoin by ancillary bill other members of the class from relitigating the issues in a state suit. *Looney* v. *Eastern Texas R. Co.*, 247 U. S. 214, cited as a controlling precedent, was suggested there by appellant, the Supreme Tribe of Ben-Hur, upon the very point here under discussion. *Id.*, 65 Law. Ed. 675. This Court now lays the *Looney* case aside as not being a "relitigation" case. While the injunction in the *Looney* case was not in aid of a decree, it was in aid of jurisdiction taken to determine a Texas rate controversy. A temporary injunction had been entered to maintain the status quo until a review by the Interstate Commerce Commission. A temporary injunction may well be likened to a decree and entitled to the same protection against relitigation. Such was evidently this Court's view. It said, page 221: "So important is it that unseemly conflict of authority between state and federal courts should be avoided by maintaining the jurisdiction of each free from the encroachments of the other, that § 265 of the Judicial Code, Rev. Stats., § 720, Act of March 2, 1793,

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Ry. Co., 146 F. 337, 340 (1906). *Craft* v. *Lathrop*, Fed. Cas. No. 3318 (1851), presents the converse situation of the exercise of this power without consideration of the contemporary equivalent of § 265.

[17] II Pomeroy's Equitable Remedies (1905) § 640, p. 1079. After discussing § 265—"Accordingly, a federal court may grant an injunction against a proceeding in a state court when necessary to render effective its own decree."

c. 22, 1 Stat. 334, has repeatedly been held not applicable to such an injunction."

The last case in this Court, *Local Loan Co.* v. *Hunt*, 292 U. S. 234, upheld by a unanimous court an injunction, upon an ancillary bill in a bankruptcy proceeding, forbidding the prosecution in a state court of a claim discharged in bankruptcy. This Court placed its decision squarely on the jurisdiction of the bankruptcy court to execute its decrees "notwithstanding the provisions of § 265 of the Judicial Code." Quite properly no mention is made of the exception in § 265 "except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." The only authorization for injunctions is in Bankruptcy Act § 11, 11 U. S. C. § 29, which provides for a stay of pending suits during adjudication in bankruptcy. This is substantially the language of § 21 of the Bankruptcy Act of 1867, 14 Stat. 526, which caused the insertion of the exception in the Revised Statutes, as is shown by the cross-reference under R. S. § 720. The specific exception of § 265 was inapplicable to the Local Loan Company situation. Furthermore, this case involved a *res* only in the sense that every bankruptcy proceeding involves a *res*, i. e., the estate.

Other federal courts, since the adoption of the Judicial Code, have continued to enjoin relitigation of settled issues.[18]

We think it may be accurately stated that for more than half a century there has been a widely accepted rule sup-

[18] *St. Louis-San Francisco Ry.* v. *McElvain*, 253 F. 123 (1918) (validity of mortgage foreclosure); *Wilson* v. *Alexander*, 276 F. 875 (1921) (defeasibility of title to land); *Hickey* v. *Johnson*, 9 F. 2d 498 (1925) (validity of deeds to Indian land); *American Surety Co.* v. *Baldwin*, 2 F. Supp. 679 (1933) (liability of surety on appeal bond); *Sterling* v. *Gredig*, 5 F. Supp. 329 (1932) (validity of provisions in a will); *Hesselberg* v. *Aetna Life Ins. Co.*, 102 F. 2d 23 (1939) (validity of insurance policy).

porting the power of federal courts to prevent relitigation. There are adequate precedents directly in point and others which recognize that the rule exists and is sound. Some at one time involved a *res*. A number applied the same rule when a *res* was never in the hands of the court. Not a case nor a text book is cited to support the Court's present position. No articles in periodicals suggest the propriety or desirability of so positive a change, except a single query as to the logic of the relitigation development.[19] Though the Judicial Code received careful analysis before adoption,[20] no language was inserted to disavow the settled construction of the reënacted section. *Dial* v. *Reynolds*, 96 U. S. 340, said by the Court to be a "relitigation" case, did not involve a decree. In a federal suit to quiet title an injunction was sought to forbid a state action in ejectment. It is in line with *Kline* v. *Burke Construction Co.*, 260 U. S. 226, but not even persuasive on the question of relitigation or execution of decrees.

We turn now briefly to the original and auxiliary decrees in the two cases under consideration. In the *Toucey* case, his suit in equity against the insurance company for restoration of an insurance policy and payments for benefits under it on the ground of the fraud of the company was decided against Toucey. An assignee of Toucey's in privity with him sought to relitigate the same issues in a state court. The federal court which entered the original decree enjoined on supplemental bill "retrial, reconsideration or readjudication" of the settled issues and the prosecution of the state action.[21]

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[19] See Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, (1933) 42 Yale L. J. 1169, 1176. Cf. Warren, *Federal and State Court Interference*, (1930) 43 Harv. L. Rev. 345, 378.

[20] Senate Report No. 388, 61st Cong., 2d Sess., (1910), p. 2.

[21] Cf. *Toucey* v. *New York Life Ins. Co.*, 102 F. 2d 16, 20; *Equitable Life Assur. Soc.* v. *Wert*, 102 F. 2d 10.

In the *Iowa-Wisconsin Bridge Co.* case, a decree, invalidating a certain mortgage and bonds issued in consideration of claimed indebtedness after protracted litigation, was entered December 1, 1936, in a mortgage foreclosure suit brought in a federal court by the bondholders. This decree became final.[22] Thereafter parties to the proceedings sought to litigate, in the state courts of Delaware, the validity of certain items of the indebtedness which are alleged to form the basis for the bond issue and to have been invalidated by the former federal decree. A supplemental and ancillary bill was filed by the Bridge Company in the original federal court suit seeking an injunction against the relitigation of the already adjudicated causes of action. The District Court granted the injunction on a finding that the causes declared upon in Delaware had been settled by the federal litigation.[23]

These summary statements show plainly, it seems to us, that the injunctions now set aside by this Court were issued within the recognized rule that federal courts may protect their decrees by prohibiting relitigation, without violation of § 265 as heretofore understood and interpreted. Both decrees should be affirmed.[24]

The CHIEF JUSTICE and MR. JUSTICE ROBERTS concur in this dissent.

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[22] 98 F. 2d 416, cert. denied, 305 U. S. 650.

[23] See, for an understanding of the complexities of the issues already settled: *Bechtel Trust Co.* v. *Iowa-Wisconsin Bridge Co.*, 19 F. Supp. 127; *First Trust & Savings Bank* v. *Iowa-Wisconsin Bridge Co.*, 98 F. 2d 416; *Phoenix Finance Corp.* v. *Iowa-Wisconsin Bridge Co.*, 115 F. 2d 1.

[24] It might be noted that § 265 is recognized as merely a limitation on general equity powers, *Smith* v. *Apple*, 264 U. S. 274, while the Norris-LaGuardia Act, 47 Stat. 70, is a denial of jurisdiction to enjoin. "No court of the United States . . . shall have jurisdiction to issue any . . . injunction in a case involving or growing out of a labor dispute, except . . ."

SOUTHERN RAILWAY CO. *v.* PAINTER, ADMINISTRATRIX.

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

No. 24. Argued October 20, 21, 1941.—Decided November 17, 1941.

Section 265 of the Judicial Code forbids a federal court to enjoin proceedings in a state court though such injunction be in support of a suit, under the Federal Employers' Liability Act, begun earlier and then pending in the federal court. P. 159.

117 F. 2d 100, reversed.

CERTIORARI, 313 U. S. 556, to review the affirmance of a decree of injunction.

Mr. Sidney S. Alderman, with whom *Messrs. H. O'B. Cooper, Rudolph J. Kramer, Bruce A. Campbell,* and *S. R. Prince* were on the brief, for petitioner.

Mr. Roberts P. Elam, with whom *Mr. Mark D. Eagleton* was on the brief, for respondent.

The federal District Court had jurisdiction, as to both subject matter and parties, over the action under the Federal Employers' Liability Act.

That the plaintiff under § 6, as amended, had an unqualified right to bring the action in the federal court in Missouri, is plain from the language and the legislative history of that section.

This right to select the forum is an absolute federal right. *Second Employers' Liability Cases,* 223 U. S. 1, 58; *Hoffman* v. *Missouri ex rel. Foraker,* 274 U. S. 21; *McKnett* v. *St. Louis & S. F. R. Co.,* 292 U. S. 230; see, also, *Missouri ex rel. St. Louis, B. & M. R. Co.* v. *Taylor,* 255 U. S. 200.

The Tennessee Chancery Court was without jurisdiction of the subject matter of the Railway's complaint. Its injunction was unauthorized and void.

Where the state and federal courts have concurrent jurisdiction, the plaintiff has the absolute right to elect the forum in which he will bring his action.

When a federal court is properly appealed to in a case over which it has by law jurisdiction, it is not only the right, but the duty, of that court to take and exercise jurisdiction. Dist'g *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U. S. 413; *Penn General Casualty Co.* v. *Pennsylvania*, 294 U. S. 189; *Pennsylvania* v. *Williams*, 294 U. S. 176; and *Harkin* v. *Brundage*, 276 U. S. 36.

The doctrine of *forum non conveniens* is one which is applicable only by a court to a case pending before it, as the decisions relied upon by petitioner railway well illustrate; it cannot be applied by one court to a case pending before a court in another jurisdiction—and petitioner railway made no attempt to have the federal District Court below apply that doctrine to this respondent's case, but, on the contrary, sought a "back-handed" application of the doctrine by the state court of Tennessee. In the second place, the doctrine of *forum non conveniens* is not to be applied merely upon considerations of convenience or expense, but is to be applied only where the trial of the cause in the forum in which it is pending will produce an injustice. In the third place, the doctrine of *forum non conveniens* is never to be applied where it will result in an injustice to the plaintiff.

The courts of a State have no authority or jurisdiction to restrain or enjoin proceedings in the federal courts.

A court of equity, in a proper case and to prevent harassing, vexatious and inequitable consequences, may restrain and enjoin parties within its jurisdiction from instituting or prosecuting proceedings in the courts of other jurisdictions. *Cole* v. *Cunningham*, 133 U. S. 107. But that doctrine is subject to the exception, based upon necessity, that state courts cannot enjoin parties from proceeding in federal courts. The doctrine applies only in cases

where both parties to the proceedings in the foreign court are residents within the jurisdiction of the court of equity wherein relief is sought from the prosecution of the proceeding in the foreign court.

Furthermore, the effect of the specific provision of the Federal Employers' Liability Act is to supersede the law of the States, common law as well as statutory.

The injunction by the Tennessee Chancery Court, without authority, undertook (1) to deprive respondent entirely of her right to bring her action in the federal court at the place first provided for by the Act, *viz.*, in the district of the residence of petitioner railway at Richmond, Virginia; (2) to impair and limit the right of respondent to bring her action in a federal court in the places last provided for by the Act, *viz.*, the various federal districts in which the petitioner railway was doing business; and (3) to direct respondent to bring her action in the federal court at a place not provided for by the Act, *viz.*, the district of plaintiff's residence, where the railway might not be doing business.

That the employee's election of a venue may cause, incidentally, a burden on interstate commerce, cannot affect his right to make it, pursuant to the Act.

The general rule that, ordinarily, an administrator or executor cannot sue or be sued in his official capacity in the courts of a jurisdiction foreign to that from which he derives his authority, is without application to an administrator or executor who brings an action under the Federal Employers' Liability Act.

Respondent did not bring her action in the federal District Court in Missouri by virtue of her inherent right as the representative of the estate of her decedent, but by virtue of her designation by the federal statute as trustee for designated dependent survivors of the decedent and for them alone.

The injunction of the Chancery Court is not entitled to "full faith and credit." The District Court had occa-

sion and power and authority to grant the injunction against the railway.

No state or federal court, other than the federal District Court below in Missouri, is open or available to respondent for the prosecution of her cause of action, for the injury to and death of her decedent, because the two-year time limitation of the Act (before the amendment of § 6) applies, and the time has expired.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

On August 31, 1939, respondent brought an action against petitioner in the federal District Court for the Eastern District of Missouri to recover damages under the Federal Employers' Liability Act, 35 Stat. 65; 45 U. S. C. § 51 *et seq.*, for the wrongful death of her husband while employed by petitioner as a fireman on an interstate train operated between points in Tennessee and North Carolina. While this action was pending, petitioner filed a bill in the Chancery Court of Knox County, Tennessee, alleging that respondent and the deceased were citizens of Tennessee; that petitioner, a Virginia corporation having its principal office in Richmond, Virginia, does no business in Missouri other than of an interstate character; that the accident occurred in Madison County, North Carolina, "just beyond the North Carolina-Tennessee line"; that the Missouri federal court is more than 500 miles distant from respondent's residence, the residence of petitioner's witnesses, and the place where the accident occurred; that petitioner could not transport its witnesses to Missouri except at "enormous expense"; that respondent's purpose in bringing suit in Missouri was to evade the law of Tennessee and North Carolina; and that petitioner maintains agents in Tennessee and North Carolina upon whom process can be served. The chancellor thereupon enjoined respondent from further prosecuting her action in the

Missouri federal court and from instituting any similar suits against petitioner except in the state and federal courts in Tennessee and North Carolina. Respondent did not appeal from this decree. Instead, she filed a "supplemental bill" in the Missouri federal court to enjoin the proceedings in the Tennessee state court. Holding that the commencement of respondent's action for damages gave the federal court "specific, complete, sole and exclusive jurisdiction" which could not be "intrenched upon" by proceedings in another court, the District Court, by an appropriate interlocutory decree, forbade petitioner from further prosecuting its suit in the Tennessee state court and ordered it to dismiss the state suit. This decree was affirmed by the Circuit Court of Appeals for the Eighth Circuit, 117 F. 2d 100. We brought the case here, 313 U. S. 556, in view of the relation of its jurisdictional problems to those in *Toucey* v. *New York Life Insurance Co.* and *Phoenix Finance Corp.* v. *Iowa-Wisconsin Bridge Co.*, *ante*, p. 118.

The limitations imposed on the power of the federal courts by § 265 of the Judicial Code, as we have applied them this day in the *Toucey* and *Phoenix* cases, *supra*, govern the disposition of this case. The restrictions of § 265 upon the use of the injunction to stay a litigation in a state court confine the district courts even though such an injunction is sought in support of an earlier suit in the federal courts. Congress has endowed the federal courts with such protective jurisdiction neither generally nor in the specific instance of claims arising under the Federal Employers' Liability Act. Ever since the Act of March 2, 1793, 1 Stat. 334, § 5, Congress has done precisely the opposite. Because of its views of appropriate policy in the interplay of state and federal judiciaries, Congress has forbidden the exclusive absorption of such litigation by the federal courts. If a state court proceeds as the Chancery

Court of Tennessee acted, the ultimate vindication of any federal right lies with this Court.

The District Court was here without power to enjoin petitioner from further prosecuting its suit in the Tennessee state court.

Reversed.

The CHIEF JUSTICE, MR. JUSTICE ROBERTS and MR. JUSTICE REED, concurring:

The reasons which led to dissent in *Toucey* v. *New York Life Insurance Co.*, and *Phoenix Finance Corp.* v. *Iowa-Wisconsin Bridge Co.*, *ante*, p. 118, do not exist in this case. There is no federal decree and therefore no need of an injunction to protect the decree or prevent relitigation.

EDWARDS *v.* CALIFORNIA.

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF YUBA.

No. 17. Argued April 28, 29, 1941. Reargued October 21, 1941.—Decided November 24, 1941.

1. Transportation of persons from one State into another is interstate commerce. P. 172.
2. A statute of California making it a misdemeanor for anyone knowingly to bring or assist in bringing into the State a nonresident "indigent person," *held* invalid as an unconstitutional burden on interstate commerce. P. 174.

For the purposes of this case it is assumed that the term "indigent person," though not confined to the physically or mentally incapacitated, includes only persons who are presently destitute of property and without resources to obtain the necessities of life, and who have no relatives or friends able and willing to support them. P. 172.

How far the regulatory power of Congress extends over such transportation, and whether the attempted state regulation is also prohibited by other provisions of the Constitution, are questions not decided in this case and upon which the majority of the Court expresses no opinion. Pp. 176, 177.

3. Remarks in *New York* v. *Miln,* 11 Pet. 102, and other cases, concerning the power of a State to exclude "paupers" are considered and the meaning of that term discussed. P. 176.

Reversed.

APPEAL from a judgment of the Superior Court of California which affirmed the conviction of Edwards under a California statute declaring it to be a misdemeanor for any person to bring, or assist in bringing, into the State any nonresident of the State, knowing him to be an indigent person. The court below was the highest court to which an appeal could be taken under the laws of California. The case was argued here, and reargument was ordered, at the 1940 Term, 313 U. S. 545.

Mr. Samuel Slaff for the appellant.

The transient unemployed comprise most of the nonresidents who come into California. The act of bringing or assisting in bringing almost any of these people into the State has been made a crime, for it is clear that practically all migratory-casual labor and transient unemployed fall within the classification of "indigent persons."

The passage of persons from State to State constitutes interstate commerce, *Gibbons* v. *Ogden,* 9 Wheat. 1; *Hoke* v. *United States,* 227 U. S. 308; *Gooch* v. *United States,* 297 U. S. 124; *United States* v. *Miller,* 17 F. Supp. 65; *Covington & Cincinnati Bridge Co.* v. *Kentucky,* 154 U. S. 204, whether they be moved by common carrier or otherwise. *Caminetti* v. *United States,* 242 U. S. 470; *United States* v. *Burch,* 226 F. 974.

The effect of the statute is to bar the movement of indigent persons into California, and to compel their removal therefrom at the pleasure of the authorities.

A natural tendency of the statute is to intimidate, under threat of criminal prosecution, not only one who would transport an indigent migrant, but also the migrants themselves. Its consequence often will be to leave the

latter substantially helpless to move, compelling them to remain at their place of origin where employment is wanting and opportunity lacking.

If the movement of indigent migrants into a State may be barred or impeded because of fear of the creation of a burden which may subsequently fall on the residents of that State, then migration out of a State might also be restrained where depopulation would increase the burden of governmental indebtedness on those remaining. If the principle of freezing population in areas of origin is constitutionally sound, there is legal sanction for the growth of an economic condition of virtual peonage, chaining people to that part of the land where accident of birth has first placed them.

By impeding the free movement of employables across state lines, the statute interposes a barrier against the competition of the labor of nonresidents with that of residents. Cf. *Best & Co.* v. *Maxwell,* 311 U. S. 454, 457. The absence of capital cannot serve to fetter the merchant or deny him a regional or national market. *Baldwin* v. *Seelig,* 294 U. S. 511, 527.

Poverty is not a "moral pestilence." *New York* v. *Miln,* 11 Pet. 102, 142. Migrants are not improper subjects of commerce. *Asbell* v. *Kansas,* 209 U. S. 251; *Baldwin* v. *Seelig, supra,* 525.

Interstate trade, the redistribution of population from marginal and sub-marginal areas, the right to migrate in pursuit of livelihood, freedom of opportunity, freedom of passage from State to State, the needs of national industry, the requirements of national defense—these are not merely local, internal affairs and matters on which the State may have some power to affect interstate commerce. They are matters affected with a vital national interest; they are the very fabric of national unity. Whether by the statute in question California seeks to bar the passage of indigents directly or indirectly, her

action in either event invades the power of the National Government over interstate commerce.

The statute is void on its face and operates to deprive the appellant of liberty without due process of law and to deny him the equal protection of the laws.

It is beyond the power of the State to make a crime of assisting another in the exercise of his constitutional rights. *De Jonge* v. *Oregon,* 299 U. S. 353, 357, 362 *et seq.* Could Duncan have been barred from California, solely because of his indigency, without being deprived of liberty without due process? Cf. *Schneider* v. *Irvington,* 308 U. S. 147, 161. The right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure. *Truax* v. *Raich,* 239 U. S. 33, 41. Implicit therein is the right to go to any place where those occupations may require.

Freedom of movement and of residence must be a fundamental right in a democratic State. Whether within the privileges and immunities clause of the Fourteenth Amendment or within the term liberty in the due process clause, it is a basic constitutional right, the more valuable to those who migrate because of economic compulsions.

The protection of our form of government may not be minified by reasons of temporary economic expediency. "Those who would enjoy the blessings of liberty must, like men, undergo the fatigues of supporting it." Thomas Paine, complete works, vol. 2, 135. The Fourteenth Amendment is no fair weather protection of the liberties of persons. Its operation is not limited to times of economic security when there is no pressure upon States to curtail liberty. It furnishes a "guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society." *United States* v. *Cruikshank,* 92 U. S. 542, 554.

By special leave of Court, *Mr. John H. Tolan,* with whom *Mr. Irwin W. Silverman* was on the brief, for the Select Committee of the House of Representatives of the United States (appointed pursuant to House Resolution No. 63, April 22, 1940, to investigate interstate migration of destitute citizens), as *amicus curiae,* urging reversal.

The statute contravenes the privileges and immunities clauses of the Constitution. Art. IV, § 2; Fourteenth Amendment.

Art. IV, § 2, like Art. IV of the Articles of Confederation, was intended to insure to each of the citizens of the several States the fundamental right to move about freely and easily from State to State in search of opportunity. Expressions of the courts confirm this conclusion. See *Corfield* v. *Coryell,* 6 Fed. Cas. 546, 551; *Passenger Cases,* 7 How. 283, 492; *Crandall* v. *Nevada,* 6 Wall. 35, 49; *Paul* v. *Virginia,* 8 Wall. 168, 180; *Ward* v. *Maryland,* 12 Wall. 418, 430; *Slaughter-House Cases,* 16 Wall. 36, 76; *United States* v. *Wheeler,* 254 U. S. 281, 290, 297; *Truax* v. *Raich,* 239 U. S. 33. Distinguishing cases dealing with quarantines of persons and products.

The proposition that a State, under its police powers, may exclude "paupers," is not sustained by the cases that have been cited for it. Distinguishing *New York* v. *Miln,* 11 Pet. 102, and other cases in this Court.

The *Miln* case was directly or impliedly overruled by *Henderson* v. *Wickham,* 92 U. S. 259.

This Court has never squarely passed upon the question whether a State may, in the exercise of its police power, exclude paupers from its limits. There is, however, ample authority in the state courts to the effect that a State may prevent persons who are lunatics, idiots, vagrants, aged, or infirm, and who are without any visible means of support, from coming within its limits. But, unfortunately, in most of these cases, the decisions do not turn on whether these persons are paupers or indigents, but rather on the question of a particular locality's support or nonsupport of these people.

In each of these cases, exclusion is narrowly limited to those who are physically or mentally handicapped and without some means of support; and, in no case has this doctrine been expanded to include persons who are not imbeciles, who are not drunkards, who are not vagrants or tramps, who are not diseased, who are not aged or infirm, nor as to persons who have always worked, persons who are willing to work, persons who are able to work and who are competent in every other respect, except that they are temporarily without work and without funds.

This state statute, applying to all modes of interstate transportation of persons into California, imposes the burden upon every carrier into that State, if it would avoid criminal liability, of determining for itself whether it has aboard any persons who may be deemed "indigent"; yet the content of that term is wholly undefined.

The statute is not sufficiently explicit. It fails to inform those subject to its penalties of what conduct will render them liable. It is therefore void for uncertainty. *Ex parte Leach,* 215 Cal. 536; *Hewit* v. *State Board of Medical Examiners,* 148 Cal. 590; *State* v. *Partlow,* 91 N. C. 550.

The Act obliges the carrier to conduct an investigation of its own into the health, morals, personal and financial position, of those aboard, in order to determine who is "indigent." Ignorance and mistake do not excuse. The statute makes no provision for its administration, or for a hearing, or for an appeal, as to whether the carrier has complied with its provisions. Upon arrival at the state border, the carrier will be subjected to an equally rigorous inspection by state officials, or will be required to stop at a quarantine station, or at some port of entry. This double investigation will involve the expenditure of enormous sums by the carriers, and will exclude from interstate passage on public convey-

ances thousands of citizens whom the carriers may regard as "poor risks."

The controlling factor is not whether such a law or regulation affects interstate or foreign commerce, but whether the type of commerce is within the exclusive jurisdiction of Congress.

No one can deny that this Act imposes a definite, arbitrary interference and burden on interstate commerce, over which Congress has exclusive jurisdiction.

The question of interstate migration is not for each State to regulate individually and without regard to the regulations enacted by the other States. Nor is it a problem which each State in intercourse with all others can settle for itself, without interfering with the power over interstate commerce delegated to Congress by the Constitution.

The statute must also fall for the reason that it violates the Equal Protection Clause of the Fourteenth Amendment, *Barbier* v. *Connolly,* 113 U. S. 27, 31. It declares, in effect, that a person, competent and able and willing to work and who can afford to pay for his transportation on a public carrier, is not an indigent; while a person who possesses like qualifications, but who can not afford to pay for his transportation, is an indigent. See *Truax* v. *Raich,* 239 U. S. 33.

Mr. Charles A. Wetmore, Jr. submitted on the original argument for appellee.

The statute is a valid exercise of the police power of the State.

In *New York* v. *Miln,* 11 Pet. 102, this Court recognized the right of a State to exclude paupers from its boundaries. See also, *Hannibal & St. Joseph R. Co.* v. *Husen,* 95 U. S. 465; *In re Ah Fong,* 3 Saw. 144, 1 Fed. Cas. 213; *Henderson* v. *Wickham,* 92 U. S. 259; *Chy Lung* v. *Freeman,* 92 U. S. 275; *Passenger Cases,* 7 How. 283; *Plumley* v. *Massachusetts,* 155 U. S. 461; *Missouri, K. & T. Ry.* v. *Haber,* 169 U. S. 613.

In *Kaoru Yamataya* v. *Fisher* (the "Japanese Immigrant Case"), 189 U. S. 86, the Court held that the exclusion of paupers was a police measure properly to be exercised by the Federal Government. Similarly, exclusion by the States is but the States' exercise of the same kind of power, and is valid under the reservation of such power by the several States under the Constitution.

Many other States have statutes similar to the California statute. *State* v. *Cornish,* 66 N. H. 329; *Pitkin County* v. *Law,* 3 Colo. App. 328; *Superintendents of the Poor* v. *Nelson,* 75 Mich. 154; *Coe* v. *Smith,* 24 Wend. 341.

Although in 1901, when the statute under consideration was originally enacted, there was no acute pauper immigration to California, the last decade has developed from this source a problem staggering in its proportions.

A social problem in the South and Southwest for over half a century, the "poor white" tenants and share croppers, following reduction of cotton planting, droughts and adverse conditions for small-scale farming, swarmed into California. These unfortunate people were usually destitute when they arrived. Their ordinary routine upon coming to California has been, first to go on federal relief for one year, and then on to state and county relief rolls indefinitely. After they earn a little money in the harvests, they send back home transportation for their relatives, generally the aged and infirm, and these immediately become and continue to be public charges.

They avoid our cities and even our towns by crowding together, in the open country and in camps, under living conditions shocking both as to sanitation and social environment. Underfed for many generations, they bring with them the various nutritional diseases of the South. Their presence here upon public relief, with their habitual unbalanced diet and consequently lowered body resistance, means a constant threat of epidemics. Venereal diseases

and tuberculosis are common with them, and are on the increase. The increase of rape and incest are readily traceable to the crowded conditions in which these people are forced to live. Petty crime among them has featured the criminal calendars of every community into which they have moved.

As proven by experience in agricultural strikes, they are readily led into riots by agitators; although, it must be said, they stubbornly resist all subversive influences, being loyal Americans whose only wish is for a better chance in life.

Their coming here has alarmingly increased our taxes and the cost of welfare outlays, old age pensions, and the care of the criminal, the indigent sick, the blind and the insane.

Should the States that have so long tolerated, and even fostered, the social conditions that have reduced these people to their state of poverty and wretchedness, be able to get rid of them by low relief and insignificant welfare allowances and drive them into California to become our public charges, upon our immeasurably higher standard of social services? Naturally, when these people can live on relief in California better than they can by working in Mississippi, Arkansas, Texas or Oklahoma, they will continue to come to this State.

If a statute be a proper police measure, it is valid even though interstate commerce may be incidentally affected. *Bayside Fish Flour Co.* v. *Gentry,* 297 U. S. 442; *Great Northern R. Co.* v. *Washington,* 300 U. S. 154; *Denver & R. G. R. Co.* v. *Denver,* 250 U. S. 241. A state regulation declaring that paupers, indigents, and vagabonds are not legitimate subjects of interstate commerce is not violative of the commerce clause. *License Cases,* 5 How. 504; *Passenger Cases,* 7 How. 283.

The Fourteenth Amendment protects the life, liberty and property of persons within the boundaries of the

United States, but this protection is subject to reasonable police regulation by the States. *Nebbia* v. *New York*, 291 U. S. 502; *Lacoste* v. *Department of Conservation*, 263 U. S. 545; *Keller* v. *United States*, 213 U. S. 138.

Mr. W. T. Sweigert, Assistant Attorney General of California, with whom *Messrs. Earl Warren*, Attorney General, and *Hiram W. Johnson, 3rd*, Deputy Attorney General, were on the brief, on the reargument, for appellee.

Section 2615 does not in terms exclude any indigent person, nor does it in effect exclude any indigent family. It applies only to other persons, whether citizens of California or not, who, as volunteers and without any tie of legal support to the indigent, knowingly bring, or assist in bringing, indigent persons into the State.

Such act of stimulating, promoting or assisting an influx of destitute persons, over and above a normal entry of indigents themselves, is, in itself, related to a local problem affecting the health, safety, welfare and economic resources of the State.

The statute, in its reference to indigent persons, contemplates only a limited class of persons, *i. e.*, persons so destitute of means for the support of themselves and their families as to be dependent on public aid.

Congress has not acted in the field of regulating the movement of such persons between States but has merely made available some funds to assist in their care after arrival, and even in this respect the aid consists merely in the permissive use by certain federal agencies of such appropriations as may be available, there being no permanent or comprehensive federal plan for the purpose.

Congress has acted to exclude alien "paupers," "professional beggars," "vagrants," "persons likely to become a public charge" and "persons whose ticket or passage is paid for by the money of another, or who are assisted by

others to come . . ." (U. S. C. Tit. 8, § 3), but has not provided any similar legislation for interstate migration.

Section 2615 does not contravene the privileges and immunities clause of Article IV, § 2 of the Constitution. The Articles of Confederation expressly excepted "paupers, vagabonds, and fugitives from justice" from those inhabitants of each State entitled to all privileges and immunities of the citizens of the several States; and Article IV, § 2 of the Constitution was drawn with reference to the corresponding clause of the Articles of Confederation and was intended to perpetuate the limitations of the former. *United States* v. *Wheeler*, 254 U. S. 281, 296.

The right of persons to move across state boundaries is not referable to the privileges and immunities clause of the Fourteenth Amendment. Even if that clause covers the right of ingress and egress between States, it does not, when read in the light of the exception implied in Article IV, § 2, in respect to paupers, and in the light of the reiterated pronouncements of this Court with respect to paupers, apply to ingress and egress of paupers, persons so destitute as to be dependent on public aid.

In any event, appellant is in no position to assert the invalidity of § 2615 under these particular constitutional provisions, because he has not been deprived of any privilege or immunity thereby secured, even if it be assumed that an indigent nonresident could rely upon them in a proper case.

Mr. Justice Byrnes delivered the opinion of the Court.

The facts of this case are simple and are not disputed. Appellant is a citizen of the United States and a resident of California. In December, 1939, he left his home in Marysville, California, for Spur, Texas, with the intention of bringing back to Marysville his wife's brother, Frank Duncan, a citizen of the United States and a resident of Texas.

When he arrived in Texas, appellant learned that Duncan had last been employed by the Works Progress Administration. Appellant thus became aware of the fact that Duncan was an indigent person and he continued to be aware of it throughout the period involved in this case. The two men agreed that appellant should transport Duncan from Texas to Marysville in appellant's automobile. Accordingly, they left Spur on January 1, 1940, entered California by way of Arizona on January 3, and reached Marysville on January 5. When he left Texas, Duncan had about $20. It had all been spent by the time he reached Marysville. He lived with appellant for about ten days until he obtained financial assistance from the Farm Security Administration. During the ten day interval, he had no employment.

In Justice Court a complaint was filed against appellant under § 2615 of the Welfare and Institutions Code of California, which provides: "Every person, firm or corporation or officer or agent thereof that brings or assists in bringing into the State any indigent person who is not a resident of the State, knowing him to be an indigent person, is guilty of a misdemeanor." On demurrer to the complaint, appellant urged that the Section violated several provisions of the Federal Constitution. The demurrer was overruled, the cause was tried, appellant was convicted and sentenced to six months imprisonment in the county jail, and sentence was suspended.

On appeal to the Superior Court of Yuba County, the facts as stated above were stipulated. The Superior Court, although regarding as "close" the question of the validity of the Section, felt "constrained to uphold the statute as a valid exercise of the police power of the State of California." Consequently, the conviction was affirmed. No appeal to a higher state court was open to appellant. We noted probable jurisdiction early last

term, and later ordered reargument (313 U. S. 545) which has been held.

At the threshold of our inquiry a question arises with respect to the interpretation of § 2615. On reargument, the Attorney General of California has submitted an exposition of the history of the Section, which reveals that statutes similar, though not identical, to it have been in effect in California since 1860. (See Cal. Stat. (1860) 213; Cal. Stat. (1901) 636; Cal. Stat. (1933) 2005). Neither under these forerunners nor under § 2615 itself does the term "indigent person" seem to have been accorded an authoritative interpretation by the California courts. The appellee claims for the Section a very limited scope. It urges that the term "indigent person" must be taken to include only persons who are presently destitute of property and without resources to obtain the necessities of life, and who have no relatives or friends able and willing to support them. It is conceded, however, that the term is not confined to those who are physically or mentally incapacitated. While the generality of the language of the Section contains no hint of these limitations, we are content to assign to the term this narrow meaning.

Article I, § 8 of the Constitution delegates to the Congress the authority to regulate interstate commerce. And it is settled beyond question that the transportation of persons is "commerce," within the meaning of that provision.[1] It is nevertheless true, that the States are not wholly precluded from exercising their police power in matters of local concern even though they may thereby affect inter-

[1] *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 203; *Leisy* v. *Hardin,* 135 U. S. 100, 112; *Covington Bridge Co.* v. *Kentucky,* 154 U. S. 204, 218; *Hoke* v. *United States,* 227 U. S. 308, 320; *Caminetti* v. *United States,* 242 U. S. 470, 491; *United States* v. *Hill,* 248 U. S. 420, 423; *Mitchell* v. *United States,* 313 U. S. 80. Cf. The Federal Kidnaping Act of 1932, U. S. C., Title 18, §§ 408a–408c. It is immaterial whether or not the transportation is commercial in character. See *Caminetti* v. *United States, supra.*

state commerce. *California* v. *Thompson,* 313 U. S. 109, 113. The issue presented in this case, therefore, is whether the prohibition embodied in § 2615 against the "bringing" or transportation of indigent persons into California is within the police power of that State. We think that it is not, and hold that it is an unconstitutional barrier to interstate commerce.

The grave and perplexing social and economic dislocation which this statute reflects is a matter of common knowledge and concern. We are not unmindful of it. We appreciate that the spectacle of large segments of our population constantly on the move has given rise to urgent demands upon the ingenuity of government. Both the brief of the Attorney General of California and that of the Chairman of the Select Committee of the House of Representatives of the United States, as *amicus curiae,* have sharpened this appreciation. The State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. It is not for us to say that this is not true. We have repeatedly and recently affirmed, and we now reaffirm, that we do not conceive it our function to pass upon "the wisdom, need, or appropriateness" of the legislative efforts of the States to solve such difficulties. See *Olsen* v. *Nebraska,* 313 U. S. 236, 246.

But this does not mean that there are no boundaries to the permissible area of State legislative activity. There are. And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders. It is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world. But, in the words of Mr. Justice Cardozo: "The Constitution was

framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *Seelig*, 294 U. S. 511, 523.

It is difficult to conceive of a statute more squarely in conflict with this theory than the Section challenged here. Its express purpose and inevitable effect is to prohibit the transportation of indigent persons across the California border. The burden upon interstate commerce is intended and immediate; it is the plain and sole function of the statute. Moreover, the indigent non-residents who are the real victims of the statute are deprived of the opportunity to exert political pressure upon the California legislature in order to obtain a change in policy. *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 185, n. 2. We think this statute must fail under any known test of the validity of State interference with interstate commerce.

It is urged, however, that the concept which underlies § 2615 enjoys a firm basis in English and American history.[2] This is the notion that each community should care for its own indigent, that relief is solely the responsibility of local government. Of this it must first be said that we are not now called upon to determine anything other than the propriety of an attempt by a State to prohibit the transportation of indigent non-residents into its territory. The nature and extent of its obligation to afford relief to newcomers is not here involved. We do, however, suggest that the theory of the Elizabethan poor laws no longer fits the facts. Recent years, and particularly the past decade, have been marked by a growing recognition that in an industrial society the task of pro-

[2] See Hirsch, H. M., *Our Settlement Laws* (N. Y. Dept. of Social Welfare, 1933), *passim*.

viding assistance to the needy has ceased to be local in character. The duty to share the burden, if not wholly to assume it, has been recognized not only by State governments, but by the Federal government as well. The changed attitude is reflected in the Social Security laws under which the Federal and State governments coöperate for the care of the aged, the blind and dependent children. U. S. C., Title 42, §§ 301–1307, esp. §§ 301, 501, 601, 701, 721, 801, 1201. It is reflected in the works programs under which work is furnished the unemployed, with the States supplying approximately 25% and the Federal government approximately 75% of the cost. See, *e. g.*, Joint Resolution of June 26, 1940, c. 432, § 1 (d), 54 Stat. 611, 613. It is further reflected in the Farm Security laws, under which the entire cost of the relief provisions is borne by the Federal government. *Id.*, at §§ 2 (a), 2 (b), 2 (d).

Indeed, the record in this very case illustrates the inadequate basis in fact for the theory that relief is presently a local matter. Before leaving Texas, Duncan had received assistance from the Works Progress Administration. After arriving in California he was aided by the Farm Security Administration, which, as we have said, is wholly financed by the Federal government. This is not to say that our judgment would be different if Duncan had received relief from local agencies in Texas and California. Nor is it to suggest that the financial burden of assistance to indigent persons does not continue to fall heavily upon local and State governments. It is only to illustrate that in not inconsiderable measure the relief of the needy has become the common responsibility and concern of the whole nation.

What has been said with respect to financing relief is not without its bearing upon the regulation of the transportation of indigent persons. For the social phenomenon of large-scale interstate migration is as certainly a matter of national concern as the provision of assistance to those who have found a permanent or temporary abode.

Moreover, and unlike the relief problem, this phenomenon does not admit of diverse treatment by the several States. The prohibition against transporting indigent non-residents into one State is an open invitation to retaliatory measures, and the burdens upon the transportation of such persons become cumulative. Moreover, it would be a virtual impossibility for migrants and those who transport them to acquaint themselves with the peculiar rules of admission of many States. "This Court has repeatedly declared that the grant [the commerce clause] established the immunity of interstate commerce from the control of the States respecting all those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation must be prescribed by a single authority." *Milk Control Board* v. *Eisenberg Farm Products,* 306 U. S. 346, 351. We are of the opinion that the transportation of indigent persons from State to State clearly falls within this class of subjects. The scope of Congressional power to deal with this problem we are not now called upon to decide.

There remains to be noticed only the contention that the limitation upon State power to interfere with the interstate transportation of persons is subject to an exception in the case of "paupers." It is true that support for this contention may be found in early decisions of this Court. In *City of New York* v. *Miln,* 11 Pet. 102, at 143, it was said that it is "as competent and as necessary for a State to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported, . . ." This language has been casually repeated in numerous later cases up to the turn of the century. See, *e. g., Passenger Cases,* 7 How. 283, 426 and 466–467; *Railway Company* v. *Husen,* 95 U. S. 465, 471; *Plumley* v. *Massachusetts,* 155 U. S. 461, 478; *Missouri, K. & T. Ry.*

Co. v. *Haber,* 169 U. S. 613, 629. In none of these cases, however, was the power of a State to exclude "paupers" actually involved.

Whether an able-bodied but unemployed person like Duncan is a "pauper" within the historical meaning of the term is open to considerable doubt. See 53 Harvard L. Rev. 1031, 1032. But assuming that the term is applicable to him and to persons similarly situated, we do not consider ourselves bound by the language referred to. *City of New York* v. *Miln* was decided in 1837. Whatever may have been the notion then prevailing, we do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a "moral pestilence." Poverty and immorality are not synonymous.

We are of the opinion that § 2615 is not a valid exercise of the police power of California; that it imposes an unconstitutional burden upon interstate commerce, and that the conviction under it cannot be sustained. In the view we have taken it is unnecessary to decide whether the Section is repugnant to other provisions of the Constitution.

Reversed.

MR. JUSTICE DOUGLAS, concurring:

I express no view on whether or not the statute here in question runs afoul of Art. I, § 8 of the Constitution granting to Congress the power "to regulate Commerce with foreign Nations, and among the several States." But I am of the opinion that the right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines. While the opinion of the Court expresses no view on that issue, the right involved is so fundamental that I deem it appropriate to indicate the reach of the constitutional question which is present.

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The right to move freely from State to State is an incident of *national* citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference. Mr. Justice Moody in *Twining* v. *New Jersey,* 211 U. S. 78, 97, stated, "Privileges and immunities of citizens of the United States . . . are only such as arise out of the nature and essential character of the National Government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States." And he went on to state that one of those rights of *national* citizenship was "the right to pass freely from State to State." *Id.,* p. 97. Now it is apparent that this right is not specifically granted by the Constitution. Yet before the Fourteenth Amendment it was recognized as a right fundamental to the national character of our Federal government. It was so decided in 1867 by *Crandall* v. *Nevada,* 6 Wall. 35. In that case this Court struck down a Nevada tax "upon every person leaving the State" by common carrier. Mr. Justice Miller writing for the Court held that the right to move freely throughout the nation was a right of *national* citizenship. That the right was implied did not make it any the less "guaranteed" by the Constitution. *Id.,* p. 47. To be sure, he emphasized that the Nevada statute would obstruct the right of a citizen to travel to the seat of his national government or its offices throughout the country. And see *United States* v. *Wheeler,* 254 U. S. 281, 299. But there is not a shred of evidence in the record of the *Crandall* case that the persons there involved were en route on any such mission any more than it appears in this case that Duncan entered California to interview some federal agency. The point which Mr. Justice Miller made was merely in illustration of the damage and havoc which would ensue if the States had the power to prevent the free movement of citizens from one State to another.

This is emphasized by his quotation from Chief Justice Taney's dissenting opinion in the *Passenger Cases,* 7 How. 283, 492: "We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." Hence the *dictum* in *United States* v. *Wheeler, supra,* p. 299, which attempts to limit the *Crandall* case to a holding that the statute in question directly burdened "the performance by the United States of its governmental functions" and limited the "rights of the citizens growing out of such functions," does not bear analysis.

So, when the Fourteenth Amendment was adopted in 1868, it had been squarely and authoritatively settled that the right to move freely from State to State was a right of *national* citizenship. As such it was protected by the privileges and immunities clause of the Fourteenth Amendment against state interference. *Slaughter House Cases,* 16 Wall. 36, 74, 79. In the latter case Mr. Justice Miller recognized that it was so "protected by implied guarantees" of the Constitution. *Id.,* p. 79. That was also acknowledged in *Twining* v. *New Jersey, supra.* And Chief Justice Fuller in *Williams* v. *Fears,* 179 U. S. 270, 274, stated: "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution."

In the face of this history I cannot accede to the suggestion (*Helson & Randolph* v. *Kentucky,* 279 U. S. 245, 251; *Colgate* v. *Harvey,* 296 U. S. 404, 444) that the commerce clause is the appropriate explanation of *Crandall* v. *Nevada, supra.* Two of the Justices in that case expressly

put the decision on the commerce clause; the others put it on the broader ground of rights of *national* citizenship, Mr. Justice Miller stating that "we do not concede that the question before us is to be determined" by the commerce clause. *Id.*, p. 43. On that broader ground it should continue to rest.

To be sure, there are expressions in the cases that this right of free movement of persons is an incident of *state* citizenship protected against discriminatory state action by Art. IV, § 2 of the Constitution. *Corfield* v. *Coryell*, 4 Wash. C. C. 371, 381; *Paul* v. *Virginia*, 8 Wall. 168, 180; *Ward* v. *Maryland*, 12 Wall. 418, 430; *United States* v. *Wheeler, supra*, pp. 298–299. Under the *dicta* of those cases the statute in the instant case would not survive, since California is curtailing only the free movement of indigents who are non-residents of that State. But the thrust of the *Crandall* case is deeper. Mr. Justice Miller adverted to *Corfield* v. *Coryell, Paul* v. *Virginia*, and *Ward* v. *Maryland*, when he stated in the *Slaughter House Cases* that the right protected by the *Crandall* case was a right of *national* citizenship arising from the "implied guarantees" of the Constitution. 16 Wall. at pp. 75–79. But his failure to classify that right as one of *state* citizenship protected solely by Art. IV, § 2, underscores his view that the free movement of persons throughout this nation was a right of *national* citizenship. It likewise emphasizes that Art. IV, § 2, whatever its reach, is primarily concerned with the incidents of residence (the matter involved in *United States* v. *Wheeler, supra*) and the exercise of rights within a State, so that a citizen of one State is not in a "condition of alienage when he is within or when he removes to another State." *Blake* v. *McClung*, 172 U. S. 239, 256. Furthermore, Art. IV, § 2, cannot explain the *Crandall* decision. The statute in that case applied to citizens of Nevada as well as to citizens of

other States. That is to say, Nevada was not "discriminating against citizens of other States in favor of its own." *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 511 and cases cited. Thus it is plain that the right of free ingress and egress rises to a higher constitutional dignity than that afforded by *state* citizenship.

The conclusion that the right of free movement is a right of *national* citizenship stands on firm historical ground. If a state tax on that movement, as in the *Crandall* case, is invalid, *a fortiori* a state statute which obstructs or in substance prevents that movement must fall. That result necessarily follows unless perchance a State can curtail the right of free movement of those who are poor or destitute. But to allow such an exception to be engrafted on the rights of *national* citizenship would be to contravene every conception of national unity. It would also introduce a caste system utterly incompatible with the spirit of our system of government. It would permit those who were stigmatized by a State as indigents, paupers, or vagabonds to be relegated to an inferior class of citizenship. It would prevent a citizen because he was poor from seeking new horizons in other States. It might thus withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity. The result would be a substantial dilution of the rights of *national* citizenship, a serious impairment of the principles of equality. Since the state statute here challenged involves such consequences, it runs afoul of the privileges and immunities clause of the Fourteenth Amendment.

MR. JUSTICE BLACK and MR. JUSTICE MURPHY join in this opinion.

MR. JUSTICE JACKSON, concurring:

I concur in the result reached by the Court, and I agree that the grounds of its decision are permissible ones under

applicable authorities. But the migrations of a human being, of whom it is charged that he possesses nothing that can be sold and has no wherewithal to buy, do not fit easily into my notions as to what is commerce. To hold that the measure of his rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights. I turn, therefore, away from principles by which commerce is regulated to that clause of the Constitution by virtue of which Duncan is a citizen of the United States and which forbids any State to abridge his privileges or immunities as such.

This clause was adopted to make United States citizenship the dominant and paramount allegiance among us. The return which the law had long associated with allegiance was protection. The power of citizenship as a shield against oppression was widely known from the example of Paul's Roman citizenship, which sent the centurion scurrying to his higher-ups with the message: "Take heed what thou doest: for this man is a Roman." I suppose none of us doubts that the hope of imparting to American citizenship some of this vitality was the purpose of declaring in the Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ."

But the hope proclaimed in such generality soon shriveled in the process of judicial interpretation. For nearly three-quarters of a century this Court rejected every plea to the privileges and immunities clause. The judicial history of this clause and the very real difficulties in the way of its practical application to specific cases have been too well and recently reviewed to warrant repetition.[1]

[1] See dissenting opinion of Mr. Justice Stone in *Colgate* v. *Harvey*, 296 U. S. 404, 436, *et seq.*

While instances of valid "privileges or immunities" must be but few, I am convinced that this is one. I do not ignore or belittle the difficulties of what has been characterized by this Court as an "almost forgotten" clause. But the difficulty of the task does not excuse us from giving these general and abstract words whatever of specific content and concreteness they will bear as we mark out their application, case by case. That is the method of the common law, and it has been the method of this Court with other no less general statements in our fundamental law. This Court has not been timorous about giving concrete meaning to such obscure and vagrant phrases as "due process," "general welfare," "equal protection," or even "commerce among the several States." But it has always hesitated to give any real meaning to the privileges and immunities clause lest it improvidently give too much.

This Court should, however, hold squarely that it is a privilege of citizenship of the United States, protected from state abridgment, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing.

The language of the Fourteenth Amendment declaring two kinds of citizenship is discriminating. It is: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." While it thus establishes national citizenship from the mere circumstance of birth within the territory and jurisdiction of the United States, birth within a state does not establish citizenship thereof. State citizenship is ephemeral. It results only from residence and is gained or lost therewith. That choice of residence was subject to local approval is contrary to the inescapable implications of the westward movement of our civilization.

Even as to an alien who had "been admitted to the United States under the Federal law," this Court, through Mr. Justice Hughes, declared that "He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any State in the Union." *Truax* v. *Raich,* 239 U. S. 33, 39. Why we should hesitate to hold that federal citizenship implies rights to enter and abide in any state of the Union at least equal to those possessed by aliens passes my understanding. The world is even more upside down than I had supposed it to be, if California must accept aliens in deference to their federal privileges but is free to turn back citizens of the United States unless we treat them as subjects of commerce.

The right of the citizen to migrate from state to state which, I agree with MR. JUSTICE DOUGLAS, is shown by our precedents to be one of national citizenship, is not, however, an unlimited one. In addition to being subject to all constitutional limitations imposed by the federal government, such citizen is subject to some control by state governments. He may not, if a fugitive from justice, claim freedom to migrate unmolested, nor may he endanger others by carrying contagion about. These causes, and perhaps others that do not occur to me now, warrant any public authority in stopping a man where it finds him and arresting his progress across a state line quite as much as from place to place within the state.

It is here that we meet the real crux of this case. Does "indigence" as defined by the application of the California statute constitute a basis for restricting the freedom of a citizen, as crime or contagion warrants its restriction? We should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. "Indigence" in itself is neither a source of rights nor a basis for denying them. The mere

state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color. I agree with what I understand to be the holding of the Court that cases which may indicate the contrary are overruled.

Any measure which would divide our citizenry on the basis of property into one class free to move from state to state and another class that is poverty-bound to the place where it has suffered misfortune is not only at war with the habit and custom by which our country has expanded, but is also a short-sighted blow at the security of property itself. Property can have no more dangerous, even if unwitting, enemy than one who would make its possession a pretext for unequal or exclusive civil rights. Where those rights are derived from national citizenship no state may impose such a test, and whether the Congress could do so we are not called upon to inquire.

I think California had no right to make the condition of Duncan's purse, with no evidence of violation by him of any law or social policy which caused it, the basis of excluding him or of punishing one who extended him aid.

If I doubted whether his federal citizenship alone were enough to open the gates of California to Duncan, my doubt would disappear on consideration of the obligations of such citizenship. Duncan owes a duty to render military service, and this Court has said that this duty is the result of his citizenship. Mr. Chief Justice White declared in the *Selective Draft Law Cases,* 245 U. S. 366, 378: "It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it." A contention that a citizen's duty to render military service is suspended by "indigence" would meet with little favor. Rich or penniless, Duncan's citizenship under the Con-

stitution pledges his strength to the defense of California as a part of the United States, and his right to migrate to any part of the land he must defend is something she must respect under the same instrument. Unless this Court is willing to say that citizenship of the United States means at least this much to the citizen, then our heritage of constitutional privileges and immunities is only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will.

UNITED STATES *v.* KALES.

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

No. 35. Argued November 14, 1941.—Decided December 8, 1941.

1. A taxpayer who had paid a 1919 income tax on the profits of a sale of stock computed on the basis of a March 1, 1913, valuation of the stock sold, and who later had been subjected by the Commissioner of Internal Revenue to a jeopardy assessment for an additional tax on the profits of the same transaction computed upon a lower 1913 valuation, paid the additional tax and accompanied the payment with a letter protesting against it upon the ground that the Commissioner had no authority to reopen and set aside the 1913 valuation as made by his predecessor, but also asserting that the first 1913 valuation was itself too low, and that if it were to be set aside by administrative action, or in the courts, the taxpayer would insist that the earlier tax was therefore excessive and would claim a refund of the excess paid. *Held*, that the letter sufficed as a claim to stay the running of the statute of limitations on the taxpayer's right to a refund of an excess in the earlier tax. P. 193.
2. A notice fairly advising the Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because too general or because it does not comply with formal requirements of the statute and regulations, will nevertheless be treated as a claim where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period. This is

especially the case where such a claim has not misled the Commissioner and he has accepted and treated it as such. P. 194.

3. Treatment by the taxing authorities of the informal claim and its later amendment as a claim for refund operated as a waiver of regulations prescribing the formality and particularity with which grounds for a refund are required to be stated. P. 196.
4. A judgment against a Collector of Internal Revenue refunding 1919 income taxes collected by him in 1925 does not bar a later suit against the United States to recover an excess of tax on income for the same year, paid to a different Collector in 1920. P. 197.

115 F. 2d 497, affirmed.

CERTIORARI, 313 U. S. 553, to review a judgment reversing a dismissal by the District Court of a suit against the United States for refund of overpaid 1919 income taxes. The Collector to whom the payment was made had retired from office and had died before the suit was begun.

Mr. Arnold Raum, with whom *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Harry Marselli* were on the brief, for the United States.

The 1925 letter was not a claim for refund, but even if it were it was merged with and extinguished by the judgment in the prior litigation. *Woodworth* v. *Kales,* 26 F. 2d 178. See also *Burnet* v. *Porter,* 283 U. S. 230; *Commissioner* v. *Newport Industries,* 121 F. 2d 655, 657.

Income-tax liability for any one year constitutes a single cause of action. *Lewis* v. *Reynolds,* 284 U. S. 281. A judgment in a former suit for refund is a bar to a subsequent suit for refund of taxes for the same year, notwithstanding the fact that the ground for recovery urged in the second suit had not been presented in the first. *Chicago Junction Rys.* v. *United States,* 10 F. Supp. 156; *Bowe-Burke Mining Co.* v. *Willcuts,* 45 F. 2d 394; *Western Maryland Ry. Co.* v. *United States,* 23 F. Supp. 554; *Bertelsen* v. *White,* 58 F. 2d 792, aff'd 65 F. 2d 719; *American Woolen Co.* v. *United States,* 18 F. Supp. 783, 21 *id.* 125, cert. den. 304 U. S. 581.

The suit is barred by the doctrine of *res judicata*. The earlier litigation dealt with the basis of the Ford stock, and the refund sought herein turns upon the basis for the identical shares.

The former suit in this case against the Collector was in substance a suit against the Government. See *Elliott* v. *Swartwout*, 10 Pet. 137; *Barney* v. *Watson*, 92 U. S. 449, 452; *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272, 275; *Cary* v. *Curtis*, 3 How. 236; *Curtis's Administratrix* v. *Fiedler*, 2 Black 461, 478; *Arnson* v. *Murphy*, 109 U. S. 238, 240.

To the extent that *Sage* v. *United States*, 250 U. S. 33, seems to reach a different result, it is plainly out of line with *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373. In any event, the *Sage* case is distinguishable. There, the rights which were the subject matter of the second suit had not been the subject of prior litigation. The case has been regarded as resting upon the particular legislation involved. *Second National Bank of Saginaw* v. *Woodworth*, 54 F. 2d 672, 673, aff'd 66 F. 2d 170; *Cudahy Packing Co.* v. *Harrison*, 18 F. Supp. 250, 254, appeal dismissed, 102 F. 2d 981. See, also, Griswold, *Res Judicata in Federal Tax Cases*, 46 Yale L. J. 1320, 1341–1342.

Mr. Hal H. Smith, with whom *Messrs. Archibald Broomfield* and *Laurence A. Masselink* were on the brief, for respondent.

The 1925 letter constituted an informal claim for refund of taxes overpaid in 1920.

The word "claim" is interpreted liberally in determining the application of statutes of limitation. *Factors & Finance Co.* v. *United States*, 56 F. 2d 902, 905, affirmed 288 U. S. 89; *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 67; *Jones* v. *United States*, 5 F. Supp. 146.

By retaining and treating the 1925 letter as a claim for refund for a period of over ten years, the Commissioner waived any and all defects of form contained therein. *United States* v. *Garbutt Oil Co.*, 302 U. S. 528; *Georgia, F. & A. Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190; *Tucker* v. *Alexander*, 275 U. S. 228. See, also, *United States* v. *Elgin National Watch Co.*, 66 F. 2d 344; *United States* v. *Humble Oil & Refining Co.*, 69 F. 2d 214; *Reynolds* v. *McMurray*, 77 F. 2d 740.

The taxpayer has not split a cause of action. *Old Colony Ry. Co.* v. *United States*, 27 F. 2d 994; *Cambridge Loan & Building Co.* v. *United States*, 57 F. 2d 936.

The rule of *res judicata* can be applied only when the two suits in question are between the same parties or their privies. Then the question is whether the second suit is on the same demand as was the first. If the second suit is on a different demand, then the first judgment is conclusive on the parties only as to the point there actually litigated and determined. Here the second suit is not on the same demand. *Sage* v. *United States*, 250 U. S. 33.

The doctrine of the *Sage* case has been consistently followed by this Court. It has been relied on to protect the rights, or further the interests, of the Government. *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1; *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 430; *Bankers Coal Co.* v. *Burnet*, 287 U. S. 308, 312; *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620; *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373.

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

Two questions are presented for decision by the record in this case. First, was a letter, written to the tax collector

by respondent taxpayer and lodged with the Commissioner, a claim for refund of overpaid taxes so as to stop the running of the statute of limitations against the claim? Second, did a judgment, refunding taxes paid to the collector in 1925 upon profits from the sale of certain shares of stock in 1919, bar a later suit for a further recovery of 1919 taxes, overpaid in 1920 to a different collector upon profits from the same transaction?

In 1919, respondent was the owner of 525 shares of the stock of the Ford Motor Company which she had acquired before March 1, 1913. In anticipation of the sale of the stock, she requested and obtained, in 1919, from the Commissioner of Internal Revenue, a ruling that the March 1st, 1913, value of the stock was $9,489 per share. She then sold the stock for $12,500 a share, and reported in her income tax return for 1919 the profit over the March 1, 1913 value thus established. In 1920, she paid the tax so computed, amounting to $1,216,086, to Collector Grogan, since deceased.

In March, 1925, the Commissioner made a jeopardy deficiency assessment against respondent for an increase of profit on the sale of the stock in 1919, on the ground that respondent had overstated the 1913 value of the stock in her 1919 tax return. Respondent paid the additional assessment, amounting to $2,627,309, to Collector Woodworth on March 24, 1925. At the same time, she lodged with the collector and the Commissioner a written protest, dated March 23, 1925, against the jeopardy assessment on the ground, among others, that the Commissioner was without authority in law to reopen and set aside the 1913 valuation of the stock as determined in 1919 by the then Commissioner, on the basis of which respondent had sold her stock. By paragraph 9 of the protest, respondent also advised the collector, the Commissioner and the Government that, while it was respondent's position that the deficiency assessment was illegal and void for this and

other reasons stated, if the Internal Revenue Department, the Board of Tax Appeals or any court having jurisdiction should hold that the assessment of March 1, 1913 value of her stock, made in 1919, should be vacated, set aside, reopened or reversed, then respondent would insist that the valuation fixed by the Commissioner in 1919 was less than the fair market value as of March 1, 1913, that the 1919 tax which she had paid in 1920 was correspondingly excessive, and that she should recover the tax to the extent of such excess when the fair value had been determined. She added in paragraph 10 that "if for any reason a revaluation shall be had," she "will insist" that the stock was greatly undervalued by the Department and "will claim the right to a refund" of the excess tax collected.

After a claim duly filed for refund of the amount of the jeopardy assessment, paid in 1925, respondent brought suit in the district court against Collector Woodworth, which resulted in a judgment for the taxpayer for the full amount of the assessment with interest. The Circuit Court of Appeals for the Sixth Circuit affirmed the judgment, *Woodworth* v. *Kales,* 26 F. 2d 178, which was satisfied in November, 1928.

September 24, 1928, respondent filed a formal claim for refund of the taxes paid in 1919, stated to be an amendment of the claim for refund contained in her letter of protest of March 23, 1925. By the amendment, respondent sought an additional refund of income taxes, paid for the year 1919, in the amount of $195,710 with interest, upon the ground that the Ford stock, as the Board of Tax Appeals had then determined in James Couzens, 11 B. T. A. 1040, had a March 1, 1913 value of $10,000 per share, and that she should accordingly have the benefit of this higher basis in computing her profit. At a hearing granted by the General Counsel for the Bureau of Internal Revenue on June 13, 1929, the amended claim was considered on the merits. Again, in January, 1933, a mem-

ber of his staff, at a conference with respondent's attorney, advised the latter that the informal claim was filed in time and was good as an informal claim.

By letter of June 4, 1935, however, the Commissioner declined to act upon it, on the single ground that because respondent's judgment for refund of the jeopardy assessment for 1919 taxes had been satisfied "the Bureau is precluded from giving further consideration in any respect to the matter of your income tax liability for the taxable year 1919." This was followed by the Deputy Commissioner's letter of August 20, 1935, to respondent, stating that "the refund claim filed in 1925 was merged into the judgment . . . and you were, therefore, precluded from filing an amendment to the earlier claim which had been finally adjudicated." The letter added "The adjudication by the court removed this matter from the realm of administrative action other than to make refund as directed by the judgment."

Collector Grogan having retired from office and having died, the present suit for refund of the overpayment of the tax claimed was brought in the district court against the United States under the provisions of § 1122 (c) of the Revenue Act of 1926. This section authorizes suits in the district court for the refund of overpayment of revenue taxes, even if in excess of $10,000, to be brought against the United States, where the collector to whom the overpayment was made is dead or is not in office when the suit is brought. The judgment of the district court dismissing the suit on motion was reversed by the Circuit Court of Appeals, 115 F. 2d 497, which held that the letter of March 23, 1925, was a timely informal claim for refund which had been perfected by the formal amended claim filed in September, 1928, that consequently the respondent's cause of action was not barred by limitation and that recovery was not precluded by the previous judgment for recovery of the jeopardy assessment for 1919. We granted

certiorari, 313 U. S. 553, upon petition of the Government, which urged that any further recovery for overpayment of the 1919 tax was barred by the judgment in the respondent's suit and recovery of the jeopardy assessment for that year, a question of importance in the administration of the revenue laws. The Government urges as grounds for reversal that, if respondent's letter of March 23, 1925 be considered a claim for refund, any recovery is barred by the 1928 judgment, and that in any event the letter was not a claim for refund and does not support the present suit.

First. Concededly, recovery of the 1919 tax, paid in 1920, is not barred by limitation if respondent's letter of March 23, 1925, be treated as a claim for refund. The Collector of Internal Revenue extended the respondent's time to make return of her 1919 income taxes for thirty days from March 15, 1920, and her letter was placed with the Commissioner within five years of the expiration of the extended time. Section 284 (h) of the 1926 Revenue Act, 44 Stat. 9, provides that a claim for refund of 1919 taxes shall not be barred by a lapse of time if filed within five years from the date when the return was due. Revised Statutes § 3226, 26 U. S. C. § 1672, makes the filing of a claim for refund in accordance with the law and Treasury regulations a condition precedent to suit to recover it. Article 1306 of Treasury Regulations 65, promulgated under the 1924 Revenue Act and applicable here, provides that claims for refund shall be made upon Form 843, setting forth all the facts relied on under oath. But Treasury Decision 4266, promulgated March 27, 1929, authorizes the Commissioner to make a refund after the expiration of the statutory period of limitation, even though no formal claim has been filed before that time, in any case in which an informal or defective claim, duly filed prior to the expiration of the period of limitation and stating specifically the grounds for the refund, is perfected by the filing of a claim prior to May 1, 1929.

This Court, applying the statute and regulations, has often held that a notice fairly advising the Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because too general or because it does not comply with formal requirements of the statute and regulations, will nevertheless be treated as a claim, where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Factors & Finance Co.*, 288 U. S. 89; *Bemis Bro. Bag Co.* v. *United States*, 289 U. S. 28; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 384. This is especially the case where such a claim has not misled the Commissioner and he has accepted and treated it as such. *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258; *United States* v. *Memphis Cotton Oil Co., supra*, 70.

In applying these guiding principles to the case in hand, it is necessary to read the letter of March 23, 1925, in the light of the peculiar circumstances then well known to the Commissioner and referred to in the letter. The letter dealt with two distinct subjects. One was the jeopardy assessment which the taxpayer was about to pay and did in fact pay to the collector on the following day when the letter in duplicate was given to the collector and the Commissioner. The other, stated in paragraphs 9 and 10 of the letter, related to the liability of the Government for overpayments of 1919 taxes made to Collector Grogan in 1920, in the event that the Commissioner's 1919 assessment of the Ford stock should be set aside by the courts or administrative action. In that event, the letter recites that the 1919 valuation was too low, the tax paid in 1920 was too high, and asserts the taxpayer's consequent "right to a refund of said tax to the extent of such excess."

The letter states correlative alternative rights on which the taxpayer relied. One was the challenge to the validity

of the 1925 jeopardy assessment on the ground that the appraisal in 1919 of the then Commissioner was unalterable. The other was respondent's right to a refund of taxes paid in 1920 in the event that the 1919 appraisement of the stock should be set aside by the Bureau or be determined to be erroneous. Whether the Commissioner would insist upon changing the 1919 appraisal of her stock, and whether in any case the Board of Tax Appeals would find a different 1913 value for the stock, were matters for future determination. When respondent filed her letter, the time within which a claim for refund could be filed was about to expire, and the occurrence of the contingencies on which a recovery could be had by respondent remained uncertain. But the Commissioner could have been left in no doubt that she was setting forth her right to a refund in the event of a departmental revision of its 1919 valuation of her stock. Her letter was present notice that, if the department insisted upon changing its original decision as to the 1913 value, she asserted that the stock had been undervalued and in consequence of the undervaluation she had a "right to a refund of said [1919] tax to the extent of such excess." Her concluding paragraph made the like assertion "if for any reason a revaluation shall be had" of the Ford stock. At that time, the Commissioner had assessed deficiencies aggregating $31,000,000 against former Ford stockholders who had sold stock which they had acquired before March 1, 1913. See James Couzens, 11 B. T. A. 1043–4. Respondent's amended formal claim of September 11, 1928, only made more specific the allegations of her earlier informal claim by stating that the Board of Tax Appeals had found the 1913 value of the stock to be $10,000 per share, and by computing the excess tax, the right to which had been asserted in the earlier claim.

The fact that respondent had originally stated her claim in the future tense, saying that in the event of depart-

mental revision of the valuation of the stock she "will insist" on a higher valuation and "will claim the right to a refund," does not, in the circumstances of this case, lend even grammatical support to the Government's contention. Such a use of the future tense in stating a claim may, with due regard to the circumstances of making it, rightly be taken as an assertion of a present right. See *Georgia, F. & A. Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 197–8; cf. *Moore Ice Cream Co.* v. *Rose, supra,* 384, reversing 61 F. 2d 605. Here the claim is alternative and contingent upon future events. The statement that upon the happening of the contingency the claim will be prosecuted is not inconsistent with the present assertion of it. It is indeed an appropriate, if not the necessary, phraseology for the present assertion of an alternative claim with respect to which a taxpayer, in his presentation of an informal tax refund claim, should be in no less favorable position than the plaintiff in a suit at law who is permitted to plead his cause of action in the alternative. See Rule 8 (e) of the Federal Rules of Civil Procedure; *United States* v. *Richards,* 79 F. 2d 797.

If the point were more doubtful than we think it is, it would be resolved by the consistent administrative treatment of respondent's letter of March 23, 1925, and the later amendment as a claim for refund. Neither the original nor the amended claim has ever been rejected as inadequate by the Commissioner or the Bureau. There has been no objection to the claim on the ground that it was informal, deficient in its content, or untimely. Acknowledgment of the letter of March 23, 1925, by the Commissioner referred to the jeopardy assessment, but made no mention of the asserted right to refund of taxes paid in 1920. After the amendment was filed in September, 1928, the claim was held under advisement by the Bureau for nearly seven years. As we have said, it was consistently treated in correspondence by the Bureau and at hearings

during this period as a claim for refund. The Commissioner finally, by his letters of June 4, 1935 and August 25, 1935, declined to consider the claim on the sole ground that it was no longer a subject of administrative action because "the refund claim filed in 1925 was merged into the judgment" for refund of the tax paid on the jeopardy assessment. Not only do we think that this entire course of departmental action was an administrative construction of respondent's letter of March 23, 1925, conforming to our own interpretation of its words, but we think it was a waiver of the requirements of the regulations as to the formality and particularity with which the grounds for refund are required to be stated. *Bonwit Teller & Co.* v. *United States, supra,* 264; *United States* v. *Memphis Cotton Oil Co., supra,* 288 U. S. at p. 70; cf. *Tucker* v. *Alexander,* 275 U. S. 228, 231; *United States* v. *Garbutt Oil Co.,* 302 U. S. 528, 533.

Second. The Government argues that the right to recover for overpayment of income taxes in any tax year constitutes a single cause of action against the Government, and that the present suit by the respondent, seeking recovery of 1919 taxes, after having recovered the amount of the jeopardy assessment for the same year, involved an inadmissible splitting of her cause of action. In any event, it insists that no cause of action for recovery of overpayment of 1919 taxes could survive the recovery of the amount of the jeopardy assessment, since the judgment for that recovery merged all claims for overpayment of 1919 taxes and so foreclosed the present suit for additional overpayments of taxes growing out of the same transaction.

But we think these contentions disregard the statutory scheme which has been set up for the recovery from an internal revenue collector, of taxes which he had unlawfully collected. See *Sage* v. *United States,* 250 U. S. 33. Originally, payment under protest to an internal revenue

collector of illegally exacted taxes gave rise to a common law cause of action against the collector for restitution of the overpayment. *Elliott* v. *Swartwout,* 10 Pet. 137, 153, 156; *Moore Ice Cream Co.* v. *Rose, supra,* 375, and cases cited. By the protest the collector was informed of the contention of the taxpayer and was thus precluded from relieving himself, by payment into the Treasury of the moneys collected, from liability to make restitution. *Elliott* v. *Swartwout, supra; Smietanka* v. *Indiana Steel Co.,* 257 U. S. 1, 4. By a series of Congressional acts it was made the duty of the collector to pay to the Government the moneys collected, regardless of a protest. 12 Stat. 442; 13 Stat. 483; R. S. § 3210; 26 U. S. C. § 1761. But with imposition of this duty on the collector to pay over, the Government undertook to indemnify him upon certification by the court, either that there was probable cause for the act done by the collector, or that he acted under directions of the Secretary of the Treasury or other proper officers of the Government. 12 Stat. 741, § 12. In that event, no execution was to issue against him, but the amount of recovery was to be paid out of the Treasury. These provisions, carried into Revised Statutes § 989, are continued as 28 U. S. C. § 842. By § 1014 of the Revenue Act of 1924, 43 Stat. 253, 343, amending Revised Statutes § 3226, the requirement for protest of the payment was abolished.

While the effect of the certificate in indemnifying the collector has been said to convert the suit against him into a suit against the Government, at least so far as the ultimate incidence of the liability is concerned, *United States* v. *Sherman,* 98 U. S. 565, 567; *Moore Ice Cream Co.* v. *Rose, supra,* 289 U. S. at p. 381, the statutory provisions have not altered the nature and extent of the claims which the taxpayer is authorized to prosecute in suits against the collector. Originally it was the payment of the illegally exacted tax which gave rise to the cause of action. It

was the payment which designated the person against whom the suit might be brought and which measured the right of recovery. Payments made to one collector could not be recovered from another, and, since the causes of action against the two collectors were different, recovery upon one could not bar recovery upon the other.

After the enactment of legislation requiring collectors of customs to pay over to the Government duties collected under protest, 5 Stat. 348; R. S. § 3010, doubts arose whether suit could, in such circumstances, be maintained against them, since it was thought that the statutory command had relieved the collectors from personal liability. See *Cary* v. *Curtis,* 3 How. 235. But those doubts were put at rest by later acts of Congress establishing the continued right of the taxpayer to maintain a suit against such a collector notwithstanding payment over of his collections to the Treasury. 5 Stat. 727; R. S. § 3011; *Curtis's Administratrix* v. *Fiedler,* 2 Black 461, 479; *Arnson* v. *Murphy,* 109 U. S. 238, 241. A like uncertainty as to the effect of the statutes requiring internal revenue collectors to pay moneys collected to the Government was resolved by this Court's decisions in *Philadelphia* v. *Collector,* 5 Wall. 720, 731; *Collector* v. *Hubbard,* 12 Wall. 1, 13. As Congress had enacted provisions for indemnification of the collector by the Government, the implication necessarily arose that the taxpayer could maintain an action against him. See 12 Stat. 434, 729, 741; 13 Stat. 239.

The right of action thus continued is identical with that which existed before Congress had acted. Notwithstanding the provision for indemnifying the collector and protecting him from execution, the nature and extent of the right asserted and the measure of the recovery remain the same. It was payment to the collector which gave rise to the suit against him and limited the amount of the recovery. The judgment against the collector is a personal judgment, to which the United States is a

stranger except as it has obligated itself to pay it. See *Sage* v. *United States, supra; Smietanka* v. *Indiana Steel Co., supra,* 4, 5.

While the statutes have for most practical purposes reduced the personal liability of the collector to a fiction, the course of the legislation indicates clearly enough that it is a fiction intended to be acted upon to the extent that the right to maintain the suit and its incidents, until judgment rendered, are to be left undisturbed. Among its incidents is the right to a jury trial, which is not available in suits against the United States. 28 U. S. C. § 41 (20).

By no possibility could the respondent in the suit brought against Collector Woodworth in 1925 recover taxes paid to Collector Grogan in 1920, which she demands here. Recovery from one collector of the payment to him does not bar recovery on the different cause of action arising upon payment to the other, even though the two collections are for taxes arising out of the same transaction. *Sage* v. *United States, supra; Bankers Pocahontas Coal Co.* v. *Burnet,* 287 U. S. 308; cf. *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 430; *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 403. The right to pursue the common law action against the collector is too deeply imbedded in the statutes and judicial decisions of the United States to admit of so radical a departure from its traditional use and consequences as the Government now urges, without further Congressional action.

Affirmed.

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

PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, *v.* A. A. A. HIGHWAY EXPRESS, INC. ET AL.

CERTIORARI TO THE SUPREME COURT OF GEORGIA.

No. 48. Argued November 19, 1941.—Decided December 8, 1941.

Although, by the law of the State of incorporation, policyholders of a mutual insurance company be "members" of the company and as such liable to pay assessments made and adjudged against them in that State in liquidation proceedings, the courts of another State are not required by the Full Faith and Credit Clause to enforce such liability against local residents whose policies are local contracts and on their face are mere contracts of insurance without mention of membership or assessments; but are free to decide according to the local law and policy the question whether by entering into such contracts the residents became members of the company. P. 208.

So *held*, where the policyholders had not appeared or been personally served, in the foreign liquidation proceedings.

191 Ga. 520, 13 S. E. 2d 337, affirmed.

CERTIORARI, 313 U. S. 555, to review a judgment which affirmed a judgment dismissing on demurrer a suit brought by a New York Superintendent of Insurance against numerous residents of Georgia, policyholders in a New York mutual insurance company, to recover assessments made against them in proceedings conducted in New York for the liquidation of the company.

Mr. Max F. Goldstein, with whom *Messrs. Alfred C. Bennett, Arthur G. Powell, Burket D. Murphy, James N. Frazer,* and *James W. Dorsey* were on the brief, for petitioner.

The laws of the State where the corporation was chartered control the rights and liabilities of the stockholders and members. *Supreme Council* v. *Green,* 237 U. S. 531; *Sovereign Camp* v. *Bolin,* 305 U. S. 65; *Chandler* v. *Peketz,* 297 U. S. 609; *Hartford Steam Boiler Co.* v.

Harrison, 301 U. S. 459, 464; *Taggart* v. *Wachter, Hoskins & Russell, Inc.,* 21 A. 2d 141; *Pink* v. *Aaron,* 13 S. E. 2d 489; *Pink* v. *Town Taxi Co.,* 21 A. 2d 656.

The laws of New York impose on all policyholders a contingent liability, *Factory Mutual Liability Ins. Co.* v. *Behan,* 253 N. Y. S. 562, 564; *Beha* v. *Weinstock,* 247 N. Y. 221, in which creditors have a vested right. *Corning* v. *McCullough,* 1 Comstock 47; *Coombes* v. *Getz,* 285 U. S. 434, 448.

Statutory requirements are read into the policies. *Bakker* v. *Aetna Life Ins. Co.,* 264 N. Y. 150; *Newton* v. *Employers Liability Assurance Corp.,* 107 F. 2d 164; *National Union Fire Ins. Co.* v. *Wanberg,* 260 U. S. 71; *Merchants Mutual Ins. Co.* v. *Smart,* 267 U. S. 129; *Fire Association of Philadelphia* v. *New York,* 119 U. S. 110; *Cogliano* v. *Ferguson,* 139 N. E. 527; *Southern Surety Co.* v. *Chambers,* 115 Ohio St. 434.

Residents of Georgia received notice of and were bound by the New York proceedings. *Milliken* v. *Meyer,* 311 U. S. 457; *Bernheimer* v. *Converse,* 206 U. S. 516; *Taggart* v. *Wachter, Hoskins & Russell, Inc.,* 21 A. 2d 141; *Marin* v. *Augedahl,* 247 U. S. 142.

The assessment having been approved by the court became *res judicata* against all defendants. *Broderick* v. *Rosner,* 294 U. S. 629; *Chandler* v. *Peketz,* 297 U. S. 609; *Marin* v. *Augedahl,* 247 U. S. 142; *Hancock National Bank* v. *Farnum,* 176 U. S. 640.

Application of the laws of Georgia deprived petitioner of constitutional rights. *Sovereign Camp* v. *Bolin,* 305 U. S. 65.

Mr. Frank A. Hooper, Jr., with whom *Messrs. T. Baldwin Martin, A. O. B. Sparks,* and *Samuel A. Miller* were on the brief, for respondents.

Full faith and credit was not denied petitioner. *In re Auto Mutual Indemnity Co.,* 14 N. Y. S. 2d 601; *Pennoyer*

v. *Neff,* 95 U. S. 733; *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 471; *Bagley* v. *General Fire Extinguisher Co.,* 212 U. S. 477; *Commercial Publishing Co.* v. *Beckwith,* 188 U. S. 567; *Old Wayne Mutual Life Assn.* v. *McDonough,* 204 U. S. 8; *Wetmore* v. *Karrick,* 205 U. S. 141; *Pacific Employers' Ins. Co.* v. *Industrial Accident Comm'n,* 306 U. S. 493.

The defendants did not under their contracts become members of the company. *Craig* v. *Western Life Ins. Co.,* 116 S. W. 1113; *Beha* v. *Weinstock,* 160 N. E. 17; 23 Harv. L. Rev. 38. The policy was but an ordinary standard commercial old-line policy with a flat premium. There are many mutual companies whose policies are not assessable.

The policy having been issued in violation of the law of New York, the policyholder is not liable for assessment. § 346 New York Insurance Laws.

Respondents are bound only by provisions on the face of the policy. *Northwestern National Ins. Co.* v. *Southern States Phosphate Co.,* 20 Ga. App. 605; *Electric Lumber Co.* v. *New York Underwriters Ins. Co.,* 43 Ga. App. 355; *Dwindell* v. *Kramer,* 92 N. W. 227; *Baker* v. *Sovereign Camp,* 116 S. W. 513.

Rulings of the Supreme Court of Georgia construing a contract made in Georgia are binding and final. *Wilhelm* v. *Security Benefit Assn.,* 104 S. W. 2d 1042; *Pink* v. *Georgia Stages, Inc.,* 35 F. Supp. 437.

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

Petitioner, as Superintendent of Insurance for the State of New York, is the statutory liquidator of Auto Mutual Indemnity Company, an insolvent mutual insurance company, organized under the laws of New York. He brought this suit in the Superior Court of Georgia against respondents, who are residents of Georgia and policyholders in the company, to recover assessments alleged to be due by

virtue of their membership in it. The Supreme Court of Georgia affirmed the judgment of the trial court, dismissing the petition on demurrers of the several respondents. 191 Ga. 502, 13 S. E. 2d 337. We granted certiorari, 313 U. S. 555, because of the asserted denial by Georgia of full faith and credit to certain statutes and judicial proceedings in New York, under which the assessment was levied.

The relevant facts set out in the amended petition are as follows: The Indemnity Company, organized in 1932 under Article 10–B of the New York Insurance Law, was, on application of the Superintendent of Insurance, placed in liquidation by order of the New York Supreme Court on November 24, 1937. Upon further proceedings, pursuant to § 422 of the New York Insurance Law, the court ordered, August 12, 1938, that each member of the Indemnity Company, during the year prior to November 10, 1937, should pay assessments in specified amounts aggregating 40% of premiums earned by the company during that year. The order directed that the members show cause on a specified date why they should not be held liable to pay and why the Superintendent should not have judgment for such assessments. Pursuant to § 422 and the order, the Superintendent mailed notice of the order to each policyholder, including respondents. None of respondents entered an appearance. It is alleged that all "were policyholders and members of the Company" during the year mentioned; that at the time when each purchased his policy and became a member there was in force § 346 of the New York Insurance Law, which under New York statutes and judicial decisions became a part of the insurance contract, binding upon each policyholder. Section 346 provides that every mutual insurance company "shall in its by-laws and policies fix the contingent mutual liability of the members for the payment of losses and expenses not provided for by its admitted assets" to a spec-

ified extent, and that "all assessments, whether levied by the board of directors, by the Superintendent of Insurance in the liquidation of the corporation, or otherwise, shall be for no greater amount than that specified in the policy and by-laws." It is further alleged that the assessment made against respondents was for their pro rata share of the 40% assessment levied by order of the court pursuant to the statutes of New York and the by-laws of the company, and was confirmed as to members, including respondents, by the order of November 17, 1938. The form of policy acquired by respondents is by reference made a part of the petition.

The Supreme Court of Georgia, construing the amended petition as a whole, took its averment that respondents "were policyholders and members of the company" to mean that they were members because they were policyholders. That construction has not been challenged and we adopt it here. The court accepted the allegations of the meaning and effect of the New York statutes and judicial decisions as correct, but held that respondents, none of whom was made a party to the New York proceedings by service of process, were not concluded by the New York orders and statutes on the question whether their relation as policyholders to the company was such as to subject them to liability.

Examining the contract embodied in the policies, the court found that although the name of the company contained the word "mutual" the contracts of insurance were without any term or provision purporting to make the policyholder a member of a mutual company or to subject him to assessment. Each policy provided that the insured agrees that it "embodies all agreements existing between himself and the company or any of its agents relating to this insurance." Printed on the back of each policy but not referred to in the contract was a "Notice to policyholders" that "the insured is hereby notified

that by virtue of this policy he is a member of the Auto Mutual Indemnity Company," and that "the contingent liability of the named insured under this policy shall be limited to one year from the expiration or cancellation hereof and shall not exceed the limits provided by the Insurance Law of the State of New York," there being on the face of the policy no reference to any contingent liability or assessment or to any law providing for such. The petition does not make it clear where the policies were delivered to respondents, and the court held that in the absence of a showing to the contrary they were governed by Georgia law.

Applying to this state of facts the law and policy of Georgia derived from its statutes and judicial decisions, the court held that the relation between the insured and the company was that of contract, that the whole contract was embodied in the stipulations appearing on the face of the policy, and that it did not by its provisions make respondents members of the company or subject them to assessment in accordance with the laws of New York or otherwise. Petitioner challenges the judgment on the ground that it fails to accord to the New York orders and statutes the full faith and credit to which they are entitled under Article IV, § 1 of the Constitution.

While urging in brief and argument that all those who are shown to be members of the Indemnity Company are bound by the New York adjudication as to the necessity for and amount of the assessment, petitioner does not specifically urge that the New York proceedings have established the personal liability of respondents for the assessments which have been ordered. He could not well do so, for the proceeding in the New York courts to determine what judgments should be entered against the policyholders, including nonresidents, and the judgments actually entered, do not appear to have been made a part of the present record. See *In re Auto Mutual Indemnity*

Co., 14 N. Y. S. 2d 601. In any case, it suffices for present purposes to say that New York does not attribute any such effect to the judgments of her courts rendered against absent nonresident defendants. See *Kittredge* v. *Grannis*, 244 N. Y. 182, 192–96, 155 N. E. 93; *Geary* v. *Geary*, 272 N. Y. 390, 398, 6 N. E. 2d 67; cf. *Pope* v. *Heckscher*, 266 N. Y. 114, 194 N. E. 53; *Hood* v. *Guaranty Trust Co.*, 270 N. Y. 17, 200 N. E. 55. Such was the ruling in the New York proceeding for the liquidation of the Indemnity Company with which we are here concerned. See *In re Auto Mutual Indemnity Co., supra*, 611, where the referee's opinion states: ". . . no personal judgment will be ordered against non-resident members or policyholders who have not appeared generally or been served personally with process within the State, although, as hereinabove set forth, they are bound by the finding of the necessity for the assessment and the amount thereof."

It is a familiar rule that those who become stockholders in a corporation subject themselves to liability for assessment when made in conformity to the statutes of the state of its organization, although they are not made parties to the proceeding for levying it. *Hawkins* v. *Glenn*, 131 U. S. 319; *Hancock National Bank* v. *Farnum*, 176 U. S. 640; *Bernheimer* v. *Converse*, 206 U. S. 516; *Converse* v. *Hamilton*, 224 U. S. 243, 260; *Selig* v. *Hamilton*, 234 U. S. 652; *Marin* v. *Augedahl*, 247 U. S. 142; *Broderick* v. *Rosner*, 294 U. S. 629; *Chandler* v. *Peketz*, 297 U. S. 609. Whether we support these legal consequences by reference to consent of the stockholder or to his assumption of a corporate relationship subject to the regulatory power of the State of incorporation, in either case the procedure conforms to accepted principles, involves no want of due process, and is entitled to full faith and credit so far as the necessity and amount of the assessment are concerned. See *Christopher* v. *Brusselback*, 302 U. S. 500, and cases cited. The like principle has been consistently applied

to mutual insurance associations, where the fact that the policyholders were members was not contested. *Royal Arcanum* v. *Green,* 237 U. S. 531; *Modern Woodmen* v. *Mixer,* 267 U. S. 544. The Supreme Court of Georgia found it unnecessary to consider the application of these authorities to the present case, since it decided that respondents, by acquiring the particular form of policy issued by the Indemnity Company, did not become members of it.

It is evident that if the constitutional authority of the Indemnity Company to stand in judgment for its absent members turns on their consent or their assumption of membership in the Company, respondents, who were not parties to the New York proceedings, may defend on the ground that they never became members because they have done no act signifying such consent or assumption. After an assessment has been lawfully levied on the members of a corporation, it is still open to any who were not parties to the assessment proceeding to defend on the ground that they never became stockholders. *Great Western Telegraph Co.* v. *Purdy,* 162 U. S. 329, 336–37; *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 423; *Royal Arcanum* v. *Green,* 237 U. S. 531, 544; *Chandler* v. *Peketz,* 297 U. S. 609, 611; cf. *Hawkins* v. *Glenn,* 131 U. S. 319, 335. Ordinarily this means no more than that they have not acquired or owned stock in the corporation during the relevant period. For a necessary consequence of becoming a stockholder is the assumption of those obligations which, by the laws governing the organization and management of the corporation, attach to stock ownership.

Other considerations may be significant in determining whether a membership in a mutual insurance company has been effected through acquisition of a policy. A mere contract is not a share of stock and when made with a corporation or association does not necessarily connote membership in it. A policy of insurance may be a contract

whose terms purport to define completely the relationship and obligations of the parties. Here the policy, which was on its face a contract and nothing more, stipulated only for obligations to be performed by the insurer upon payment of the prescribed premium. The policy's stipulations contained no provision making the insured a member of the association or subjecting him to liability for assessment as such. Although the company was denominated "mutual," that term does not necessarily signify that policyholders are members or subject to assessment.

Without the command of some constitutionally controlling statute, the Georgia court was free to interpret the obligation of the policy as limited to those stipulations expressed on its face and as excluding any stipulation for membership or for liability to assessment which the contract did not mention. Petitioner finds such a command in the New York statutes, which, he asserts, make all policyholders liable to assessment without the aid of any stipulation to that effect in the policy. He relies on the full faith and credit clause to exact obedience to the statutes.

Every state has authority under the Constitution to establish laws, through both its judicial and its legislative arms, which are controlling upon its inhabitants and domestic affairs. When it is demanded in the domestic forum that the operation of those laws be supplanted by the statute of another state, that forum is not bound, apart from the full faith and credit clause, to yield to the demand, and the law of neither can, by its own force, determine the choice of law for the other. *Milwaukee County* v. *White Co.*, 296 U. S. 268, 272; *Pacific Ins. Co.* v. *Commission,* 306 U. S. 493, 500; *Kryger* v. *Wilson,* 242 U. S. 171, 176; *Union Trust Co.* v. *Grosman,* 245 U. S. 412; *Griffin* v. *McCoach,* 313 U. S. 498.

To the extent that Georgia must give full faith and credit to the New York statutes and judicial proceedings,

it must be denied authority to adjudicate the meaning and domestic effect under its own laws of a contract entered into by its own inhabitants and containing no stipulation that they should be bound by obligations extrinsically imposed by New York law. But the full faith and credit clause is not an inexorable and unqualified command. It leaves some scope for state control within its borders of affairs which are peculiarly its own. This Court has often recognized that, consistently with the appropriate application of the full faith and credit clause, there are limits to the extent to which the laws and policy of one state may be subordinated to those of another. *Alaska Packers Assn.* v. *Commission,* 294 U. S. 532; *Pacific Ins. Co.* v. *Commission,* 306 U. S. 493; *Klaxon Co.* v. *Stentor Co.,* 313 U. S. 487, 497–98; see *Milwaukee County* v. *White Co.,* 296 U. S. 268, 273.

It was the purpose of that provision to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in others. But the very nature of the federal union of states, to each of which is reserved the sovereign right to make its own laws, precludes resort to the Constitution as the means for compelling one state wholly to subordinate its own laws and policy concerning its peculiarly domestic affairs to the laws and policy of others. When such conflict of interest arises, it is for this Court to resolve it by determining how far the full faith and credit clause demands the qualification or denial of rights asserted under the laws of one state, that of the forum, by the public acts and judicial proceedings of another. See *Alaska Packers Assn.* v. *Commission,* 294 U. S. 532, 547; *Pacific Ins. Co.* v. *Commission,* 306 U. S. 493.

Where a resident of one state has by stipulation or stock ownership become a member of a corporation or association of another, the state of his residence may have no such domestic interest in preventing him from fulfilling the obligations of membership as would admit of a restricted

application of the full faith and credit clause. But it does have a legitimate interest in determining whether its residents have assented to membership obligations sought to be imposed on them by extrastate law to which they are not otherwise subject.

Without the aid of agreement or consent, the laws of the state of organization can be imposed on Georgia courts and policyholders only so far as the full faith and credit clause compels it. The undue extension of the statutes and authority of a state beyond its own borders, by the expedient of rendering a judgment against non-citizens over whose persons or property the state has acquired jurisdiction, may infringe due process. *Home Ins. Co.* v. *Dick,* 281 U. S. 397. Like, but more cogent, reasons may call for the restriction of the full faith and credit clause as the instrument for controlling the law and policy of one state, with respect to its domestic affairs, by the statutory command of another.

The interpretation and legal effect of policies of insurance entered into by the inhabitants of Georgia, who are sued upon them in its courts, are peculiarly matters of local concern. *Griffin* v. *McCoach,* 313 U. S. 498. Were it not for the New York statute, there could be no question of Georgia's authority to adjudicate the rights and obligations arising under the policies. And as we have seen, the only basis for the imposition by New York of its command on the Georgia court and policyholders is the assumption by the latter of membership in the New York company. But this, in the circumstances of this case, depends upon the meaning and effect of all the provisions appearing on the policies with respect to the assumption of membership, which is for Georgia to determine. There being no question of evasion of constitutional obligation, we accept that determination as one of domestic law and policy which the full faith and credit clause does not override.

Affirmed.

UNITED STATES *v.* KANSAS FLOUR MILLS CORPORATION.

CERTIORARI TO THE COURT OF CLAIMS.

No. 45. Argued November 21, 1941.—Decided December 8, 1941.

Contracts for the purchase of flour by the Government included as part of the price any federal tax theretofore imposed by Congress applicable to the material purchased, and provided that if any processing or other tax were imposed or "changed by Congress" after the date set for opening of bids and were paid to the Government by the contractor on the supplies contracted for, then the price would be "increased or decreased" accordingly. *Held*, that the subsequent decision in *United States* v. *Butler*, 297 U. S. 1, adjudging the processing tax void, and the recognition of that holding through provisions of the Revenue Act of 1936, amounted to a "change" of the vendor's tax liability made "by Congress," within the meaning of the contract, and that amounts paid by the Government as part of the contract price to offset processing taxes presumptively payable by the vendor but which because of that decision the vendor escaped, were recoverable by the United States. P. 217.
92 Ct. Cls. 390, reversed.

CERTIORARI, 313 U. S. 554, to review a decision of the Court of Claims awarding damages to the flour mills company on a contract for the sale of flour and bran, and denying the right of the United States to offset payments made by it on earlier contracts to cover processing taxes which were subsequently held to be unconstitutional so that the vendor was not obliged to pay them.

Mr. Warner W. Gardner, with whom *Assistant Solicitor General Fahy*, *Assistant Attorney General Clark*, and *Messrs. Sewall Key* and *Hubert L. Will* were on the brief, for the United States.

Messrs. Edgar Shook and *Phil D. Morelock*, with whom *Mr. Joseph B. Brennan* was on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Between May, 1935, and January 6, 1936, the respondent entered into eight contracts for the sale of flour to the United States. Deliveries were duly made and the contract price was paid.

Each of the eight contracts provided:

"Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items."

Under the terms of the Agricultural Adjustment Act,[1] processing taxes were due, in respect of the flour sold, aggregating $28,419.20.

In 1936, the respondent entered into four contracts for the sale of flour and bran to the United States for a total price of $23,288.11. The commodities were delivered and vouchers for the purchase price tendered to the General Accounting Office. Payment was withheld by the Comptroller General, who notified the respondent that the Government had overpaid it in the sum of $28,419.20.

The respondent had obtained an injunction against the collection of any processing taxes from it and, as a result

[1] U. S. C. Supp. V, Tit. 7, § 609.

of the decision in *United States* v. *Butler*, 297 U. S. 1, paid no processing taxes on the wheat used in the manufacture of flour covered by the 1935 contracts.

The respondent sued in the Court of Claims to recover the purchase price under the four 1936 contracts, and contested the offsets claimed by the Government arising out of the eight 1935 contracts. Judgment was rendered in favor of the respondent for $23,288.11. 92 Ct. Cls. 390. We granted certiorari because of the importance of the question [2] and of the number of pending cases involving the same question. We are of opinion that the respondent was not entitled to recover.

The contracts are to be construed in the light of the relations between the parties at the time they were executed. The Agricultural Adjustment Act did not exempt a vendor to the United States from the processing tax; and a Treasury Regulation required that he pay the tax.[3] The quoted clause shows that this tax was specifically in the minds of the parties, for it was stipulated that it was included in the price bid. The Government stood in a dual relation to the respondent. It became, at the same time, a purchaser at the named price and also a claimant of the processing tax upon the material purchased. The stipulation was evidently made in view of the facts that the purchasing officer could not buy the goods tax-free and that the Government desired that the price to it should be ex-tax. To accomplish this the sale price was *pro tanto* offset by the amount of the tax. Plainly, if the United States had not been thought entitled to collect the tax, the bid price would not have been acceptable. Plainly, also, if the respondent had not been thought

[2] *United States* v. *Hagan & Cushing Co.*, 115 F. 2d 849; *Ismert-Hincke Milling Co.* v. *United States*, 90 Ct. Cls. 27; *United States* v. *American Packing & Provision Co.*, 122 F. 2d 445.

[3] Regulations 81, Art. 9, under the Agricultural Adjustment Act.

liable for the tax, the bid price would have been less.[4] As disclosed by the contracts, the understanding was that the price would have been less by the amount of the tax. The respondent disputes this, contending that we cannot say how much of the tax it was willing to absorb in order to obtain the contracts; that it may have been making the sales at an actual loss. But this is not the theory of the contracts. They provide that if, in future, any existing tax described therein is changed by Congress, the price named in each contract "will be increased or decreased accordingly." This does not mean, as contended by respondent, that the amount of increase or decrease is an unknown quantity to be made definite and certain by proof. It means that the amount of any increase in tax shall be added to, and the amount of any decrease subtracted from, the contract price. This view is strengthened by the provision for separate billing of the increase, if any.

The respondent, however, argues that, under any construction, the Government is not entitled to maintain its set-off, first, because the contracts contain no undertaking by respondent that it will pay the tax, and, secondly, that, even if they do, the stipulation for reduction of price applies only to changes by Congress and excludes relief from the tax by an adjudication that the exaction is unconstitutional.

In support of the first proposition, the respondent relies on numerous decisions holding tax clauses in private contracts not to require adjustment of the contract price as a result of the decision in the *Butler* case, *supra*.[5] These

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[4] Compare *United States* v. *Glenn L. Martin Co.*, 308 U. S. 62.

[5] *Moundridge Milling Co.* v. *Cream of Wheat Corp.*, 105 F. 2d 366; *Consolidated Flour Mills* v. *Ph. Orth Co.*, 114 F. 2d 898; *United States* v. *American Packing & Provision Co.*, 122 F. 2d 445; *City Baking Co.* v. *Cascade Milling & Elevator Co.*, 24 F. Supp. 950; *G. S. Johnson*

go on the absence of an express provision respecting the constitutional validity and upon the omission of the parties to bill the tax separately from the purchase price. We think they are inapplicable in the present case since the tax clause here had a purpose different from those in private contracts. As we have said, the purpose here was to deprive either party of the advantage or disadvantage resulting from the incidence of the tax; and, therefore, it was sought to eliminate the effect of the exaction on the contract price.

In the case of private contracts, the vendees purchase for resale and the tax burden assumed is passed on to their customers. The fact that the processor—the vendor—is protected from the payment of the tax by injunction does not reduce the price to the vendee or to purchasers from him. The courts will not permit the unjust enrichment involved in recovery by the vendee of the amount of tax which he has passed on to his customers.[6] In the contracts in question, the Government did not buy for resale. Unless it received the tax it suffered a definite disadvantage.[7] Its purpose, as shown by the contracts, was to balance the tax element in the price

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Co. v. *N. Sauer Milling Co.*, 148 Kan. 861 (1938), 84 P. 2d 934; *Sparks Milling Co.* v. *Powell*, 283 Ky. 669 (1940), 143 S. W. 2d 75; *Crete Mills* v. *Smith Baking Co.*, 136 Neb. 448 (1939), 286 N. W. 333.

[6] See the cases cited Note 5. The respondent urges that the unjust enrichment tax imposed by Title III of the Revenue Act of 1936 (49 Stat. 1734) destroys the equity of the Government's case, but if respondent is required to reduce its price by the amount of its unpaid processing tax it will not be subject to the unjust enrichment tax on these transactions. See §§ 501 (b) (2) and 501 (j) (4).

[7] In *United States* v. *American Packing & Provision Co.*, 122 F. 2d 445, the Government was held entitled to maintain a set-off asserted under conditions like those here involved on the ground that the vendor had received money from the Government which in equity and good conscience it should repay.

paid with the tax collected.[8] The Government, which could not pass on the tax on resale, was thus protected, not against a fall in the market price but against a loss in its tax revenues. In cases of private sales, the processor's injunction against collection of the tax, as held by the cases cited, worked no harm to his vendee. A similar injunction, in the case of Government contracts, would leave the price to the Government at the higher level reflecting the tax and deprive the Government of the reciprocal benefit flowing from collection of the tax.

In its second position, the respondent attempts to meet what has been said as to the inequity of its retaining the full price, when it escapes paying the tax, with the argument that the result is inevitable under the contracts. It refers to the fact that it had already obtained an injunction against the collection of the processing tax when some of the 1935 contracts were made, and asserts that, if the Government desired to provide against a decision that the taxing act was unconstitutional, this could readily have been done by the addition of a single phrase.

As we have said, there is respectable authority for the position that tax clauses in private contracts do not reach a judicial decision of invalidity of the statute. We think, however, these decisions have no application in the present instance. Here, legislation recognizing the decision in *United States* v. *Butler, supra,* and imposing taxes on the enrichment of those who passed on the amount of the tax without having to pay it, may properly be said to have been a change of the tax by Congress within the terms of the contracts.

The decision in the *Butler* case was rendered January 6, 1936. It is true that after that decision a taxpayer's right to an injunction against the collection of the tax

[8] Compare *United States* v. *Cowden Mfg. Co.,* 312 U. S. 34, 36–37.

was clear.[9] But, by the Revenue Act of 1936,[10] which became a law June 22, 1936, Congress not only recognized the effect of that decision as doing away with the tax in question but legislated with respect to the consequent rights and remedies of those who had paid the tax and the liability of those who had passed on its burden and escaped payment.

By Title III a tax is laid on the unjust enrichment consequent upon the passing on to customers the burden of unpaid processing taxes. In § 501 (b) (i) (2) and (j) (2), Congress defines the date of termination of the tax as "in the case of a Federal excise tax held invalid by a decision of the Supreme Court, the date of such decision." In Title IV there is a provision relative to floor stock taxes which recognizes the invalidity of the Agricultural Adjustment Act by reënacting the refund provisions of that Act in respect of transactions prior to January 6, 1936, the date of the *Butler* decision. § 601 (a). The title defines a taxable commodity as one on which a processing tax was provided for as of January 5, 1936, the day before the *Butler* decision. § 602 (c) (1).

Title VII makes provision for the refund of processing taxes collected under the Agricultural Adjustment Act and is a recognition by Congress that the taxes were invalid.

Thus, a change in respondent's tax liability has been recognized and confirmed by Congress. Even though this legislative action was a confirmation of or acquiescence in the *Butler* decision, and although its effect may have been merely cumulative, it amounted to a change made by Congress in respondent's liability for the tax, within the meaning of the contracts.

The judgment is

Reversed.

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[9] *Rickert Rice Mills, Inc.* v. *Fontenot*, 297 U. S. 110.

[10] 49 Stat. 1648.

Syllabus.

LISENBA *v.* CALIFORNIA.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

Nos. 4 and 5. Reargued October 14, 15, 1941.—Decided December 8, 1941.

1. The claim that discrimination by police officers in treating some persons illegally and others legally violates the equal protection clause of the Fourteenth Amendment, *held* unsupported. P. 226.
2. In the sentencing of accomplices, the practice of taking into consideration their aid to the State as witnesses involves no denial of due process to a convicted confederate. P. 227.
3. Whether the testimony of an accomplice in this case was corroborated as required by the state law was a question for decision by the courts of the State. P. 227..
4. Where it was alleged as a basis of release by *habeas corpus* in a state court that testimony of an accomplice leading to the conviction of the petitioner was known by the prosecuting officers to be false and was induced by their promises and threats; and affidavits of the accomplice, made several years after the trial, were produced to substantiate the allegation, the appraisal of the affidavits with other, conflicting evidence in the record was a matter for the state courts. P. 226.
5. The admissibility in a murder trial of evidence of another similar crime, to establish intent, design and system on the part of the accused, is left by the Fourteenth Amendment to be determined by the state law and the state courts. P. 227.
6. Action of state courts in denying a continuance to an accused in a criminal trial—*held* not reviewable by this Court under the Fourteenth Amendment. P. 228.
7. Where it was part of the State's case that live rattlesnakes were to be used in pursuance of a conspiracy to murder, and two such snakes were brought to the court room to be identified by a witness who sold them to one of the conspirators, the propriety of admitting such evidence was for the state courts to decide; the claim that its introduction made the trial so unfair as to deny due process of law, is unsound. P. 228.
8. The fact that a person accused of a state offense was, some time before making a confession, subjected to restraints and other acts of state officers which were in themselves breaches of the state law and possible violations of due process, may be relevant to the ques-

tion whether the use of the confession at his trial was a denial of due process but is not conclusive of that issue. P. 235.

9. The fact that a confession has been conclusively adjudged by the state courts to be admissible in evidence under the state law does not answer the question whether, in view of the circumstances in which it was made, its use at the trial was a denial of due process. P. 236.

10. The state rule against admitting a confession which was not voluntarily made seeks to exclude false evidence. The aim of due process in forbidding its use is to prevent fundamental unfairness of using such evidence, whether true or false. The criteria for decision in the one case or the other may, or may not, be the same, according to the circumstances. P. 236.

11. To determine a claim that due process was violated by the use in evidence in a state court of a confession alleged to have been obtained by coercion or promises, this Court must make an independent examination of the record. P. 237.

12. The Court is unable to find that the confessions in this case were induced by coercion or promises, and that their use in evidence therefore vitiated the trial, the evidence being conflicting and the state tribunals having found that the confessions were free and voluntary and were therefore admissible under the state law, and the state supreme court having also found that their use conformed to due process. P. 238.

13. Where a prisoner held incommunicado is subjected to questioning by officers for long periods, and deprived of the advice of counsel, the Court will scrutinize the record with care to determine whether the use of his confession was contrary to due process. P. 240.

14. On the facts, and in the light of the findings in the state courts, this Court can not hold that the illegal conduct in which the law enforcement officers of California indulged by the prolonged questioning of the prisoner before arraignment and in the absence of counsel, or their later questioning, coerced the confessions, the use of which is complained of as an infringement of due process. P. 240.

89 P. 2d 39; 14 Cal. 2d 403, 94 P. 2d 569, affirmed.

CERTIORARI, 311 U. S. 617, to review the affirmance of a sentence for murder and a judgment denying the writ of *habeas corpus*. The cases were argued together at the last term and the judgments were affirmed by an

equally divided Court, 313 U. S. 537. A petition for rehearing before a full Court was granted; the affirmances were set aside, and the cases were restored to the docket for reargument, 313 U. S. 597.

Mr. Morris Lavine for petitioner.

Messrs. Everett W. Mattoon, Assistant Attorney General of California, and *Eugene D. Williams,* with whom *Messrs. Earl Warren,* Attorney General, and *Frank Richards,* Deputy Attorney General, were on the brief, for respondent.

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner was convicted of murder, and sentenced to death, in the Superior Court of California for Los Angeles County. The Supreme Court of California affirmed the judgment March 21, 1939, two judges dissenting.[1] A rehearing was granted, the case was reargued and, October 5, 1939, the decision was reaffirmed and the former opinion adopted and amplified, two justices dissenting.[2] No question arising under the Constitution of the United States had been raised or decided. In a second petition for rehearing, the petitioner, for the first time, asserted that his conviction violated the Fourteenth Amendment. November 3, 1939, the Court ruled: "The petition for a rehearing herein is denied."

The Chief Justice of the State allowed an appeal, November 6, 1939, and, November 8, 1939, executed a certificate in which he enumerated the constitutional questions presented by the second petition for rehearing; stated that the court entertained the petition, and explicitly overruled each of the contentions made therein; certified

[1] 89 P. 2d 39.

[2] 14 Cal. 2d 403, 94 P. 2d 569.

that the decision denying rehearing "is to be interpreted and considered as holding against the appellant's contention that his rights under the Fourteenth Amendment to the Constitution of the United States . . . were violated"; and concluded: "It is ordered that this certificate be filed in this court and made a part of the record on appeal to the Supreme Court of the United States." On the record so made, this Court has jurisdiction to review the judgment.[3]

The appellant did not draw in question the constitutional validity of any statute of California. We, therefore, dismissed the appeal [4] but, treating the papers as a petition for certiorari,[5] we granted the writ. This case is No. 4.

October 31, 1939, the petitioner prayed the Supreme Court of California for a writ of *habeas corpus* on the theory that his trial and conviction had deprived him of his life without due process. He submitted affidavits of one Hope, who had turned state's evidence against him. In these, Hope asserted that his testimony was false, had been coerced by threats, and induced by promises of leniency and by fraud.

November 9, 1939, *habeas corpus* was denied, without prejudice. The Chief Justice of California allowed an appeal and made, and ordered filed of record, a certificate respecting the constitutional questions presented and decided by the court, similar to that entered in No. 4. We followed the same course as in No. 4, and the case is here as No. 5.

The appeals were presented *in forma pauperis*. The typewritten record is of great length. In the belief that

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[3] *Roby* v. *Colehour*, 146 U. S. 153; *Gulf & Ship Island R. Co.* v. *Hewes*, 183 U. S. 66; *Whitney* v. *California*, 274 U. S. 357; *Honeyman* v. *Hanan*, 300 U. S. 14.

[4] Judicial Code § 237, as amended; 28 U. S. C. § 344 (a).

[5] Judicial Code § 237, as amended; 28 U. S. C. § 344 (c).

only by briefs and oral argument, and on a record printed by the court, could proper consideration and decision be had of certain apparently important questions presented, we issued the writs. The cases were argued at the October 1940 term, and the judgments were affirmed by a divided Court. A petition for rehearing before a full Court was granted, the affirmances set aside, and the causes set for rehearing at this term.[6]

The petitioner, who used, and was commonly known by, the name of Robert S. James (and will be so called), and one Hope were indicted, May 6, 1936, for the murder of James' wife on August 5, 1935. Hope pleaded guilty and was sentenced to life imprisonment. James pleaded not guilty, was tried, convicted, and sentenced to death. The trial was a long one in which the petitioner made objections to rulings and to the charge, which raise questions of state law decided by the opinion below, with which we have no concern. We shall refer only to so much of the evidence as bears upon the constitutional questions open here.

The State's theory is that the petitioner conceived the plan of marrying, insuring his wife's life by policies providing double indemnity for accidental death, killing her in a manner to give the appearance of accident, and collecting double indemnity.

James employed Mary E. Busch as a manicurist in his barber shop in March, 1935, and, about a month later, went through a marriage ceremony with her, which was not legal, as he then had a living wife. While they were affianced, insurance was negotiated on her life, with James as beneficiary. Upon the annulment of the earlier marriage, a lawful ceremony was performed. The petitioner made sure that the policies were not annulled by the fact that, when they were issued, Mary had not been his lawful wife.

[6] 313 U. S. 537, 597.

The allegation is that James enlisted one Hope in a conspiracy to do away with Mary and collect and divide the insurance on her life. Hope testified that, at James' instigation, he procured rattlesnakes which were to bite and kill Mary; that they appeared not to be sufficiently venomous for the purpose, but he ultimately purchased others and delivered them to James; that James, on August 4, 1935, blindfolded his wife's eyes, tied her to a table, had Hope bring one of the snakes into the room, and caused the reptile to bite her foot; that, during the night, James told Hope the bite did not have the desired effect; and, in the early morning of August 5, he told Hope that he was going to drown his wife; that later he said to Hope, "That is that"; and still later, at his request, Hope aided him in carrying the body to the yard, and James placed the body face down at the edge of a fish pond with the head and shoulders in the water.

James was at his barber shop on August 5. On that evening he took two friends home for dinner. When they arrived the house was dark and empty, and, upon a search of the grounds, his wife's body was found in the position indicated. An autopsy showed the lungs were almost filled with water. The left great toe showed a puncture and the left leg was greatly swollen and almost black. Nothing came of the investigation of the death.

James attempted to collect double indemnity; the insurers refused to pay; suits were instituted and one of them settled. As a result of this activity, a fresh investigation of Mary James' death was instituted. On April 19, 1936, officers arrested James for the crime of incest. He was booked on this charge on the morning of April 21, was given a hearing and remanded to jail. On May 2 and 3 he made statements respecting his wife's death to the prosecuting officials.

At the trial, in addition to that of Hope, testimony was adduced as to the finding and condition of the body, other

evidence to connect James with the death, and expert testimony that the condition of the left leg could be attributed to rattlesnake bites. The purchase of snakes by Hope was proved by him and several other witnesses, one of whom said he sold the two snakes to Hope, one of which, Hope claimed, had bitten Mary James. Two snakes were brought into court, which the witness identified as those sold to Hope and by Hope resold to the witness.

James' statements were offered in evidence. Objection was made that they were not voluntary. Before they were admitted the trial judge heard testimony offered by the State and the defendant on that issue. He ruled that the confessions were admissible, and they were received in evidence.

The State offered evidence with respect to the death of a former wife of James, in 1932. This tended to prove that, while driving down Pike's Peak, their automobile went off the road. James went for aid. When the persons called upon reached the automobile they found James' wife lying partly outside the car with her head badly crushed and a bloody hammer in the back of the car. James appeared unhurt. The woman recovered from her injuries, but, shortly afterwards, was discovered, by James and another man, drowned in the bathtub in a house James had temporarily leased at Colorado Springs. James collected double indemnity from insurance companies for her death, the insurance having been placed at about the time he married her and her death having occurred within a few months thereafter. This evidence was admitted over objection and, at the close of the State's case, defendant's counsel moved for an adjournment so that they might take depositions of witnesses in Colorado. The court refused the application for want of a sufficient showing.

The petitioner's contentions, based upon the Fourteenth Amendment, are: that the conduct of the prosecuting

officials and police officers denied him the equal protection of the laws; that his conviction deprived him of his life without due process, because the testimony of Hope, an accomplice, was not corroborated as required by the Penal Code of California, and was, therefore, insufficient to sustain a conviction; because Hope's affidavits filed since the trial showed that his testimony was obtained by deceit, fraud, collusion, and coercion, and was known to the prosecutor to be false, and hence the trial was a mere pretense; because the alleged occurrences in Colorado were wholly disconnected from the crime charged, and petitioner was afforded no opportunity to answer the State's evidence respecting them; because the production of the rattlesnakes in the court was solely for the purpose of inflaming the jury; and because physical violence, threats, and other coercive means produced the confessions, and denial of requested opportunity to consult counsel preceded and accompanied their procurement.

First. The contention that illegal conduct on the part of the State's officers deprived petitioner of the equal protection of the laws hardly needs notice. The claim is that where officers violate the law so that some defendants are treated as was petitioner, and others are treated as the law requires, inequality and discrimination results which denies equal protection. The contention is frivolous. The record is bare of any proof to support it.

Second. The petitioner asserts that Hope's testimony was not corroborated. Under California law, the uncorroborated testimony of an accomplice is not sufficient to sustain a conviction.[7] Petitioner contends that, in consideration of Hope's confessing and turning state's evidence, leniency was extended him by the court. Petitioner says that Hope's affidavits show that the prosecuting officials well knew that Hope's testimony was a

[7] Penal Code § 1111.

fabrication; that he was persuaded so to testify by fraud, promises of leniency, and threats, and the trial was a mere sham.[8]

These contentions need but brief notice. The Fourteenth Amendment does not forbid a state court to construe and apply its laws with respect to the evidence of an accomplice. There is no adequate showing that there was a corrupt bargain with Hope, and the practice of taking into consideration, in sentencing an accomplice, his aid to the State in turning state's evidence can be no denial of due process to a convicted confederate. Hope's affidavits not only were prepared after the State Supreme Court had passed upon the case and its opinion had been published but after the lapse of nearly three years from the trial. They could, therefore, be considered only in the *habeas corpus* case. The State contends that it had no opportunity to answer them. This is contested by the petitioner. In any event, it was stipulated that the record on appeal in the other case should be part of the record on the *habeas corpus* hearing; and comparison of the testimony at the trial with the allegations of the affidavits raises serious doubts as to their truthfulness. The appraisal of the conflicting evidence was for the court below. Even if its refusal to believe Hope's depositions were erroneous, the error would be no more a denial of due process than was its approval, on appeal, of the trial judge's refusal to direct a verdict on the ground of insufficiency of evidence.

Third. Testimony was admitted concerning the death of James' former wife, on the widely recognized principle that similar but disconnected acts may be shown to establish intent, design, and system.[9] The Fourteenth Amendment leaves California free to adopt a rule of relevance

[8] Cf. *Mooney* v. *Holohan*, 294 U. S. 103.

[9] See Wigmore, Evidence (3rd Ed.) Vol. II, § 363.

which the court below holds was applied here in accordance with the State's law.

The insistence that the trial judge's refusal to grant a continuance, so that petitioner could take answering depositions, was a denial of due process goes even farther afield. Counsel had notice at the opening of the trial, or shortly thereafter, that the State intended to introduce evidence on this subject,—but waited until the State had rested before asking the continuance. Even then the showing was inadequate as to the identity of the witnesses and the nature of the expected evidence. The judge, in the exercise of his discretion, denied the motion. The Fourteenth Amendment gives this Court no mandate to review his action or inquire whether he abused his discretion in such a field.

Fourth. A part of the State's case was that Hope had purchased snakes and brought them to the petitioner in pursuance of the conspiracy. Two snakes were brought into the courtroom to be identified by the witness who said he sold them to Hope. The petitioner says that the sole purpose of the production of the snakes was to prejudice the jury against him and that those in the courtroom, including the jury, were in a panic as a result of the incident. For this he cites current newspaper accounts and affidavits of his counsel. The State denies any improper purpose and, to rebut the assertions of petitioner, relies on a counter-affidavit and a statement by the trial judge. The record discloses that at a subsequent stage of the trial the snakes were brought into court at the defendant's request.

We do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence. We cannot hold, as petitioner urges, that the introduction and identification of the snakes so infused the trial with unfairness as to deny due process of law. The fact that evidence admitted as relevant by

a court is shocking to the sensibilities of those in the courtroom cannot, for that reason alone, render its reception a violation of due process.

Fifth. The important question is whether the use of the confessions rendered petitioner's conviction a deprivation of his life without due process of law. Recital of the relevant facts is essential to a decision.

The petitioner, while having almost no formal education, is a man of intelligence and business experience. After his arrest, on the charge of incest, on the morning of Sunday, April 19, 1936, he was taken for a short time to the adjoining house and shown a dictaphone there installed. He was brought to the District Attorney's offices, where he was lodged in the Bureau of Investigation. He says that during the two or three hours he stayed there he was not questioned. He was taken into an office where the District Attorney showed him a statement made by a Miss Wright respecting the incest charge and asked him what he cared to say about it. He replied that he would not talk about it. He was questioned for about an hour. He says he was asked about his wife's death; others who were present deny this.

He was held in the District Attorney's suite until 5 or 6 o'clock, was given supper at a cafe, and then conducted to the house next door to his home, where he arrived about 7 or 7:30. Various officers questioned him there, in relays throughout the night, concerning his wife's death. He sat in a chair fully dressed and had no sleep. Monday morning he was taken out for breakfast and went with the officers to point out to them a house at 9th and Alvarado Streets, after which he was taken to the District Attorney's offices. He was brought back to the house next door to his home, and the questioning was resumed, and continued until about 3 o'clock Tuesday morning, when, he says, he fainted; and others present say he fell asleep and slept until 7 or 8 o'clock. After he had breakfasted he was

booked at the jail, arraigned before a magistrate, and committed on the incest charge.

James testified that about 10 P. M. Monday, April 20, the officers began to beat him; that his body was made black and blue; that the beating impaired his hearing, and caused a hernia; that later that night an Assistant District Attorney questioned him and that, after this ordeal, he collapsed. It is admitted that an officer slapped his face that night. This is said to have occurred as the result of an offensive remark James made concerning his wife; he denies having made the remark. In corroboration of James' testimony two witnesses said they noticed that one or both of his ears were bruised and swollen when he was lodged in the jail. All of this testimony is contradicted by numerous witnesses for the State, save only that it is admitted James was repeatedly and persistently questioned at intervals during the period from Sunday night until Tuesday morning. It is testified that, except for the one slap, no one laid a hand on James; that no inducement was held out to him; that no threats were made; that he answered questions freely and intelligently; and that he was at ease, cool, and collected. He admits that no promises or threats were made or maltreatment administered on the occasions when he was in the District Attorney's office. It is significant that James stated to one of the other officers that Officer Southard had slapped him and that when, May 2, the District Attorney asked how he had been treated, he again referred to the slap. In neither case did he say anything of any other mistreatment. During the period April 19–21 James made no incriminating admission or confession.

James says that shortly after his arrest on Sunday morning, he asked, and was refused, permission to get into touch with Mr. Silverman, who had been his attorney for a number of years. This is denied. There is evidence that he saw Mr. Silverman on Monday, April 20, at the District

Attorney's office. Mr. Silverman testified that he saw the petitioner immediately after his formal arrest; that he was with the petitioner at the arraignment on Tuesday, April 21st; and again on April 25th in the jail. It is not suggested that James was not allowed to see his attorney as often as he desired or that any obstacle was interposed to the attorney's interviewing him between April 21 and May 2.

There is no claim that from April 21, when he was lodged in the jail, until May 2, he was interviewed, questioned, threatened, or mistreated by anyone. During this period his attorney told him that he would be indicted for his wife's murder and should not answer any questions unless his attorney was present.

May 1, Hope was arrested and made a statement. On the morning of May 2, James was brought from his cell to the chaplain's room in the prison and confronted with Hope. An Assistant District Attorney outlined Hope's story and asked James whether he had anything to say, to which he replied: "Nothing."

He went back to his cell and, about noon, an order of court was obtained to remove him from the prison. He was taken to his former home by two deputy sheriffs. The evidence does not disclose clearly either the purpose or the incidents of this trip. He was then brought to the District Attorney's office and that official began to question him. He requested that his attorney be sent for. In his presence a telephone call was made which disclosed that Mr. Silverman was not in Los Angeles. He asked that another attorney be summoned. He states that the District Attorney said it would take too long to acquaint any other attorney with the facts; others say that James did not give the name of the other attorney he wanted and it took some time to discover whom he had in mind. The attorney was not summoned.

The District Attorney and, at times, others questioned James until supper time. Sandwiches and coffee were

procured. James says he had coffee but someone took his sandwiches. There is testimony that he had them. The questioning, based on Hope's confession, was continued into the night without James having refused to answer questions or having made any incriminating answers.

There is a sharp conflict as to how the session terminated. James says that Officer Southard, who had struck him on April 20, occupied the room alone with him, all others having left; that the officer told him he had been lying all evening and that if he did not tell the truth the officer would take him back to the house and beat him; that this so frightened him that he agreed to do his best to recite to the District Attorney the same story Hope had told. There is much evidence that no such incident occurred. Deputy Sheriff Killion says that sometime before midnight the others had left petitioner alone with him, and that petitioner turned to him and said something to the effect: "Why can't we go out and get something to eat; if we do I'll tell you the story." To this Killion replied that they could go out. Killion and another Deputy Sheriff, Gray, a lady friend, and another person accompanied petitioner to a public cafe, where they had a supper and afterwards had cigars. James testified that neither Killion nor Gray nor the District Attorney ever laid hand on him, threatened him or offered him any inducement to confess.

The State's evidence is that, after they started to smoke, James told a story, of which Killion took notes. Killion narrated at the trial what James had told him. The party returned to the District Attorney's office and there, responding to a question by the District Attorney, James said he had told Killion the story, and, in answer to questions, he repeated that story. The interview was stenographically recorded. Most of the questions were asked by the District Attorney, some few by Killion and one or two

other officers who were present. The group seems to have consisted of the District Attorney, an Assistant District Attorney, two officers, the two deputy sheriffs, and the stenographer.

Hope's statement laid on James the initiation of the murder plot, the attempt to consummate it with snake poison, the drowning and the disposition of her body. The account James gave Killion and the District Attorney, which he now says was an attempt to retell the tale Hope had told, which had been constantly dinned into his ears, is by no means a reiteration of Hope's story. On the contrary, James insisted that Hope suggested the destruction of Mary James, and the rattlesnake expedient, which Hope carried out; that when this failed Hope suggested that he, Hope, burn down the house to make it appear that Mrs. James died by accident; and that Hope also volunteered to commit an abortion on Mrs. James and also to do away with her. James asserted that, while he was absent from his home on the morning of August 5, 1935, Hope drowned his wife in the bathtub and told James that he had done so.

It is also to be noted that James' statement presents a lurid picture of the heavy drinking and intoxication of Hope, James, and Mary James during the three days anterior to the death of the latter. The effort evidently was to suggest that all were more or less irresponsible for their actions.

If Hope's story is true, James planned and accomplished the murder of his wife to obtain the insurance on her life. If James' statement is true, Hope planned the murder, James desired to abandon the scheme and thought that all Hope ultimately intended to do was to commit an abortion on James' wife, and was shocked and surprised to learn that Hope had murdered her.

James said during supper at the cafe, and stated on another occasion, that there were not enough men in the

District Attorney's office to make him talk, and if Hope had not talked he would never have told the story.

Scrutiny of the two statements indicates that James carefully considered what Hope had said, and made up his mind to tell a story consistent with his intimacy with Hope, and with various incidents James could not deny, and then depict a drunken orgy as a result of which his will power was so enfeebled that he could not resist Hope's determination to make away with Mrs. James.

At the trial, James contradicted the essential particulars of Hope's testimony and most of his own confession, including the evidence respecting the snakes. He swore all Hope was to do was to attempt an abortion; he believed Hope did not accomplish this, and that his wife died as a result of falling into the pond in a fainting fit due to her pregnancy.

The evidence as to the treatment of James and the conduct of officials and officers, from the moment of his arrest until the close of his statement to the District Attorney, was heard preliminarily by the trial judge in order to determine whether the State had, as required by California law, carried its burden of proving the confessions voluntary. The ruling was that it had; and the confessions were admitted. The trial judge, at defendant's request, charged the jury, in accordance with the State law, that the confessions must be utterly disregarded unless they were voluntary, that is, not the result of inducements, promises, threats, violence, or any form of coercion.

The failure of the arresting officers promptly to produce the petitioner before an examining magistrate, their detention of him in their custody from Sunday morning to Tuesday morning, and any assault committed upon him, were violations of state statutes [10] and criminal offenses.[11]

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[10] California Penal Code §§ 849, 4004.

[11] *Id.* §§ 145, 146, 149.

We find no authority for the issue of the court order under which the sheriff's deputies took the accused from jail to his former home, and to the District Attorney's office for questioning.[12] The denial of opportunity to consult counsel, requested on May 2nd, was a misdemeanor.[13] It may be assumed this treatment of the petitioner also deprived him of his liberty without due process and that the petitioner would have been afforded preventive relief if he could have gained access to a court to seek it.

But illegal acts, as such, committed in the course of obtaining a confession, whatever their effect on its admissibility under local law, do not furnish an answer to the constitutional question we must decide. The effect of the officers' conduct must be appraised by other considerations in determining whether the use of the confessions was a denial of due process. Moreover, petitioner does not, and cannot, ask redress in this proceeding for any disregard of due process prior to his trial. The gravamen of his complaint is the unfairness of the use of his confessions, and what occurred in their procurement is relevant only as it bears on that issue.

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[12] The record does not disclose whether the application for the order was in the form of a petition; whether defendant was apprised of the motion for the order; whether he consented to its issue, or what representations were made to the court which granted the order. Section 4004 of the 1941 Code (§ 1600 of the 1935 Code) requires a prisoner committed by a magistrate to be confined in a jail until legally discharged, and declares that if he is permitted to go at large out of the jail, except by virtue of a legal order or process, this shall constitute an escape. The only statutes we are able to find authorizing an order for the removal of a prisoner from jail are §§ 4011 and 4012 of the Penal Code, 1941, (§§ 1607 and 1608 of the 1935 Code) which provide for cases of individual illness or a general outbreak of pestilence or disease in a prison. Section 4011 permits a removal without court order in case of fire.

[13] Penal Code, § 825.

On the other hand, the fact that the confessions have been conclusively adjudged by the decision below to be admissible under State law, notwithstanding the circumstances under which they were made, does not answer the question whether due process was lacking. The aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence. Tests are invoked to determine whether the inducement to speak was such that there is a fair risk the confession is false.[14] These vary in the several States.[15] This Court has formulated those which are to govern in trials in the federal courts.[16] The Fourteenth Amendment leaves California free to adopt, by statute or decision, and to enforce, such rule as she elects, whether it conform to that applied in the federal or in other state courts. But the adoption of the rule of her choice cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law. The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false. The criteria for decision of that question may differ from those appertaining to the State's rule as to the admissibility of a confession.

As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. Such unfairness exists when a coerced confession is used as a means

[14] Wigmore, Evidence (3d Ed.) §§ 823, 824.

[15] *Id.* § 824.

[16] *Sparf and Hansen* v. *United States,* 156 U. S. 51, 55; *Wilson* v. *United States,* 162 U. S. 613, 622; *Bram* v. *United States,* 168 U. S. 532; *Wan* v. *United States,* 266 U. S. 1, 14.

of obtaining a verdict of guilt. We have so held in every instance in which we have set aside for want of due process a conviction based on a confession.

To extort testimony from a defendant by physical torture in the very presence of the trial tribunal is not due process. The case stands no better if torture induces an extra-judicial confession which is used as evidence in the courtroom.[17]

A trial dominated by mob violence in the courtroom is not such as due process demands.[18] The case can stand no better if mob violence anterior to the trial is the inducing cause of the defendant's alleged confession.

If, by fraud, collusion, trickery, and subornation of perjury, on the part of those representing the State, the trial of an accused person results in his conviction, he has been denied due process of law.[19] The case can stand no better if, by the same devices, a confession is procured, and used in the trial.

The concept of due process would void a trial in which, by threats or promises in the presence of court and jury, a defendant was induced to testify against himself. The case can stand no better if, by resort to the same means, the defendant is induced to confess and his confession is given in evidence. As we have said, "due process of law . . . commands that no such practice . . . shall send any accused to his death." [20]

Where the claim is that the prisoner's statement has been procured by such means, we are bound to make an independent examination of the record to determine the validity of the claim. The performance of this duty cannot be foreclosed by the finding of a court, or the verdict

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[17] *Brown* v. *Mississippi*, 297 U. S. 278.

[18] *Moore* v. *Dempsey*, 261 U. S. 86.

[19] *Mooney* v. *Holohan*, 294 U. S. 103.

[20] *Chambers* v. *Florida*, 309 U. S. 227, 241.

of a jury, or both.[21] If the evidence bearing upon the question is uncontradicted, the application of the constitutional provision is unembarrassed by a finding or a verdict in a state court; even though, in ruling that the confession was admissible, the very tests were applied in the state court to which we resort to answer the constitutional question.[22]

There are cases, such as this one, where the evidence as to the methods employed to obtain a confession is conflicting, and in which, although denial of due process was not an issue in the trial, an issue has been resolved by court and jury, which involves an answer to the due process question. In such a case, we accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.

Here, judge and jury passed on the question whether the petitioner's confessions were freely and voluntarily made, and the tests applied in answering that question rendered the decision one that also answered the question whether the use of the confessions involved a denial of due process; this notwithstanding the issue submitted was not *eo nomine* one concerning due process. Furthermore, in passing on the petitioner's claim, the Supreme Court of the State found no violation of the Fourteenth Amendment. Our duty, then, is to determine whether the evidence requires that we set aside the finding of two courts and a jury, and adjudge the admission of the confessions so fundamentally unfair, so contrary to the common concept of ordered liberty, as to amount to a taking of life without due process of law.

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[21] *Brown* v. *Mississippi, supra,* 278; *Chambers* v. *Florida, supra; Canty* v. *Alabama,* 309 U. S. 629; *White* v. *Texas,* 310 U. S. 530; *Vernon* v. *Alabama,* 313 U. S. 547; *Lomax* v. *Texas,* 313 U. S. 544.

[22] Cases *supra,* Note 21.

In view of the conflicting testimony, we are unable to say that the finding below was erroneous so far as concerns the petitioner's claims of physical violence, threats, or implied promises of leniency. There remains the uncontradicted fact that on two occasions, separated by an interval of eleven days, the petitioner was questioned for protracted periods. He made no admission implicating him in his wife's death during, or soon after, the interrogations of April 19, 20, and 21. If, without more, eleven days later, confessions had been forthcoming, we should have no hesitation in overruling his contention respecting the admission of his confessions.

Does the questioning on May 2nd, in and of itself, or in the light of his earlier experience, render the use of the confessions a violation of due process? If we are so to hold, it must be upon the ground that such a practice, irrespective of the result upon the petitioner, so tainted his statements that, without considering other facts disclosed by the evidence, and without giving weight to accredited findings below that his statements were free and voluntary, as a matter of law, they were inadmissible in his trial. This would be to impose upon the state courts a stricter rule than we have enforced in federal trials.[23] There is less reason for such a holding when we reflect that we are dealing with the system of criminal administration of California, a quasi-sovereign; that if federal power is invoked to set aside what California regards as a fair trial, it must be plain that a federal right has been invaded.

We have not hesitated to set aside convictions based in whole, or in substantial part, upon confessions extorted in graver circumstances. These were secured by protracted and repeated questioning of ignorant and untutored persons, in whose minds the power of officers

[23] *Wan* v. *United States*, 266 U. S. 1, 14, and cases cited.

was greatly magnified; who sensed the adverse sentiment of the community and the danger of mob violence; who had been held incommunicado, without the advice of friends or of counsel; some of whom had been taken by officers at night from the prison into dark and lonely places for questioning.[24] This case is outside the scope of those decisions.

Like the Supreme Court of California, we disapprove the violations of law involved in the treatment of the petitioner, and we think it right to add that where a prisoner, held incommunicado, is subjected to questioning by officers for long periods, and deprived of the advice of counsel, we shall scrutinize the record with care to determine whether, by the use of his confession, he is deprived of liberty or life through tyrannical or oppressive means. Officers of the law must realize that if they indulge in such practices they may, in the end, defeat rather than further the ends of justice. Their lawless practices here took them close to the line. But on the facts as we have endeavored fairly to set them forth, and in the light of the findings in the state courts, we cannot hold that the illegal conduct in which the law enforcement officers of California indulged, by the prolonged questioning of the prisoner before arraignment, and in the absence of counsel, or their questioning on May 2, coerced the confessions, the introduction of which is the infringement of due process of which the petitioner complains. The petitioner has said that the interrogation would never have drawn an admission from him had his confederate not made a statement; he admits that no threats, promises, or acts of physical violence were offered him during this questioning or for eleven days preceding it. Counsel had been afforded full opportunity to see him and had advised him.

[24] See *Chambers* v. *Florida*; *Canty* v. *Alabama*; *White* v. *Texas*; *Vernon* v. *Alabama*; *Lomax* v. *Texas, supra,* Note 21.

He exhibited a self-possession, a coolness, and an acumen throughout his questioning, and at his trial, which negatives the view that he had so lost his freedom of action that the statements made were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer.

The judgments are

Affirmed.

MR. JUSTICE BLACK, dissenting, with whom MR. JUSTICE DOUGLAS concurs:

I believe the confession used to convict James was the result of coercion and compulsion, and that the judgment should be reversed for that reason. The testimony of the officers to whom the confession was given is enough, standing alone, to convince me that it could not have been free and voluntary. Cf. *Bram* v. *United States,* 168 U. S. 532. In brief, those officers admitted the following:

Suspecting the defendant of murder, they entered his home on Sunday, April 19, 1936, at 9 a. m. He was taken to a furnished house next door, in which the State's Attorney's office had installed a dictaphone. For the next forty-eight hours, or a little longer, the State's Attorney, his assistants, and investigators held James as their prisoner. He was so held, not under indictment or warrant of arrest, but by force. At about 4 a. m. Monday, one Southard, an investigator, "slapped" the defendant, whose left ear was thereafter red and swollen. James was apparently kept at the State's Attorney's office during the daylight hours; the full extent to which he was questioned there is not clear. But on Monday and Tuesday nights, at the furnished house, with no one present but James and the officers, he was subjected to constant interrogation. The questioning officers divided themselves into squads, so that some could sleep while the others continued the question-

ing. The defendant got no sleep during the first forty-two hours after the officers seized him. And about 3:30 or 4 a. m. Tuesday morning, while sitting in the chair he occupied while being interrogated, at the very moment a question was being asked him, the defendant fell asleep. There he remained asleep until about 7 or 8 a. m. At about 11 a. m. the officers took him to jail and booked him on a charge of incest. During the entire forty-two hours defendant was held, he repeatedly denied any complicity in or knowledge of the murder of his wife.

The second episode during which the officers held defendant incommunicado, and which produced the confession, was on May 2 and in the early hours of May 3. About 11 a. m. on May 2, an investigator for the District Attorney took James from his cell to the chaplain's room of the jail. In the presence of an Assistant District Attorney he was confronted by Hope and told that Hope had made a confession implicating James in his wife's murder. James refused to talk and was then carried back to his cell. A short time later, under a purported order of court, the nature or authority of which does not appear, James was taken from the jail to his home, and then, somewhere between 1 and 4 p. m., to the District Attorney's office. The doors were locked. From then until about midnight the District Attorney, his Assistants, and investigators, subjected James to constant interrogation. Upon asking for his attorney, James was told he was out of the city. He then asked for another, but whatever efforts the officers made to satisfy this request were unsuccessful. He was again confronted with Hope, but neither this nor the questioning had elicited an admission of any nature, by midnight. At that time, according to the investigators, James said to one of them, "Can't we go out and get something to eat—if you fellows will take me out to eat now, I will

tell you the story." [1] He was taken out to eat by some of the officers; remained about an hour and a half; while at the restaurant made damaging admissions, and upon his return to the District Attorney's office made the full statement which was used to bring about his conviction, completing it at about 3 a. m. Southard, the investigator who had previously "slapped" him, was one of the signed witnesses of the confession.[2]

I think the facts set out are sufficient to make applicable the principles announced in *Chambers* v. *Florida,* 309 U. S. 227, and the conclusion there announced that: "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." *White* v. *Texas,* 310 U. S. 530, 533; *Canty* v. *Alabama,* 309 U. S. 629; *Vernon* v. *Alabama,* 313 U. S. 547. Cf. *Bram* v. *United States, supra.*

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[1] This is rather close to a part of James' own testimony, to wit: "He continued to question me until later on in the evening. I was very sick. I was hungry; I was tired, and I told him a thousand times that I didn't know anything about Hope's story."

[2] James' testimony at this point was that Southard, left alone with him shortly before midnight, said James had been lying to the District Attorney long enough and threatened to take him back once again to the house next door to his home where James had been questioned April 19 to 21. In response to an inquiry whether he was told his confession might be used against him, James replied: "I didn't know whether the statement would be used against me, or not. I would rather die than to have gone back to that house and went through torture like the three days I was out there. I didn't care whether the statement was taken, or not."

PARKER, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, *v.* MOTOR BOAT SALES, INC.

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

No. 46. Argued November 19, 1941.—Decided December 8, 1941.

1. In this proceeding under the Longshoremen's and Harbor Workers' Act for compensation for the death of an employee, the evidence was clearly sufficient to support the Deputy Commissioner's finding that the deceased, at the time of his death, was acting in the course of his employment; and therefore the finding was conclusive. P. 246.
2. The application of the Longshoremen's and Harbor Workers' Act to a case where the employee, at the time of his death, was acting in the course of his employment and was riding in a boat on a navigable river, is exclusive, even though the employee usually was engaged in the performance of non-maritime duties. P. 246.

   The case is not within the provision of § 3 (a) excepting from the coverage of the Act cases in which recovery may validly be provided by state law.
3. A contention that an award under the Longshoremen's and Harbor Workers' Act was void under § 5 of the Act, because the claim for compensation was made by the widow rather than by the "legal representative" of the deceased, comes too late when raised for the first time in the Circuit Court of Appeals. P. 251.

116 F. 2d 789, reversed.

CERTIORARI, 313 U. S. 554, to review the reversal of a decree sustaining an award of compensation under the Longshoremen's and Harbor Workers' Act.

Assistant Attorney General Shea, with whom *Assistant Solicitor General Fahy* and *Mr. Melvin H. Siegel* were on the brief, for petitioner.

Mr. Minitree Jones Fulton for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

August 18, 1938, George Armistead was drowned when a motor boat in which he was riding capsized on the James

River off Richmond, Virginia. The boat was navigated by one Johnnie Cooper. Both Armistead and Cooper were employees of the respondent, Motor Boat Sales, Incorporated, which sold small boats, maritime supplies, and outboard motors. The object of the ill-fated boat trip was to test one of the respondent's outboard motors, which it desired to sell, and later did sell, to the owner of the boat. The petitioner, Deputy Commissioner of the United States Employees' Compensation Commission, under authority of § 19 of the Longshoremen's and Harbor Workers' Act, 44 Stat. 1424, after complaint, investigation, and hearings, ordered the respondent to pay compensation to Armistead's widow for the benefit of herself and three minor children. Among the findings on which the Deputy based his order were these: that Armistead's death by drowning, "arose out of and in the course of his employment; that his death occurred upon navigable waters; and that at the time of his death he was engaged in maritime employment." Section 21 (b) of the Act provides that if a Deputy Commissioner's award is not made in accordance with law, Federal District Courts may enjoin enforcement of it upon petition of any party in interest. In proceedings initiated by the respondent under this section, the District Court sustained the award, dismissing the bill on the ground that the findings of fact were supported by evidence and were therefore conclusive, and that the Commissioner's conclusions and award were in accordance with law. The Circuit Court of Appeals reversed, advancing two reasons for its conclusion: (1) Armistead was not acting in the course of his employment at the time of the accident; and (2) even if he had been, recovery was barred by § 3 (a) of the Act making compensation payable "only if . . . recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

(1) The Circuit Court's conclusion that Armistead was not acting in the course of his employment rests upon a

revaluation of the evidence before the Deputy Commissioner. It is true that the respondent's president testified that "George was cautioned never to go into a boat or have anything to do with a boat or motor," but this rule was laid down "prior to November 1937" and the accident occurred in August, 1938. Against whatever inferences to be drawn from testimony regarding this general and rather remotely announced rule, are the inferences to be drawn from testimony that on the morning of the accident Armistead was sent to the river with specific instructions to help Cooper in placing the outboard motors on the boat; that there were no specific instructions as to whether or not Armistead was to stay out of the boat; that either Armistead or Cooper was told that Armistead was "to go and help" Cooper; that Cooper, the superior of the two employees, at least acquiesced in Armistead's remaining in the boat to "keep a lookout" for hidden objects in the muddy water; that Cooper regarded Armistead's acting as lookout as "helpful"; that employees of the respondent would sometimes make trips in boats for testing purposes, in furtherance of respondent's business; and that in one such instance an employee had taken a boat on a trip of at least fifty miles in respondent's behalf. Granting that more than one possible conclusion could have been reached upon the evidence, we think it was clearly sufficient to support the Deputy Commissioner's finding that Armistead was acting in the course of his employment. The Circuit Court of Appeals should therefore have accepted it as final. *Voehl* v. *Indemnity Ins. Co.*, 288 U. S. 162.

(2) The Circuit Court was of the opinion that even if Armistead had acted in the course of his employment, the Longshoremen's and Harbor Workers' Act would not apply because his employment was "so local in character" that Virginia could validly have included it under a state workmen's compensation Act. 116 F. 2d 789. This proposition cannot be rested on the ground that Armistead,

hired primarily as a janitor and porter, was predominantly a non-maritime employee. For, habitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity [1] that the award was here made. Cf. *Northern Coal Co.* v. *Strand,* 278 U. S. 142, 144; *Liability Assurance Co.* v. *Cook,* 281 U. S. 233, 236. Moreover, § 2 (4) of the Act expressly provides for its application to "employees [who] are employed . . . in whole or *in part* upon the navigable waters of the United States."

If the conclusion of the Circuit Court can be supported at all, it must be on the basis that the employment, even though maritime and therefore within an area in which Congress *could* have established exclusive federal jurisdiction, is nevertheless subject to state regulation until Congress has exercised its paramount power. Cf. *Liability Assurance Co.* v. *Cook, supra,* 237. Congress having expressly kept out of the area in which "recovery . . . may . . . validly be provided by State law," the argument may be made that Virginia would have been unhampered in providing for compensation here.

The decision of this Court in *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, however, severs a link in this chain of reasoning. For under the holding of that case, even in the absence of any Congressional action,[2] federal jurisdic-

[1] Cf. *The Moses Taylor,* 4 Wall. 411, 427; *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, 58–63; *Industrial Comm'n* v. *Nordenholt Co.,* 259 U. S. 263, 272–273; *Smith & Son* v. *Taylor,* 276 U. S. 179, 181; *London Guarantee Co.* v. *Industrial Comm'n,* 279 U. S. 109, 123, 125.

[2] While reference was made in the majority opinion of the *Jensen* case to § 9 of the Judiciary Act of 1789, 1 Stat. 76, 77, there is no implication that the Court regarded this statute as an "occupation" by Congress of a field otherwise of concurrent jurisdiction. And in *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, 157–158, the Court explained the *Jensen* case entirely in terms of the exclusive federal jurisdiction created by Article III, § 2, and Article I, § 8, of the Con-

tion is exclusive and state action forbidden in an area which, although of shadowy limits,[3] doubtless embraces the case before us. The basis of the decision, that Article III, § 2, of the Constitution, extending the judicial power of the United States "to all cases of admiralty and maritime jurisdiction," is tantamount to a command that no state may interfere with the harmony and uniformity of admiralty law, and that on the facts of that case recovery under a state statute would work such an interference, was rejected by four dissenting members of the Court. And when the doctrine of the *Jensen* case was reaffirmed in *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, and *Washington* v. *Dawson & Co.,* 264 U. S. 219, sharp disagreement was again expressed in dissenting opinions. We have not been called upon here, however, to reconsider the constitutional principles announced in those cases, and we are convinced that such a reconsideration is not necessary for disposition of the case before us.

What we are called upon to decide is not of constitutional magnitude. For, regardless of whether or not the limitation on the power of states set out in the *Jensen* case is to be accepted, it is not doubted that Congress could constitutionally have provided for recovery under a federal statute in this kind of situation. The question is whether Congress has so provided in this statute. The proviso of § 3 (a) aside, there would be no difficulty whatever in concluding it has. For the Act expressly includes within its ambit accidents "arising out of and in the course of employment" in the case of employees engaged "in

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stitution. Reference to § 9 of the Judiciary Act of 1789 was made only for the purpose of pointing out that a clause embodied in it, which saved certain common law remedies, "had no application."

[3] Cf.: "In view of these constitutional provisions and the federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied." *Southern Pacific Co.* v. *Jensen, supra,* 216.

maritime employment, in whole or in part, upon the navigable waters of the United States," and Armistead's death was the result of such an accident. While the proviso of § 3 (a) appears to be a subtraction from the scope of the Act thus outlined by Congress, we believe that, properly interpreted, it is not a large enough subtraction to place this case outside the coverage which Congress intended to provide.

In the report of the Senate Committee on the Judiciary accompanying the bill which was enacted as the Longshoremen's and Harbor Workers' Compensation Act, S. R. 973, 69th Cong., 1st Sess., 16, this avowal of Congressional purpose appears:

"If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation; but, unfortunately, they are excluded from these laws by reason of the character of their employment; and they are not only excluded but the Supreme Court has more than once held that Federal legislation can not, constitutionally, be enacted that will apply State laws to this occupation. (Southern Pacific Co. *v.* Jensen, 244 U. S. 205; Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149; Washington *v.* Dawson & Co., 264 U. S. 219.)

"It thus appears that there is no way of giving to these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation without enacting a uniform compensation statute."

There can be no doubt that the purpose of the Act was to provide for federal compensation in the area which the specific decisions referred to placed beyond the reach of the states. The proviso permitting recovery only where compensation "may not validly be provided by State law" cannot be read in a manner that would defeat this

purpose. An interpretation which would enlarge or contract the effect of the proviso in accordance with whether this Court rejected or reaffirmed the constitutional basis of the *Jensen* and its companion cases cannot be acceptable. The result of such an interpretation would be to subject the scope of protection that Congress wished to provide, to uncertainties that Congress wished to avoid.

The main impetus for the Longshoremen's and Harbor Workers' Compensation Act was the need to correct a gap made plain by decisions of this Court. We believe that there is only one interpretation of the proviso in § 3 (a) which would accord with the aim of Congress; the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the *Jensen* line of decision excluded from state compensation laws. Without affirming or rejecting the *constitutional* implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence.

(3) The respondent further contends that the award was void under § 5 of the Act. This section, set out in full in the margin below,[4] states that "an injured em-

[4] "Sec. 5. The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

ployee, or his legal repesentative in case death results from the injury, may elect to claim compensation under this Act . . ." The record does not indicate that a "legal representative" of Armistead was ever appointed. Here the claim was filed by his widow. Since the respondent did not contest the widow's capacity to file a claim, either before the Deputy Commissioner or in the District Court, the objection, even if otherwise meritorious, was made too late. Cf. *McCandless* v. *Furlaud,* 293 U. S. 67. We may nevertheless point out that the widow's asserted incapacity to sue in her own name can be derived only inferentially from the terms of § 5, and that other sections of the Act are not in harmony with this inference. Section 12 provides that notice of death may be given "by any person claiming to be entitled to compensation for such death or by a person on his behalf." Section 19 (a) provides that "Subject to the provisions of section 13 a claim for compensation may be filed . . . in accordance with regulations prescribed by the commission," and there is nothing in § 13 which makes filing by a "personal representative" mandatory. Moreover, administrative practice apparently countenances the filing of claims by widows, since the Commission has prescribed printed forms bearing the caption: "Claim for Compensation in Death Case by Widow and for Children under the Age of Eighteen." Form US–262.

We reverse the judgment of the Circuit Court of Appeals and affirm that of the District Court.

Reversed.

BRIDGES *v.* CALIFORNIA.*

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 1. Argued October 18, 21, 1940 (No. 19, 1940 Term). Reargued October 13, 1941.—Decided December 8, 1941.

1. In determining whether punishment for an out-of-court publication concerning a pending case, as a contempt, is consistent with guaranties of the Federal Constitution, the problem in the case of a judgment based upon a particularized statutory declaration of the policy of a State is different from that where the judgment is based upon a common-law concept of a general nature. P. 260.
2. The "clear and present danger" cases, decided by this Court, indicate that the substantive evil likely to result must be extremely serious and the degree of imminence extremely high before utterances can be punished. P. 263.
3. The "clear and present danger" cases do not mark the farthest constitutional boundaries of protected expression; nor do they more than recognize a minimum compulsion of the Bill of Rights. P. 263.
4. The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a State. P. 263, n. 6.
5. The First Amendment's prohibition of "any law abridging the freedom of speech or of the press" must be given the broadest scope that can be countenanced in an orderly society. P. 265.
6. The First Amendment can not be taken as approving all practices in respect to punishment for contempt which prevailed in England at the time of its ratification. P. 265.
7. The "inherent tendency" or "reasonable tendency" of an out-of-court publication to cause disrespect for the judiciary or interfere with the orderly administration of justice in a pending case is not sufficient to establish punishable contempt. P. 272.
8. Upon the facts of this case, *held* that convictions of a newspaper publisher and editor for contempt, based on the publication of editorials commenting upon cases pending in a state court, were vio-

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*Together with No. 3, *Times-Mirror Co. et al.* v. *Superior Court of California in and for the County of Los Angeles*, also on writ of certiorari, 310 U. S. 623, to the Supreme Court of California. Argued October 21, 1940 (No. 64, 1940 Term); reargued October 13, 14, 1941.

lative of constitutional rights of freedom of speech and of the press. P. 271.

9. The conviction of a labor leader for contempt of a state court, based upon his publication in the press of a telegram which he had sent to the Secretary of Labor, in which he criticized the decision of a judge in a case involving a labor dispute and indicated that enforcement of the decree would result in a strike, *held* violative of constitutional rights of freedom of speech and of the press. P. 275.

14 Cal. 2d 464, 94 P. 2d 983; 15 Cal. 2d 99, 98 P. 2d 1029, reversed.

CERTIORARI, 309 U. S. 649, 310 U. S. 623, to review, in two cases, the affirmance of convictions and sentences for contempt of court.

Mr. Osmond K. Fraenkel, with whom *Mr. A. L. Wirin* was on the brief, on the reargument for petitioner in No. 1. *Mr. Wirin* on the original brief and argument.

The power of state judges to punish for contempt is restricted by the due process clause of the Fourteenth Amendment to the same extent as is the power of the executive and legislative branches. *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, 680.

There are special reasons why judicial action in punishing for contempt should be subject to scrutiny on constitutional grounds. Where legislative action or executive action is in question, review is by a different branch of government. Not so in contempt cases. Here the judiciary reviews the acts of its own members. Moreover, in many cases, although not here, the action under review was taken by the very judge criticized in the publication complained of. And in all cases the procedure is summary, without the safeguard of trial by jury.

Where, as here, the act complained of is an expression of opinion concerning judicial action and the expression takes place outside of the courtroom, there can be no punishment unless the expression actually obstructed judicial action, or was intended improperly to influence

judicial action, or where, in the absence of such intent, there was a clear and present danger that judicial action would be improperly influenced.

The line sought to be drawn in the case at bar between cases pending and cases determined has no substantial meaning. To hold that publications may be punished merely because the time for rehearing has not expired exalts form above substance, establishes a criterion lacking in reason and sets a trap for the unwary. The layman seldom knows anything about when rehearings are available. Experience has taught him, moreover, that judges change their minds in a negligible proportion of cases, so that he considers the right to ask for a rehearing illusory.

The "reasonable tendency" test will enmesh anyone who criticizes a judicial decision immediately after it is rendered, if a judge can be persuaded that the critic ought to have foreseen that his words might have some effect on the judge criticized or on the public reaction to courts in general.

If the State may not punish one charged with attempting to overthrow it on a showing only of reasonable tendency to accomplish that unlawful end, it should have no right to punish on a showing of like character for the much less serious offense of contempt.

There were here no special facts to justify the inference that there was any clear danger that obstruction of justice would result from the publication of the telegram. The statements in the telegram were expressed, not with the purpose of interfering with the administration of justice, but with the hope that the Secretary of Labor would find a means of solving the controversy between the two competing unions in a forum other than the judicial one.

In any event, the sending and publication of the telegram were the exercise of the right to petition the government. California had no power to restrict this right by

punishing its exercise as a contempt. The right of petition is protected by the due process clause of the Fourteenth Amendment. And when the petition is addressed to the national government on an issue of national concern, it is also protected by the privileges and immunities clause of the Fourteenth Amendment. *Hague* v. *C. I. O.*, 307 U. S. 496; *United States* v. *Cruikshank*, 92 U. S. 542.

Mr. T. B. Cosgrove, with whom *Messrs. John N. Cramer* and *F. B. Yoakum, Jr.* were on the brief, for petitioners in No. 3.

The clear and present danger doctrine should be applied.

The clear and present danger doctrine requires a weighing of the evidence and a determination "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about" a substantial interference with the orderly administration of justice. *Schenck* v. *United States*, 249 U. S. 47, 52; *Schaefer* v. *United States*, 251 U. S. 466, 482; *Gitlow* v. *New York*, 268 U. S. 652, 672; *Herndon* v. *Lowry*, 301 U. S. 242, 256; *Thornhill* v. *Alabama*, 310 U. S. 88, 105; *Cantwell* v. *Connecticut*, 310 U. S. 296, 311.

The reasonable tendency test is so vague and indefinite that it "is repugnant to the guarantee of liberty contained in the Fourteenth Amendment." *Herndon* v. *Lowry*, *supra*, 259.

This Court has not subordinated constitutional liberties to governmental functions. The practice has been to reconcile the two. *Whitney* v. *California*, 274 U. S. 357, 374; *Herndon* v. *Lowry*, 301 U. S. 242, 258; *Schneider* v. *State*, 308 U. S. 147, 161, 164; *Thornhill* v. *Alabama*, 310 U. S. 88, 95–96; *Cantwell* v. *Connecticut*, 310 U. S. 296, 304, 307, 308; *Minersville School Dist.* v.

Gobitis, 310 U. S. 586, 593–594, 596; *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, 298–299; *American Federation of Labor* v. *Swing,* 312 U. S. 321, 325–326.

In summary proceedings for contempt by publication, adoption of the actual interference test or the clear and present danger doctrine will conform to *DeJonge* v. *Oregon,* 299 U. S. 353, 364–365, which declared that "legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." Proscribing all comment on judicial proceedings until finally terminated would abridge the right of free speech. However, the right would not be abridged, but its abuse would be dealt with, if comment upon pending judicial proceedings is proscribed only when it is of such a nature and published under such circumstances as to bring about an actual interference, or create a clear and present danger that it will bring about a substantial interference, with the judicial proceedings about which comment is made.

Mr. Allen W. Ashburn, with whom *Messrs. J. H. O'Connor, Wm. B. McKesson,* and *Michael G. Luddy* were on the brief, for respondents.

The determination of what constitutes contempt of a state court, and the character of punishment therefor, are matters exclusively within the control of the State. *Patterson* v. *Colorado,* 205 U. S. 454.

From the standpoint of due process, antiquity of the process is the hallmark of acceptability, whether the matter be viewed adjectively or substantively. If inherent or reasonable tendency to influence or otherwise interfere with the deliberations of a court in a pending matter was an established criterion of constructive contempt at the time of the adoption of the Federal Constitution, its application today can not constitute a denial of due process.

The inherent or reasonable tendency criterion has been established for constructive contempt for a period of two hundred years or more.

Whereas the federal statute made "obstruction" the test, the California Penal Code made "direct tendency" the test. The codifiers incorporated not only "tendency" as a criterion for acts which must be actually obstructive under the federal statute, but also adopted the common law as to contempts generally. The California decisions have uniformly held this to be the proper criterion, sometimes referring to the statute and sometimes to the inherent power of the court. *Matter of Tyler,* 64 Cal. 434, 438; *Ex parte Barry,* 85 Cal. 603, 607; *In re Shortridge,* 99 Cal. 526, 532, 533; *In re Shuler,* 210 Cal. 402; *In re Lindsley,* 75 Cal. App. 124; *Lindsley* v. *Superior Court,* 76 Cal. App. 428; *In re San Francisco Chronicle,* 1 Cal. 2d 637.

The clear and present danger doctrine has never found its way into the law of contempt.

Nye v. *United States,* 313 U. S. 33, dealt only with the effect of the federal statute which defines the method of procedure for punishment of various types of contempt and limits those which may be summarily dealt with.

Section 1209 of the California Code of Civil Procedure writes the common-law doctrine of reasonable tendency into the statutes of California. If the statutory test be adequate from a constitutional standpoint, the evidence will not be reviewed except for the limited purpose of determining whether, as expressed in the *Milk Wagon Drivers Union* case, 312 U. S. 287, the conviction rests upon "insubstantial findings of fact" amounting to "a palpable evasion of the Constitutional guaranty."

But if the reasonable tendency criterion be considered independently of the California statutes, it possesses, aside from its ancient lineage, adequate certainty to meet the demands of due process. Cf. *Herndon* v. *Lowry,* 301 U. S. 242.

Reasonable tendency may be made a new statutory standard of guilt. *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 86.

A statutory or other definition of crime is not vague for uncertainty "merely because it throws upon men the risk of rightly estimating a matter of degree." There must be an uncertainty in the standard itself, as distinguished from a mere matter of difficulty in applying the standard to the given facts. " 'Drawing the line' is a recurrent difficulty in those fields of the law where differences in degree produce ultimate differences in kind." *Harrison* v. *Schaffner,* 312 U. S. at 583; *Gorin* v. *United States,* 312 U. S. 19.

Differentiation between inherent tendency and clear present danger as applied to constructive contempts is futile.

By leave of Court, briefs of *amici curiae* were filed by *Messrs. Osmond K. Fraenkel* and *A. L. Wirin* on behalf of the American Civil Liberties Union, and its Southern California Branch; and by *Mr. Elisha Hanson* on behalf of the American Newspaper Publishers Association, all urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

These two cases, while growing out of different circumstances and concerning different parties, both relate to the scope of our national constitutional policy safeguarding free speech and a free press. All of the petitioners were adjudged guilty and fined for contempt of court by the Superior Court of Los Angeles County. Their conviction rested upon comments pertaining to pending litigation which were published in newspapers. In the Superior Court, and later in the California Supreme Court, petitioners challenged the state's action as an abridgment, prohibited by the Federal Constitution, of freedom of

speech and of the press; but the Superior Court overruled this contention, and the Supreme Court affirmed.[1] The importance of the constitutional question prompted us to grant certiorari. 309 U. S. 649; 310 U. S. 623.

In brief, the state courts asserted and exercised a power to punish petitioners for publishing their views concerning cases not in all respects finally determined, upon the following chain of reasoning: California is invested with the power and duty to provide an adequate administration of justice; by virtue of this power and duty, it can take appropriate measures for providing fair judicial trials free from coercion or intimidation; included among such appropriate measures is the common law procedure of punishing certain interferences and obstructions through contempt proceedings; this particular measure, devolving upon the courts of California by reason of their creation as courts, includes the power to punish for publications made outside the court room if they tend to interfere with the fair and orderly administration of justice in a pending case; the trial court having found that the publications had such a tendency, and there being substantial evidence to support the finding, the punishments here imposed were an appropriate exercise of the state's power; in so far as these punishments constitute a restriction on liberty of expression, the public interest in that liberty was properly subordinated to the public interest in judicial impartiality and decorum.[2]

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[1] *Bridges* v. *Superior Court*, 14 Cal. 2d 464, 94 P. 2d 983; *Times-Mirror Co.* v. *Superior Court*, 15 Cal. 2d 99, 98 P. 2d 1029. In the *Times-Mirror* case, the affidavits of complaint contained seven counts, each based upon the publication of a different editorial. The Superior Court for Los Angeles County sustained a demurrer to two of the counts, and of the five remaining counts on which conviction rested, the California Supreme Court affirmed as to three, reversed as to two.

[2] See *Times-Mirror Co.* v. *Superior Court*, *supra*, 118, where the following is quoted with approval: "Liberty of the press is subordinate to the independence of the judiciary. . . ."

If the inference of conflict raised by the last clause be correct, the issue before us is of the very gravest moment. For free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them. But even if such a conflict is not actually raised by the question before us, we are still confronted with the delicate problems entailed in passing upon the deliberations of the highest court of a state. This is not, however, solely an issue between state and nation, as it would be if we were called upon to mediate in one of those troublous situations where each claims to be the repository of a particular sovereign power. To be sure, the exercise of power here in question was by a state judge. But in deciding whether or not the sweeping constitutional mandate against any law "abridging the freedom of speech or of the press" forbids it, we are necessarily measuring a power of all American courts, both state and federal, including this one.

I

It is to be noted at once that we have no direction by the legislature of California that publications outside the court room which comment upon a pending case in a specified manner should be punishable. As we said in *Cantwell* v. *Connecticut,* 310 U. S. 296, 307–308, such a "declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations." But as we also said there, the problem is different where "the judgment is based on a common law concept of the most general and undefined nature." *Id.* 308. Cf. *Herndon* v. *Lowry,* 301 U. S. 242, 261–264. For here the legislature of California has not appraised a particular kind of situation and found a specific danger [3] sufficiently

[3] Indeed, the only evidence we have of the California legislature's appraisal indicates approval of a policy directly contrary to that here

imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation. Under such circumstances, this Court has said that "it must necessarily be found, as an original question," that the specified publications involved created "such likelihood of bringing about the substantive evil as to deprive [them] of the constitutional protection." *Gitlow* v. *New York*, 268 U. S. 652, 671.

How much "likelihood" is another question, "a question of proximity and degree" [4] that cannot be completely captured in a formula. In *Schenck* v. *United States*, however, this Court said that there must be a determination of whether or not "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils." We recognize that this statement, however helpful, does not comprehend the whole problem. As Mr. Justice Brandeis said in his concurring opinion in *Whitney* v. *California*, 274 U. S. 357, 374: "This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present."

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followed by the California courts. For § 1209, subsection 13, of the California Code of Civil Procedure (1937 ed.) provides: ". . . no speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings." The California Supreme Court's decision that the statute is invalid under the California constitution is an authoritative determination of that point. But the inferences as to the legislature's appraisal of the danger arise from the enactment, and are therefore unchanged by the subsequent judicial treatment of the statute.

[4] *Schenck* v. *United States*, 249 U. S. 47, 52.

Nevertheless, the "clear and present danger" language [5] of the *Schenck* case has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue. It has been utilized by either a majority or minority of this Court in passing upon the constitutionality of convictions under espionage acts, *Schenck* v. *United States, supra; Abrams* v. *United States,* 250 U. S. 616; under a criminal syndicalism act, *Whitney* v. *California, supra;* under an "anti-insurrection" act, *Herndon* v. *Lowry, supra;* and for breach of the peace at common law, *Cantwell* v. *Connecticut, supra.* And very recently we have also suggested that "clear and present danger" is an appropriate guide in determining the constitutionality of restrictions upon expression where the substantive evil sought to be prevented by the restriction is "destruction of life or property, or invasion of the right of privacy." *Thornhill* v. *Alabama,* 310 U. S. 88, 105.

Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be "substantial," Brandeis, J., concurring in *Whitney* v. *California, supra,* 374; it must be "serious," *id.* 376. And

[5] Restatement of the phrase "clear and present danger" in other terms has been infrequent. Compare, however: ". . . the test to be applied . . . *is not the remote or possible effect.*" Brandeis, J., dissenting in *Schaefer* v. *United States,* 251 U. S. 466, 486. ". . . we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, *unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.*" Holmes, J., dissenting in *Abrams* v. *United States,* 250 U. S. 616, 630; "To justify suppression of free speech *there must be reasonable ground to fear that serious evil will result* if free speech is practiced. *There must be reasonable ground to believe that the danger apprehended is imminent.*" Brandeis, J., concurring in *Whitney* v. *California,* 274 U. S. 357, 376. The italics are ours.

even the expression of "legislative preferences or beliefs" cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Schneider* v. *State,* 308 U. S. 147, 161.

What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment [6] does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.

II

Before analyzing the punished utterances and the circumstances surrounding their publication, we must consider an argument which, if valid, would destroy the relevance of the foregoing discussion to this case. In brief, this argument is that the publications here in question belong to a special category marked off by history,—a category to which the criteria of constitutional immunity from punishment used where other types of utterances are concerned are not applicable. For, the argument runs, the power of judges to punish by contempt out-of-court publications tending to obstruct the orderly and fair administration of justice in a pending case was deeply

[6] "The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state." *Schneider* v. *State,* 308 U. S. 147, 160.

rooted in English common law at the time the Constitution was adopted. That this historical contention is dubious has been persuasively argued elsewhere. Fox, *Contempt of Court, passim, e. g.*, 207. See also Stansbury, *Trial of James H. Peck,* 430. In any event it need not detain us, for to assume that English common law in this field became ours is to deny the generally accepted historical belief that "one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press." [7] Schofield, *Freedom of the Press in the United States,* 9 Publications Amer. Sociol. Soc., 67, 76.

More specifically, it is to forget the environment in which the First Amendment was ratified. In presenting the proposals which were later embodied in the Bill of Rights, James Madison, the leader in the preparation of the First Amendment, said: "Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in that body [Parliament], the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution." 1 Annals of Congress 1789–1790, 434. And Madison elsewhere wrote that "the state of the press . . . under the common law, cannot . . . be the standard of its freedom in the United States." VI Writings of James Madison 1790–1802, 387.

[7] Compare James Buchanan, quoted in Stansbury, Trial of James H. Peck, 434: "At the Revolution we separated ourselves from the mother country, and we have established a republican form of government, securing to the citizens of this country other and greater personal rights, than those enjoyed under the British monarchy."

There are no contrary implications in any part of the history of the period in which the First Amendment was framed and adopted. No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. It cannot be denied, for example, that the religious test oath [8] or the restrictions upon assembly [9] then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing. And since the same unequivocal language is used with respect to freedom of the press, it signifies a similar enlargement of that concept as well.[10] Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary, the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society.

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[8] 16 Geo. II, c. 30. This was not repealed until 1828. 9 Geo. IV, c. 17.

[9] 1 Geo. I, stat. 2, c. 5. Cf. also 36 Geo. III, c. 8, and discussion in Buckle, History of Civilization in England, Vol. I, 351.

[10] Compare VI Writings of James Madison, 1790–1802, 389: "To these observations one fact will be added, which demonstrates that the common law cannot be admitted as the *universal* expositor of American terms, . . . The freedom of conscience and of religion are found in the same instruments which assert the freedom of the press. It will never be admitted that the meaning of the former, in the common law of England, is to limit their meaning in the United States." See also *Near* v. *Minnesota*, 283 U. S. 697, 716–717; *Thornhill* v. *Alabama*, *supra*, 310 U. S. 102.

The implications of subsequent American history confirm such a construction of the First Amendment. To be sure, it occurred no more to the people who lived in the decades following Ratification than it would to us now that the power of courts to protect themselves from disturbances and disorder in the court room by use of contempt proceedings could seriously be challenged as conflicting with constitutionally secured guarantees of liberty. In both state and federal courts, this power has been universally recognized. See *Anderson* v. *Dunn,* 6 Wheat. 204, 227. But attempts to expand it in the post-Ratification years evoked popular reactions that bespeak a feeling of jealous solicitude for freedom of the press. In Pennsylvania and New York, for example, heated controversies arose over alleged abuses in the exercise of the contempt power, which in both places culminated in legislation practically [11] forbidding summary punishment for publications. See Nelles and King, *Contempt by Publication,* 28 Col. L. Rev. 401, 409–422.

In the federal courts, there was the celebrated case of Judge Peck, recently referred to by this Court in *Nye* v. *United States,* 313 U. S. 33, 45. The impeachment proceedings against him, it should be noted, and the strong feelings they engendered, were set in motion by his summary punishment of a lawyer for publishing comment on a case which was on appeal at the time of publication

[11] The New York statute specifically made "the publication of a false, or grossly inaccurate report" of court proceedings punishable by contempt proceedings, however. New York Rev. Stat. 1829, Part III, c. III, tit. 2, art. 1, § 10 (6). The Pennsylvania statute contained no such proviso. It explicitly stated that "all publications out of court . . . concerning any cause pending before any court of this commonwealth, shall not be construed into a contempt of the said court, so as to render the author, printer, publisher, or either of them, liable to attachment and summary punishment for the same." Pa. Acts 1808–1809, c. 78, p. 146.

and which raised the identical issue of several other cases then pending before him. Here again legislation was the outcome, Congress proclaiming in a statute expressly captioned "An Act *declaratory* of the law concerning contempts of court," [12] that the power of federal courts to inflict summary punishment for contempt "shall not be construed to extend to any cases except the misbehaviour of . . . persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice . . ." When recently called upon to interpret this statute, we overruled the earlier decision of this Court in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, in the belief that it improperly enlarged the stated area of summary punishment. *Nye* v. *United States, supra.* Here, as in the *Nye* case, we need not determine whether the statute was intended to demarcate the full power permissible under the Constitution to punish by contempt proceedings. But we do find in the enactment viewed in its historical context, a respect for the prohibitions of the First Amendment, not as mere guides to the formulation of policy, but as commands the breach of which cannot be tolerated.

We are aware that although some states have by statute or decision expressly repudiated the power of judges to punish publications as contempts on a finding of mere tendency to interfere with the orderly administration of justice in a pending case, other states have sanctioned the exercise of such a power. (See Nelles and King, *loc. cit. supra,* 536–562, for a collection and discussion of state cases.) But state power in this field was not tested in this Court for more than a century.[13] Not until 1925, with the

[12] 4 Stat. 487 (1831).

[13] *Patterson* v. *Colorado,* 205 U. S. 454, the only case before this Court during that period in which a state court's power to punish out-of-court publications by contempt was in issue, cannot be taken

decision in *Gitlow* v. *New York, supra,* 268 U. S. 652, did this Court recognize in the Fourteenth Amendment the application to the states of the same standards of freedom of expression as, under the First Amendment, are applicable to the federal government. And this is the first time since 1925 that we have been called upon to determine the constitutionality of a state's exercise of the contempt power in this kind of situation. Now that such a case is before us, we cannot allow the mere existence of other untested state decisions to destroy the historic constitutional meaning of freedom of speech and of the press.

History affords no support for the contention that the criteria applicable under the Constitution to other types of utterances are not applicable, in contempt proceedings, to out-of-court publications pertaining to a pending case.

III

We may appropriately begin our discussion of the judgments below by considering how much, as a practical matter, they would affect liberty of expression. It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion. Here, for example, labor controversies were the topics of some of the publications. Experience shows that the more acute labor controversies are, the more likely

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as a decision squarely on this point. Cf.: "We leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First." *Id.* 462.

it is that in some aspect they will get into court. It is therefore the controversies that command most interest that the decisions below would remove from the arena of public discussion.

No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Yet, it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted. Indeed, perhaps more so, because under a legislative specification of the particular kinds of expressions prohibited and the circumstances under which the prohibitions are to operate, the speaker or publisher might at least have an authoritative guide to the permissible scope of comment, instead of being compelled to act at the peril that judges might find in the utterance a "reasonable tendency" to obstruct justice in a pending case.

This unfocussed threat is, to be sure, limited in time, terminating as it does upon final disposition of the case. But this does not change its censorial quality. An endless series of moratoria on public discussion, even if each were very short, could hardly be dismissed as an insignificant abridgment of freedom of expression. And to assume that each would be short is to overlook the fact that the "pendency" of a case is frequently a matter of months or even years rather than days or weeks.[14]

[14] Compare Nelles and King, *loc. cit. supra*, 549: "While the Sacco-Vanzetti case was in the courts [six years], it was not, we believe, suggested as desirable that public expressions on either side be dealt with as contempts." In public utility rate regulation, to take one of many examples that might be given of a field in which public

For these reasons we are convinced that the judgments below result in a curtailment of expression that cannot be dismissed as insignificant. If they can be justified at all, it must be in terms of some serious substantive evil which they are designed to avert. The substantive evil here sought to be averted has been variously described below.[15] It appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice. The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste,[16] on all public institutions. And an enforced silence, however limited,

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interest is strong and public opinion divided, cases commonly remain "pending" for several years. See *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 88–92; *McCart* v. *Indianapolis Water Co.*, 302 U. S. 419, 435.

[15] Cf.: ". . . said telegram . . . had an inherent tendency . . . *to embarrass and influence the actions and decisions of the judge* before whom said action was pending." *Bridges* v. *Superior Court, supra*, 14 Cal. 2d at p. 471; "The published statement was not only *a criticism of the decision of the court* in an action then pending before said court, but was *a threat* that if an attempt was made to enforce the decision, the ports of the entire Pacific Coast would be tied up." *Id.* 488; " . . . the test . . . is whether it had a reasonable tendency *to interfere with the orderly administration of justice* . . ." *Times-Mirror Co.* v. *Superior Court, supra*, 15 Cal. 2d at 103–104; ". . . the editorial [had a] . . . reasonable tendency . . . *to interfere with* the ordinary administration of justice." *Id.* 110. The italics are ours.

[16] Compare the following statements from letters of Thomas Jefferson as set out in Padover, Democracy, 150–151: "I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. . . . These ordures are rapidly depraving the public taste.

"It is however an evil for which there is no remedy, our liberty depends on the freedom of the press, and that cannot be limited without being lost."

solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

The other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation. The very word "trial" connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases. We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment.

The Los Angeles Times Editorials. The Times-Mirror Company, publisher of the Los Angeles Times, and L. D. Hotchkiss, its managing editor, were cited for contempt for the publication of three editorials. Both found by the trial court to be responsible for one of the editorials, the company and Hotchkiss were each fined $100. The company alone was held responsible for the other two, and was fined $100 more on account of one, and $300 more on account of the other.

The $300 fine presumably marks the most serious offense. The editorial thus distinguished was entitled "Probation for Gorillas?" After vigorously denouncing two members of a labor union who had previously been

found guilty of assaulting nonunion truck drivers, it closes with the observation: "Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill." [17] Judge Scott had previously set a day (about a month after the publication) for passing upon the application of Shannon and Holmes for probation and for pronouncing sentence.

The basis for punishing the publication as contempt was by the trial court said to be its "inherent tendency" and by the Supreme Court its "reasonable tendency" to interfere with the orderly administration of justice in an

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[17] The whole editorial, published in The Los Angeles Times of May 5, 1938, was as follows:

"Two members of Dave Beck's wrecking crew, entertainment committee, goon squad or gorillas, having been convicted in Superior Court of assaulting nonunion truck drivers, have asked for probation. Presumably they will say they are 'first offenders,' or plead that they were merely indulging a playful exuberance when, with slingshots, they fired steel missiles at men whose only offense was wishing to work for a living without paying tribute to the erstwhile boss of Seattle.

"Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals. Men who commit mayhem for wages are not merely violators of the peace and dignity of the State; they are also conspirators against it. The man who burgles because his children are hungry may have some claim on public sympathy. He whose crime is one of impulse may be entitled to lenity. But he who hires out his muscles for the creation of disorder and in aid of a racket is a deliberate foe of organized society and should be penalized accordingly.

"It will teach no lesson to other thugs to put these men on good behavior for a limited time. Their 'duty' would simply be taken over by others like them. If Beck's thugs, however, are made to realize that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill."

action then before a court for consideration. In accordance with what we have said on the "clear and present danger" cases, neither "inherent tendency" nor "reasonable tendency" is enough to justify a restriction of free expression. But even if they were appropriate measures, we should find exaggeration in the use of those phrases to describe the facts here.

From the indications in the record of the position taken by the Los Angeles Times on labor controversies in the past, there could have been little doubt of its attitude toward the probation of Shannon and Holmes. In view of the paper's long-continued militancy in this field, it is inconceivable that any judge in Los Angeles would expect anything but adverse criticism from it in the event probation were granted. Yet such criticism after final disposition of the proceedings would clearly have been privileged. Hence, this editorial, given the most intimidating construction it will bear, did no more than threaten future adverse criticism which was reasonably to be expected anyway in the event of a lenient disposition of the pending case.[18] To regard it, therefore, as in itself of substantial influence upon the course of justice would be to impute to judges a lack of firmness, wisdom, or honor,—which we cannot accept as a major premise. Cf. Holmes, J., dissenting in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 424.

[18] Cf. *Times-Mirror Co.* v. *Superior Court*, *supra*, 15 Cal. 2d 109–110: "The editorial may not have been intended, but it is capable of being construed, as a notice to the trial judge that no leniency should be extended to the convicted men, and, furthermore, that should the court act contrary to the suggestions contained in the editorial, it might well expect adverse criticism in the columns of The Times." Although the foregoing statement was made with respect to another of the editorials, the opinion of the California Supreme Court later said it was applicable to "Probation for Gorillas?" *Id.* 114–115.

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The other two editorials, publication of which was fined below, are set out in the lower margin.[19] With respect to these two editorials, there is no divergence of conclusions among the members of this Court. We are all of the opinion that, upon any fair construction, their possible influence on the course of justice can be dismissed as negligible,

[19] The first of these editorials, entitled "Sit-Strikers Convicted," was published in the Los Angeles Times of December 21, 1937, the day after the jury had returned a verdict that the "sit-strikers" in question were guilty, and the day before the trial judge was to hold court for the purpose of pronouncing sentence, hearing motions for a new trial, and passing upon applications for probation. The editorial follows in its entirety:

"The verdict of a jury finding guilty the twenty-two sit-strikers who led the assault on the Douglas plant last February, will have reverberations up and down the Pacific Coast and in points farther east.

"The verdict means that Los Angeles is still Los Angeles, that the city is aroused to the danger of davebeckism, and that no kind of union terrorism will be permitted here.

"The verdict may have a good deal to do with sending Dave Beck back to Seattle. For, while the United Automobile Workers have no connection with Beck, their tactics and his are identical in motive; and if Beck can be convinced that this kind of warfare is not permitted in this area he will necessarily abandon his dreams of conquest.

"Already the united farmers and ranchers have given Beck a severe setback. The Hynes hay market is still free and it has been made plain that interference with milk deliveries to Los Angeles will not be tolerated.

"Dist. Atty. Fitts pledged his best efforts to prevent and punish union terrorism and racketeering in a strong radio address, and followed it up yesterday with a statement congratulating the jury that convicted the sit-downers and the community on one of the 'most far-reaching verdicts in the history of this country.'

"In this he is correct. It is an important verdict. For the first time since the present cycle of labor disturbances began, union lawlessness has been treated as exactly what it is, an offense against the public peace punishable like any other crime.

"The seizure of property by a militant minority, which arrogated to itself the right of dictating not only to employers, but to other workers

and that the Constitution compels us to set aside the convictions as unpermissible exercises of the state's power. In view of the foregoing discussion of "Probation for Gorillas?", analysis of these editorials and their setting is deemed unnecessary.

The Bridges Telegram. While a motion for a new trial was pending in a case involving a dispute between an

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not in sympathy with it, what should be the terms and conditions of working, has proved to be within the control of local peace officers and authorities.

"Nobody ran off to Washington to get this affair handled. It was attended to right here.

"Government may have broken down in other localities; whole States may have yielded to anarchy. But Los Angeles county stands firm; it has officers who can do their duty and courts and juries which can function.

"So long as that is the case, davebeckism cannot and will not get control here; nor johnlewisism either."

The second of these editorials, entitled "The Fall of an Ex-Queen," was published in The Los Angeles Times of April 14, 1938. Here, too, publication took place after a jury had found the subject of the editorial guilty, but before the trial judge had pronounced sentence. The editorial follows in its entirety:

"Politics as we know it is an essentially selfish business, conducted in the main for personal profit of one kind or another. When it is of the boss type, it is apt to be pretty sordid as well. Success in boss-ship, which is a denial of public rights, necessarily implies a kind of moral obliquity if not an actually illegal one.

"So that it is something of a contradiction of sense if not of terms to express regret that the political talents of Mrs. Helen Werner were not directed to other objectives than those which, in the twilight of her active life, have brought her and her husband to disgrace. If they had been, she would not have been in politics at all and probably would never have been heard of in a public way. Her natural flair was purely political; she would have been miscast in any other sphere of activity.

"Mrs. Werner's primary mistake seems to have been in failing to recognize that her political day was past. For years she enjoyed the unique distinction of being the country's only woman boss—and did she enjoy it! In her heyday she had a finger in every political pie and many were the plums she was able to extract therefrom for those

A. F. of L. union and a C. I. O. union of which Bridges was an officer, he either caused to be published or acquiesced in the publication of a telegram which he had sent to the Secretary of Labor. The telegram referred to the judge's decision as "outrageous"; said that attempted enforcement of it would tie up the port of Los Angeles and involve the entire Pacific Coast; and concluded with the announcement that the C. I. O. union, representing some twelve thousand members, did "not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board." [20]

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who played ball with her. From small beginnings she utilized every opportunity to extend her influence and to put officeholders and promising political material under obligations to her. She became a power in the backstage councils of city and county affairs and from that place of strategic advantage reached out to pull the strings on State and legislative offices as well.

"Those were the days when Mrs. Werner was 'Queen Helen' and it is only fair to say that to her the power was much more important than the perquisites. When the inevitable turning of the political wheel brought new figures to the front and new bosses to the back, she found her grip slipping and it was hard to take. The several cases which in recent years have brought her before the courts to defend her activities seem all examples of an energetic effort to regain and reassert her onetime influence in high places. That it should ultimately have landed her behind the bars as a convicted bribe-seeker is not illogical. But if there is logic in it, the money meant less to Mrs. Werner than the name of still being a political power, one who could do things with public officials that others could not do. To herself at least she was still Queen Helen."

[20] The portions of the telegram published in newspapers of general circulation in San Francisco and Los Angeles on January 24 and 25, 1938, were as follows:

"This decision is outrageous considering I. L. A. has 15 members (in San Pedro) and the International Longshoremen-Warehousemen's Union has 3000. International Longshoremen-Warehousemen Union has petitioned the labor board for certification to represent San Pedro

Apparently Bridges' conviction is not rested at all upon his use of the word "outrageous." The remainder of the telegram fairly construed appears to be a statement that if the court's decree should be enforced there would be a strike. It is not claimed that such a strike would have been in violation of the terms of the decree, nor that in any other way it would have run afoul of the law of California. On no construction, therefore, can the telegram be taken as a threat either by Bridges or the union to follow an illegal course of action.

Moreover, this statement of Bridges was made to the Secretary of Labor, who is charged with official duties in connection with the prevention of strikes. Whatever the cause might be if a strike was threatened or possible the Secretary was entitled to receive all available information. Indeed, the Supreme Court of California recognized that, publication in the newspapers aside, in sending the message to the Secretary, Bridges was exercising the right of petition to a duly accredited representative of the United States Government, a right protected by the First Amendment.[21]

It must be recognized that Bridges was a prominent labor leader speaking at a time when public interest in the particular labor controversy was at its height. The observations we have previously made here upon the time-

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longshoremen with International Longshoremen Association denied representation because it represents only 15 men. Board hearing held; decision now pending. Attempted enforcement of Schmidt decision will tie up port of Los Angeles and involve entire Pacific Coast. International Longshoremen-Warehousemen Union, representing over 11,000 of the 12,000 longshoremen on the Pacific Coast, does not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."

[21] See *Bridges* v. *Superior Court, supra,* 14 Cal. 2d at 493. Cf. *White* v. *Nicholls,* 3 How. 266.

liness and importance of utterances as emphasizing rather than diminishing the value of constitutional protection, and upon the breadth and seriousness of the censorial effects of punishing publications in the manner followed below, are certainly no less applicable to a leading spokesman for labor than to a powerful newspaper taking another point of view.

In looking at the reason advanced in support of the judgment of contempt, we find that here, too, the possibility of causing unfair disposition of a pending case is the major justification asserted. And here again the gist of the offense, according to the court below, is intimidation.

Let us assume that the telegram could be construed as an announcement of Bridges' intention to call a strike, something which, it is admitted, neither the general law of California nor the court's decree prohibited. With an eye on the realities of the situation, we cannot assume that Judge Schmidt was unaware of the possibility of a strike as a consequence of his decision. If he was not intimidated by the facts themselves, we do not believe that the most explicit statement of them could have sidetracked the course of justice. Again, we find exaggeration in the conclusion that the utterance even "tended" to interfere with justice. If there was electricity in the atmosphere, it was generated by the facts; the charge added by the Bridges telegram can be dismissed as negligible. The words of Mr. Justice Holmes, spoken in reference to very different facts, seem entirely applicable here: "I confess that I cannot find in all this or in the evidence in the case anything that would have affected a mind of reasonable fortitude, and still less can I find there anything that obstructed the administration of justice in any sense that I possibly can give to those words." *Toledo Newspaper Co.* v. *United States, supra,* 247 U. S. at 425.

Reversed.

MR. JUSTICE FRANKFURTER, with whom concurred the CHIEF JUSTICE, MR. JUSTICE ROBERTS and MR. JUSTICE BYRNES, dissenting.

Our whole history repels the view that it is an exercise of one of the civil liberties secured by the Bill of Rights for a leader of a large following or for a powerful metropolitan newspaper to attempt to overawe a judge in a matter immediately pending before him. The view of the majority deprives California of means for securing to its citizens justice according to law—means which, since the Union was founded, have been the possession, hitherto unchallenged, of all the states. This sudden break with the uninterrupted course of constitutional history has no constitutional warrant. To find justification for such deprivation of the historic powers of the states is to misconceive the idea of freedom of thought and speech as guaranteed by the Constitution.

Deeming it more important than ever before to enforce civil liberties with a generous outlook, but deeming it no less essential for the assurance of civil liberties that the federal system founded upon the Constitution be maintained, we believe that the careful ambiguities and silences of the majority opinion call for a full exposition of the issues in these cases.

While the immediate question is that of determining the power of the courts of California to deal with attempts to coerce their judgments in litigation immediately before them, the consequence of the Court's ruling today is a denial to the people of the forty-eight states of a right which they have always regarded as essential for the effective exercise of the judicial process, as well as a denial to the Congress of powers which were exercised from the very beginning even by the framers of the Constitution themselves. To be sure, the majority do not in so many words hold that trial by newspapers has constitutional

sanctity. But the atmosphere of their opinion and several of its phrases mean that or they mean nothing. Certainly, the opinion is devoid of any frank recognition of the right of courts to deal with utterances calculated to intimidate the fair course of justice—a right which hitherto all the states have from time to time seen fit to confer upon their courts and which Congress conferred upon the federal courts in the Judiciary Act of 1789. If all that is decided today is that the majority deem the specific interferences with the administration of justice in California so tenuously related to the right of California to keep its courts free from coercion as to constitute a check upon free speech rather than upon impartial justice, it would be well to say so. Matters that involve so deeply the powers of the states, and that put to the test the professions by this Court of self-restraint in nullifying the political powers of state and nation, should not be left clouded.

We are not even vouchsafed reference to the specific provision of the Constitution which renders states powerless to insist upon trial by courts rather than trial by newspapers. So far as the Congress of the United States is concerned, we are referred to the First Amendment. That is specific. But we are here dealing with limitations upon California—with restraints upon the states. To say that the protection of freedom of speech of the First Amendment is absorbed by the Fourteenth does not say enough. Which one of the various limitations upon state power introduced by the Fourteenth Amendment absorbs the First? Some provisions of the Fourteenth Amendment apply only to citizens and one of the petitioners here is an alien; some of its provisions apply only to natural persons, and another petitioner here is a corporation. See *Hague* v. *C. I. O.*, 307 U. S. 496, 514, and cases cited. Only the Due Process Clause assures constitutional protection of civil liberties to aliens and corporations. Corporations

cannot claim for themselves the "liberty" which the Due Process Clause guarantees. That clause protects only their property. *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535. The majority opinion is strangely silent in failing to avow the specific constitutional provision upon which its decision rests.

These are not academic debating points or technical niceties. Those who have gone before us have admonished us "that in a free representative government nothing is more fundamental than the right of the people through their appointed servants to govern themselves in accordance with their own will, except so far as they have restrained themselves by constitutional limits specifically established, and that in our peculiar dual form of government nothing is more fundamental than the full power of the State to order its own affairs and govern its own people, except so far as the Federal Constitution expressly or by fair implication has withdrawn that power. The power of the people of the States to make and alter their laws at pleasure is the greatest security for liberty and justice . . . We are not invested with the jurisdiction to pass upon the expediency, wisdom or justice of the laws of the States as declared by their courts, but only to determine their conformity with the Federal Constitution and the paramount laws enacted pursuant to it. Under the guise of interpreting the Constitution we must take care that we do not import into the discussion our own personal views of what would be wise, just and fitting rules of government to be adopted by a free people and confound them with constitutional limitations." *Twining* v. *New Jersey,* 211 U. S. 78, 106–07.

In a series of opinions as uncompromising as any in its history, this Court has settled that the fullest opportunities for free discussion are "implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment," protected against attempted invasion by

the states. *Palko* v. *Connecticut*, 302 U. S. 319, 324–25. The channels of inquiry and thought must be kept open to new conquests of reason, however odious their expression may be to the prevailing climate of opinion. But liberty, "in each of its phases, has its history and connotation." Whether a particular state action violates "the essential attributes of that liberty" must be judged in the light of the liberty that is invoked and the curtailment that is challenged. *Near* v. *Minnesota*, 283 U. S. 697, 708. For "the recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy. It is then the function of a court to mediate between them, assigning, so far as possible, a proper value to each, and summoning to its aid all the distinctions and analogies that are the tools of the judicial process." *Clark* v. *United States*, 289 U. S. 1, 13.

Free speech is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights. Compare Lincoln's Message to Congress in Special Session, July 4, 1861, 7 Richardson, Messages and Papers of the Presidents, pp. 3221–3232. In the cases before us, the claims on behalf of freedom of speech and of the press encounter claims on behalf of liberties no less precious. California asserts her right to do what she has done as a means of safeguarding her system of justice.

The administration of justice by an impartial judiciary has been basic to our conception of freedom ever since Magna Carta. It is the concern not merely of the immediate litigants. Its assurance is everyone's concern, and it is protected by the liberty guaranteed by the Fourteenth Amendment. That is why this Court has outlawed mob domination of a courtroom, *Moore* v. *Dempsey*, 261 U. S. 86, mental coercion of a defendant, *Chambers* v.

Florida, 309 U. S. 227, a judicial system which does not provide disinterested judges, *Tumey* v. *Ohio,* 273 U. S. 510, and discriminatory selection of jurors, *Pierre* v. *Louisiana,* 306 U. S. 354; *Smith* v. *Texas,* 311 U. S. 128.

A trial is not a "free trade in ideas," nor is the best test of truth in a courtroom "the power of the thought to get itself accepted in the competition of the market." Compare Mr. Justice Holmes in *Abrams* v. *United States,* 250 U. S. 616, 630. A court is a forum with strictly defined limits for discussion. It is circumscribed in the range of its inquiry and in its methods by the Constitution, by laws, and by age-old traditions. Its judges are restrained in their freedom of expression by historic compulsions resting on no other officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and the protection of liberties which, according to the wisdom of the ages, can only be enforced and protected by observing such methods and traditions.

The dependence of society upon an unswerved judiciary is such a commonplace in the history of freedom that the means by which it is maintained are too frequently taken for granted without heed to the conditions which alone make it possible. The rôle of courts of justice in our society has been the theme of statesmen and historians and constitution makers. It is perhaps best expressed in the Massachusetts Declaration of Rights:

"It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit."

The Constitution was not conceived as a doctrinaire document, nor was the Bill of Rights intended as a collection of popular slogans. We are dealing with instruments

of government. We cannot read into the Fourteenth Amendment the freedom of speech and of the press protected by the First Amendment and at the same time read out age-old means employed by states for securing the calm course of justice. The Fourteenth Amendment does not forbid a state to continue the historic process of prohibiting expressions calculated to subvert a specific exercise of judicial power. So to assure the impartial accomplishment of justice is not an abridgment of freedom of speech or freedom of the press, as these phases of liberty have heretofore been conceived even by the stoutest libertarians. In fact, these liberties themselves depend upon an untrammeled judiciary whose passions are not even unconsciously aroused and whose minds are not distorted by extra-judicial considerations.

Of course freedom of speech and of the press are essential to the enlightenment of a free people and in restraining those who wield power. Particularly should this freedom be employed in comment upon the work of courts, who are without many influences ordinarily making for humor and humility, twin antidotes to the corrosion of power. But the Bill of Rights is not self-destructive. Freedom of expression can hardly carry implications that nullify the guarantees of impartial trials. And since courts are the ultimate resorts for vindicating the Bill of Rights, a state may surely authorize appropriate historic means to assure that the process for such vindication be not wrenched from its rational tracks into the more primitive mêlée of passion and pressure. The need is great that courts be criticized, but just as great that they be allowed to do their duty.

The "liberty" secured by the Fourteenth Amendment summarizes the experience of history. And the power exerted by the courts of California is deeply rooted in the system of administering justice evolved by liberty-loving English-speaking peoples. From the earliest days of the

English courts, they have encountered obstructions to doing that for which they exist, namely, to administer justice impartially and solely with reference to what comes before them. These interferences were of diverse kinds. But they were all covered by the infelicitous phrase "contempt of court," and the means for dealing with them is historically known as the power of courts to punish for contempt. As is true of many aspects of our legal institutions, the settled doctrines concerning the mode of procedure for exercising the power of contempt became established on dubious historical authority. Exact legal scholarship has controverted much pertaining to the origin of summary proceedings for contempt. See Sir John Fox, The History of Contempt of Court, *passim*. But there is no doubt that, since the early eighteenth century, the power to punish for contempt for intrusions into the living process of adjudication has been an unquestioned characteristic of English courts and of the courts of this country.

The judicatures of the English-speaking world, including the courts of the United States and of the forty-eight states, have from time to time recognized and exercised the power now challenged. (For partial lists of cases, see Nelles and King, Contempt by Publication in the United States, 28 Col. L. Rev. 401, 525, 554; Sullivan, Contempts by Publication, pp. 185 *et seq.*) A declaratory formulation of the common law was written into the Judiciary Act of 1789 (§ 17, 1 Stat. 73, 83) by Oliver Ellsworth, one of the framers of the Constitution, later to become Chief Justice; the power was early recognized as incidental to the very existence of courts in a succession of opinions in this Court (*United States* v. *Hudson*, 7 Cranch 32; *Anderson* v. *Dunn*, 6 Wheat. 204, 227; *Ex parte Kearney*, 7 Wheat. 38); it was expounded and supported by the great Commentaries that so largely influenced the shaping of our law in the late eighteenth and early nineteenth cen-

turies, those of Blackstone, Kent and Story; its historic continuity withstood attack against state action under the Due Process Clause, now again invoked, *Eilenbecker* v. *Plymouth County*, 134 U. S. 31; and see *Ex parte Robinson*, 19 Wall. 505; *Ex parte Terry*, 128 U. S. 289; *Savin, Petitioner*, 131 U. S. 267.[1]

[1] "Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." *United States* v. *Hudson*, 7 Cranch 32, 34 (1812).

"That 'the safety of the people is the supreme law,' not only comports with, but is indispensable to, the exercise of those powers in their public functionaries, without which that safety cannot be guarded. On this principle it is, that Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.

"It is true, that the Courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power without the aid of the statute, or not, in cases, if such should occur, to which such statute provision may not extend; on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution, or a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment." *Anderson* v. *Dunn*, 6 Wheat. 204, 227–28 (1821).

"The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." *Ex parte Robinson*, 19 Wall. 505, 510 (1874).

"The act of 1789 did not define what were contempts of the authority of the courts of the United States, in any cause or hearing before them,

As in the exercise of all power, it was abused. Some English judges extended their authority for checking interferences with judicial business actually in hand, to "lay by the heel" those responsible for "scandalizing the court," that is, bringing it into general disrepute. Such foolishness has long since been disavowed in England and has never found lodgment here. But even the technical power of punishing interference with the court's business is susceptible of abuse. As early as 1809, Pennsylvania restricted the power to inflict summary punishment for contempts to a closely defined class of misconduct, and provided the ordinary criminal procedure for other forms of interferences with a pending cause. 1808–09 Pa. Acts, c. 78, p. 146.[2] The flagrant case of Judge Peck[3] led Con-

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nor did it prescribe any special procedure for determining a matter of contempt. Under that statute the question whether particular acts constituted a contempt, as well as the mode of proceeding against the offender, was left to be determined according to such established rules and principles of the common law as were applicable to our situation." *Savin, Petitioner,* 131 U. S. 267, 275–76 (1889).

[2] For the history leading up to the Pennsylvania legislation, see *Respublica* v. *Oswald,* 1 Dall. 319 (1788), particularly note beginning at p. 329; *Respublica* v. *Passmore,* 3 Yeates (Pa.) 441; Hamilton, Report of the Trial and Acquittal of Justices of the Supreme Court of Pennsylvania (1805). Cf. *Hollingsworth* v. *Duane,* Wall. Sr. 77, Fed. Cas. No. 6616; *United States* v. *Duane,* Wall. Sr. 102, Fed. Cas. No. 14997.

[3] The charge against Judge Peck was that he punished counsel for contempt after the final decree of the particular litigation had been rendered and the necessary steps for an appeal had been taken, and after the judge had published his opinion in a newspaper and plaintiff in reply had submitted to the public "a concise statement of some of the principal errors into which your petitioner [the accused counsel] had fallen." Stansbury, Report of the Trial of James H. Peck (1833). In view of their immediate professional responsibility, the eminent lawyers who had charge of the impeachment proceedings against Judge Peck would naturally take the least tolerant view of the power of courts to punish for contempt. Yet all the managers of the House of Representatives (James Buchanan of Pennsylvania,

gress to pass the Act of March 2, 1831, 4 Stat. 487, 28 U. S. C. § 385, the scope of which we recently considered. *Nye* v. *United States,* 313 U. S. 33. A number of states copied the federal statute. It would be pedantic to trace the course of legislation and of adjudication on this subject in our half-hundred jurisdictions. Suffice it to say that the hitherto unchallenged power of American states to clothe their courts with authority to punish for contempt was thus summarized only recently by Mr. Chief Justice Hughes in the leading case vindicating the liberty of the press against state action: "There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions." *Near* v. *Minnesota,* 283 U. S. 697, 715.[4]

George E. McDuffie of South Carolina, Ambrose Spencer and Henry Storrs of New York, Charles E. Wickliffe of Kentucky) acknowledged the historic power to punish interferences calculated to obstruct the exercise of the judicial function in a pending cause. They did so substantially in the terms now here challenged. *Ibid.,* pp. 91, 291, 293, 382, 400. The following from Mr. Storrs' argument is a fair sample:

"The law of contempts, when confined to the protection of the courts in their proper constitutional action and duties, and to the punishment of every direct or indirect interference with the exercise of their powers and the protection of those who are concerned in them as parties, jurors, witnesses and officers of justice in aid of the administration of their functions, was too well established and too well sustained by principle as well as positive law, to be doubted or disturbed; and, confined to its proper limits, admitted of all reasonable certainty in its definitions of crime. But if extended to the case of general libel, there was no security for personal liberty but the discretion or feeling of a judge." *Ibid.,* p. 400.

[4] It is relevant to add that this expressed the view of Mr. Justice Holmes and Mr. Justice Brandeis whose opinions have had such a powerful influence in pressing the Due Process Clause to the service of freedom of speech and of the press. In two earlier cases of summary punishment for contempt they strongly dissented because they found that the limits set by the Act of 1831 had been exceeded. *Toledo News-*

It is trifling with great issues to suggest that the question before us is whether eighteenth-century restraints upon the freedom of the press should now be revived. The question is rather whether nineteenth- and twentieth-century American institutions should be abrogated by judicial fiat.

That a state may, under appropriate circumstances, prevent interference with specific exercises of the process of impartial adjudication does not mean that its people lose the right to condemn decisions or the judges who render them. Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Just because the holders of judicial office are identified with the interests of justice they may forget their common human frailties and fallibilities. There have sometimes been martinets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt.[5] "A

paper Co. v. *United States,* 247 U. S. 402, and *Craig* v. *Hecht,* 263 U. S. 255. But in neither case did they suggest any constitutional difficulty in the exercise of the contempt power arising from the prohibition of the First Amendment.

[5] See the Lincoln Day, 1898, address of Mr. Justice Brewer, *Government by Injunction,* 15 Nat. Corp. Rep. 848, 849: "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death."

man cannot be summarily laid by the heels because his words may make public feeling more unfavorable in case the judge should be asked to act at some later date, any more than he can for exciting public feeling against the judge for what he already has done." Mr. Justice Holmes in *Craig* v. *Hecht,* 263 U. S. 255, 281–82. But the Constitution does not bar a state from acting on the theory of our system of justice, that the "conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson* v. *Colorado,* 205 U. S. 454, 462. The theory of our system of justice as thus stated for the Court by Mr. Justice Holmes has never been questioned by any member of the Court. It was questioned neither by Mr. Justice Harlan nor by Mr. Justice Brewer in their dissents in the *Patterson* case. The differences in that case concerned the question whether "there is to be found in the Fourteenth Amendment a prohibition . . . similar to that in the First," and, if so, what the scope of that protection is. The first question was settled in the affirmative by a series of cases beginning with *Gitlow* v. *New York,* 268 U. S. 652. And that the scope of the First Amendment was broader than was intimated in the opinion in the *Patterson* case, was later recognized by Mr. Justice Holmes, speaking for the Court, in *Schenck* v. *United States,* 249 U. S. 47. But that the conventional power to punish for contempt is not a censorship in advance but a punishment for past conduct and, as such, like prosecution for a criminal libel, is not offensive either to the First or to the Fourteenth Amendments, has never been doubted throughout this Court's history.

This conception of justice, the product of a long and arduous effort in the history of freedom, is one of the greatest achievements of civilization, and is not less to be cherished at a time when it is repudiated and derided by

powerful régimes. "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers* v. *Baltimore & Ohio R. Co.*, 207 U. S. 142, 148. This has nothing to do with curtailing expression of opinion, be it political, economic, or religious, that may be offensive to orthodox views. It has to do with the power of the state to discharge an indispensable function of civilized society, that of adjudicating controversies between its citizens and between citizens and the state through legal tribunals in accordance with their historic procedures. Courts and judges must take their share of the gains and pains of discussion which is unfettered except by laws of libel, by self-restraint, and by good taste. Winds of doctrine should freely blow for the promotion of good and the correction of evil. Nor should restrictions be permitted that cramp the feeling of freedom in the use of tongue or pen regardless of the temper or the truth of what may be uttered.

Comment however forthright is one thing. Intimidation with respect to specific matters still in judicial suspense, quite another. See Laski, Procedure for Constructive Contempt in England, 41 Harv. L. Rev. 1031, 1034; Goodhart, Newspapers and Contempt in English Law, 48 Harv. L. Rev. 885. A publication intended to teach the judge a lesson, or to vent spleen, or to discredit him, or to influence him in his future conduct, would not justify exercise of the contempt power. Compare Judge Learned Hand in *Ex parte Craig*, 282 F. 138, 160–61. It must refer to a matter under consideration and constitute in effect a threat to its impartial disposition. It must be calculated to create an atmospheric pressure incompatible with rational, impartial adjudication. But to interfere with justice it need not succeed. As with other offenses, the state should be able to proscribe attempts that fail because of the danger that attempts may succeed. The pur-

pose, it will do no harm to repeat, is not to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed. The purpose is to protect immediate litigants and the public from the mischievous danger of an unfree or coerced tribunal. The power should be invoked only where the adjudicatory process may be hampered or hindered in its calm, detached, and fearless discharge of its duty on the basis of what has been submitted in court. The belief that decisions are so reached is the source of the confidence on which law ultimately rests.

It will not do to argue that a state cannot permit its judges to resist coercive interference with their work in hand because other officials of government must endure such obstructions. In such matters "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349. Presidents and governors and legislators are political officials traditionally subject to political influence and the rough and tumble of the hustings, who have open to them traditional means of self-defense. In a very immediate sense, legislators and executives express the popular will. But judges do not express the popular will in any ordinary meaning of the term. The limited power to punish for contempt which is here involved wholly rejects any assumption that judges are superior to other officials. They merely exercise a function historically and intrinsically different. From that difference is drawn the power which has behind it the authority and the wisdom of our whole history. Because the function of judges and that of other officials in special situations may approach similarity, hard cases can be put which logically may contradict the special quality of the judicial process. "But the provisions of the Constitution are not mathematical formulas having their essence in their form;

they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." *Gompers* v. *United States,* 233 U. S. 604, 610.

We are charged here with the duty, always delicate, of sitting in judgment on state power. We must be fastidiously careful not to make our private views the measure of constitutional authority. To be sure, we are here concerned with an appeal to the great liberties which the Constitution assures to all our people, even against state denial. When a substantial claim of an abridgment of these liberties is advanced, the presumption of validity that belongs to an exercise of state power must not be allowed to impair such a liberty or to check our close examination of the merits of the controversy. But the utmost protection to be accorded to freedom of speech and of the press cannot displace our duty to give due regard also to the state's power to deal with what may essentially be local situations.

Because freedom of public expression alone assures the unfolding of truth, it is indispensable to the democratic process. But even that freedom is not an absolute and is not predetermined. By a doctrinaire overstatement of its scope and by giving it an illusory absolute appearance, there is danger of thwarting the free choice and the responsibility of exercising it which are basic to a democratic society. While we are reviewing a judgment of the California Supreme Court and not an act of its legislature or the voice of the people of California formally expressed in its constitution, we are in fact passing judgment on "the power of the State as a whole." *Rippey* v. *Texas,* 193 U. S. 504, 509; *Skiriotes* v. *Florida,* 313 U. S. 69, 79; *United Gas Co.* v. *Texas,* 303 U. S. 123, 142; *Missouri* v. *Dockery,* 191 U. S. 165, 171; *Iowa-Des Moines Bank* v. *Bennett,* 284 U. S. 239, 244.

By the constitution of California, as authoritatively construed by its Supreme Court and therefore as binding upon this Court as though ratified by all the voters of California, the citizens of that state have chosen to place in its courts the power, as we have defined it, to insure impartial justice. If the citizens of California have other desires, if they want to permit the free play of modern publicity in connection with pending litigation, it is within their easy power to say so and to have their way. They have ready means of amending their constitution and they have frequently made use of them. We are, after all, sitting over three thousand miles away from a great state, without intimate knowledge of its habits and its needs, in a matter which does not cut across the affirmative powers of the national government. Some play of policy must be left to the states in the task of accommodating individual rights and the overriding public well-being which makes those rights possible. How are we to know whether an easy-going or stiffer view of what affects the actual administration of justice is appropriate to local circumstances? How are we to say that California has no right to model its judiciary upon the qualities and standards attained by the English administration of justice, and to use means deemed appropriate to that end by English courts.[6] It is surely an arbitrary judgment to say that the

[6] "It is most important that the administration of justice in this country should not be hampered as it is hampered in some other countries, and it is not enlarging the jurisdiction of this court—it is refusing to narrow the jurisdiction of this court—when we say that we are determined while we are here to do nothing to substitute in this country trial by newspaper for trial by jury; and those who attempt to introduce that system in this country, even in its first beginnings, must be prepared to suffer for it. Probably the proper punishment—and it is one which this court may yet have to award if the punishment we are about to award proves insufficient—will be imprisonment in cases of this kind. There is no question about that, because we cannot shut our eyes to the fact that newspapers are owned by

Due Process Clause denies California that right. For respect for "the liberty of the subject," though not explicitly written into a constitution, is so deeply embedded in the very texture of English feeling and conscience [7] that it survives, as the pages of Hansard abundantly prove, the exigencies of the life and death struggle of the British people. See, *e. g.*, Carr, Concerning English Administrative Law, c. 3 ("Crisis Legislation").

The rule of law applied in these cases by the California court forbade publications having "a reasonable tendency to interfere with the orderly administration of justice in pending actions." To deny that this age-old formulation of the prohibition against interference with dispassionate adjudication is properly confined to the substantive evil is not only to turn one's back on history but also to indulge in an idle play on words, unworthy of constitutional adjudication. It was urged before us that the words "reasonable tendency" had a fatal pervasiveness, and that their replacement by "clear and present danger" was required to state a constitutionally permissible rule of law. The Constitution, as we have recently had occasion to remark, is not a formulary. *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444. Nor does it require displacement of an historic test by a phrase which first gained currency on March 3, 1919. *Schenck* v. *United States*, 249 U. S. 47. Our duty is not ended with the recita-

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wealthy people, and it may even happen that they will take the chances of the fine and pay it cheerfully and will not feel that they have then paid too much for the advertisement." *Rex* v. *Clarke*, 103 L. T. R. (N. S.) 636, 640.

[7] Thus, in England, the "third degree" never gained a foothold, and its emergence was impressively resisted long before it was outlawed here. See 217 Parl. Deb. (Commons) cols. 1303 *et seq.* (May 17, 1928); Inquiry in regard to the Interrogation by the Police of Miss Savidge, Cmd. 3147 (1928); Report of the Royal Commission on Police Powers and Procedure, Cmd. 3297 (1929).

tion of phrases that are the short-hand of a complicated historic process. The phrase "clear and present danger" is merely a justification for curbing utterance where that is warranted by the substantive evil to be prevented. The phrase itself is an expression of tendency and not of accomplishment, and the literary difference between it and "reasonable tendency" is not of constitutional dimension.

Here the substantive evil to be eliminated is interference with impartial adjudication. To determine what interferences may be made the basis for contempt tenders precisely the same kind of issues as that to which the "clear and present danger" test gives rise. "It is a question of proximity and degree." *Schenck* v. *United States, supra* at 52. And this, according to Mr. Justice Brandeis "is a rule of reason . . . Like many other rules for human conduct, it can be applied correctly only by the exercise of good judgment." *Schaefer* v. *United States,* 251 U. S. 466, 482–83. Has California's judgment here undermined liberties protected by the Constitution? In common with other questions of degree, this is to be solved not by short-hand phrases but by consideration of the circumstances of the particular case. One cannot yell "Fire" in a crowded theater; police officers cannot turn their questioning into an instrument of mental oppression. *Chambers* v. *Florida,* 309 U. S. 227.

If a rule of state law is not confined to the evil which may be dealt with but places an indiscriminate ban on public expression that operates as an overhanging threat to free discussion, it must fall without regard to the facts of the particular case. This is true whether the rule of law be declared in a statute or in a decision of a court. *Thornhill* v. *Alabama,* 310 U. S. 88; *Cantwell* v. *Connecticut,* 310 U. S. 296. In the cases before us there was no blanket or dragnet prohibition of utterance affecting courts. Freedom to criticize their work, to assail generally

the institution of courts, to report and comment on matters in litigation but not to subvert the process of deciding—all this freedom was respected. Only the state's interest in calm and orderly decisions, which represented also the constitutional right of the parties, led it to condemn coercive utterances directed towards a pending proceeding. California, speaking through its courts, acted because of their conclusion that such utterances undermined the conditions necessary for fair adjudication.

It is suggested that threats, by discussion, to untrammeled decisions by courts are the most natural expressions when public feeling runs highest. But it does not follow that states are left powerless to prevent their courts from being subverted by outside pressure when the need for impartiality and fair proceeding is greatest. To say that the framers of the Constitution sanctified veiled violence through coercive speech directed against those charged with adjudication is not merely to make violence an ingredient of justice; it mocks the very ideal of justice by respecting its forms while stultifying its uncontaminated exercise.

We turn to the specific cases before us:

The earliest editorial involved in No. 3, "Sit-strikers Convicted," commented upon a case the day after a jury had returned a verdict and the day before the trial judge was to pronounce sentence and hear motions for a new trial and applications for probation. On its face the editorial merely expressed exulting approval of the verdict, a completed action of the court, and there is nothing in the record to give it additional significance. The same is true of the second editorial, "Fall of an Ex-Queen," which luridly draws a moral from a verdict of guilty in a sordid trial and which was published eight days prior to the day set for imposing sentence. In both instances imposition of sentences was immediately pending at the time of publication, but in neither case was there any declaration,

direct or sly, in regard to this. As the special guardian of the Bill of Rights, this Court is under the heaviest responsibility to safeguard the liberties guaranteed from any encroachment, however astutely disguised. The Due Process Clause of the Fourteenth Amendment protects the right to comment on a judicial proceeding, so long as this is not done in a manner interfering with the impartial disposition of a litigation. There is no indication that more was done in these editorials; they were not close threats to the judicial function which a state should be able to restrain. We agree that the judgment of the state court in this regard should not stand.

"Probation for Gorillas?", the third editorial, is a different matter. On April 22, 1938, a Los Angeles jury found two defendants guilty of assault with a deadly weapon and of a conspiracy to violate another section of the penal code. On May 2nd, the defendants applied for probation and the trial judge on the same day set June 7th as the day for disposing of this application and for sentencing the defendants. In the Los Angeles Times for May 5th appeared the following editorial entitled "Probation for Gorillas?":

"Two members of Dave Beck's wrecking crew, entertainment committee, goon squad or gorillas, having been convicted in Superior Court of assaulting nonunion truck drivers, have asked for probation. Presumably they will say they are 'first offenders,' or plead that they were merely indulging a playful exuberance when, with slingshots, they fired steel missiles at men whose only offense was wishing to work for a living without paying tribute to the erstwhile boss of Seattle.

"Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals. Men who commit mayhem for wages are not merely violators of the peace and dignity of the State; they are also conspirators against it. The man who burgles because his

children are hungry may have some claim on public sympathy. He whose crime is one of impulse may be entitled to lenity. But he who hires out his muscles for the creation of disorder and in aid of a racket is a deliberate foe of organized society and should be penalized accordingly.

"It will teach no lesson to other thugs to put these men on good behavior for a limited time. Their 'duty' would simply be taken over by others like them. If Beck's thugs, however, are made to realize that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill."

This editorial was published three days after the trial judge had fixed the time for sentencing and for passing on an application for probation, and a month prior to the date set. It consisted of a sustained attack on the defendants, with an explicit demand of the judge that they be denied probation and be sent "to the jute mill." This meant, in California idiom, that in the exercise of his discretion the judge should treat the offense as a felony, with all its dire consequences, and not as a misdemeanor. Under the California Penal Code the trial judge had wide discretion in sentencing the defendants: he could sentence them to the county jail for one year or less, or to the state penitentiary for two years. The editorial demanded that he take the latter alternative and send the defendants to the "jute mill" of the state penitentiary. A powerful newspaper admonished a judge, who within a year would have to secure popular approval if he desired continuance in office, that failure to comply with its demands would be "a serious mistake." Clearly, the state court was justified in treating this as a threat to impartial adjudication. It is

too naïve to suggest that the editorial was written with a feeling of impotence and an intention to utter idle words. The publication of the editorial was hardly an exercise in futility. If it is true of juries it is not wholly untrue of judges that they too may be "impregnated by the environing atmosphere." Mr. Justice Holmes in *Frank* v. *Mangum,* 237 U. S. 309, 349. California should not be denied the right to free its courts from such coercive, extraneous influences; it can thus assure its citizens of their constitutional right of a fair trial. Here there was a real and substantial manifestation of an endeavor to exert outside influence. A powerful newspaper brought its full coercive power to bear in demanding a particular sentence. If such sentence had been imposed, readers might assume that the court had been influenced in its action; if lesser punishment had been imposed, at least a portion of the community might be stirred to resentment. It cannot be denied that even a judge may be affected by such a quandary. We cannot say that the state court was out of bounds in concluding that such conduct offends the free course of justice. Comment after the imposition of sentence—criticism, however unrestrained, of its severity or lenience or disparity, cf. *Ambard* v. *Attorney General for Trinidad and Tobago,* [1936] A. C. 322,—is an exercise of the right of free discussion. But to deny the states power to check a serious attempt at dictating, from without, the sentence to be imposed in a pending case, is to deny the right to impartial justice as it was cherished by the founders of the Republic and by the framers of the Fourteenth Amendment. It would erect into a constitutional right, opportunities for abuse of utterance interfering with the dispassionate exercise of the judicial function. See *Rex* v. *Daily Mail,* [1921] 2 K. B. 733, 749; *Attorney General* v. *Tonks,* [1939] N. Z. L. R. 533.

In *No. 1,* Harry R. Bridges challenges a judgment by the Superior Court of California fining him $125 for con-

tempt. He was president of the International Longshoremen's and Warehousemen's Union, an affiliate of the Committee for Industrial Organization, and also West Coast director for the C. I. O. The I. L. W. U. was largely composed of men who had withdrawn from the International Longshoremen's Association, an affiliate of the American Federation of Labor. In the fall of 1937 the rival longshoremen's unions were struggling for control of a local in San Pedro Harbor. The officers of this local, carrying most of its members with them, sought to transfer the allegiance of the local to I. L. W. U. Thereupon, longshoremen remaining in I. L. A. brought suit in the Superior Court of Los Angeles county against the local and its officers. On January 21, 1938, Judge Schmidt, sitting in the Superior Court, enjoined the officers from working on behalf of I. L. W. U. and appointed a receiver to conduct the affairs of the local as an affiliate of the A. F. of L., by taking charge of the outstanding bargaining agreements of the local and of its hiring hall, which is the physical mainstay of such a union. Judge Schmidt promptly stayed enforcement of his decree, and on January 24th the defendants in the injunction suit moved for a new trial and for vacation of the judgment. In view of its local setting, the case aroused great public interest. The waterfront situation on the Pacific Coast was also watched by the United States Department of Labor, and Bridges had been in communication with the Secretary of Labor concerning the difficulties. On the same day that the motion for new trial was filed, Bridges sent the Secretary the following wire concerning Judge Schmidt's decree:

"This decision is outrageous considering I. L. A. has 15 members (in San Pedro) and the International Longshoremen-Warehousemen's Union has 3,000. International Longshoremen-Warehousemen Union has petitioned the Labor Board for certification to represent San

Pedro longshoremen with International Longshoremen Association denied representation because it represents only 15 men. Board hearing held; decision now pending. Attempted enforcement of Schmidt decision will tie up port of Los Angeles and involve entire Pacific Coast. International Longshoremen-Warehousemen Union, representing over 11,000 of the 12,000 longshoremen on the Pacific Coast, does not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."

This telegram duly found its way into the metropolitan newspapers of California. Bridges' responsibility for its publication is clear. His publication of the telegram in the Los Angeles and San Francisco papers is the basis of Bridges' conviction for contempt.

The publication of the telegram was regarded by the state supreme court as "a threat that if an attempt was made to enforce the decision, the ports of the entire Pacific Coast would be tied up" and "a direct challenge to the court that 11,000 longshoremen on the Pacific Coast would not abide by its decision." This occurred immediately after counsel had moved to set aside the judgment which was criticized, so unquestionably there was a threat to litigation obviously alive. It would be inadmissible dogmatism for us to say that in the context of the immediate case—the issues at stake, the environment in which the judge, the petitioner and the community were moving, the publication here made, at the time and in the manner it was made—this could not have dominated the mind of the judge before whom the matter was pending. Here too the state court's judgment should not be overturned.

The fact that the communication to the Secretary of Labor may have been privileged does not constitutionally protect whatever extraneous use may have been made

of the communication. It is said that the possibility of a strike, in case of an adverse ruling, must in any event have suggested itself to the private thoughts of a sophisticated judge. Therefore the publication of the Bridges telegram, we are told, merely gave that possibility public expression. To afford constitutional shelter for a definite attempt at coercing a court into a favorable decision because of the contingencies of frustration to which all judicial action is subject, is to hold, in effect, that the Constitution subordinates the judicial settlement of conflicts to the unfettered indulgence of violent speech. The mere fact that after an unfavorable decision men may, upon full consideration of their responsibilities as well as their rights, engage in a strike or a lockout, is a poor reason for denying a state the power to protect its courts from being bludgeoned by serious threats while a decision is hanging in the judicial balance. A vague, undetermined possibility that a decision of a court may lead to a serious manifestation of protest is one thing. The impact of a definite threat of action to prevent a decision is a wholly different matter. To deny such realities is to stultify law. Rights must be judged in their context and not *in vacuo*. Compare *Aikens* v. *Wisconsin*, 195 U. S. 194, 205; *Badders* v. *United States*, 240 U. S. 391, 393–94; *American Bank & Trust Co.* v. *Federal Bank*, 256 U. S. 350, 358. "All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community." Mr. Justice Brandeis in *Duplex Co.* v. *Deering*, 254 U. S. 443, 488.

The question concerning the narrow power we recognize always is—was there a real and substantial threat to the impartial decision by a court of a case actively pending before it? The threat must be close and direct; it must be directed towards a particular litigation. The litigation must be immediately pending. When a case is pending is

not a technical, lawyer's problem, but is to be determined by the substantial realities of the specific situation.[8] Danger of unbridled exercise of judicial power because of immunity from speech which is coercing is a figment of groundless fears. In addition to the internal censor of conscience, professional standards, the judgment of fellow judges and the bar, the popular judgment exercised in elections, the power of appellate courts, including this Court, there is the corrective power of the press and of public comment free to assert itself fully immediately upon completion of judicial conduct. Because courts, like other agencies, may at times exercise power arbitrarily and have done so, resort to this Court is open to determine whether, under the guise of protecting impartiality in specific litigation, encroachments have been made upon the liberties of speech and press. But instances of past arbitrariness afford no justification for reversing the course of history and denying the states power to continue to use time-honored safeguards to assure unbullied adjudications. All experience justifies the states in acting upon the conviction that a wrong decision in a particular case may best be forestalled or corrected by more rational means than coercive intrusion from outside the judicial process.

Since courts, although representing the law, *United States* v. *Shipp*, 203 U. S. 563, 574, are also sitting in judgment, as it were, on their own function in exercising their power to punish for contempt, it should be used only in flagrant cases and with the utmost forbearance. It is al-

[8] The present cases are very different from the situation that evoked dissent in *Craig* v. *Hecht*, 263 U. S. 255, 281: "It is not enough that somebody may hereafter move to have something done. There was nothing then awaiting decision when the petitioner's letter was published." And see *Glasgow Corporation* v. *Hedderwick & Sons* (1918) Sess. Cas. 639. Compare *State ex rel. Pulitzer Pub. Co.* v. *Coleman*, 152 S. W. 2d 640 (Mo. 1941).

ways better to err on the side of tolerance and even of disdainful indifference.

No objections were made before us to the procedure by which the charges of contempt were tried. But it is proper to point out that neither case was tried by a judge who had participated in the trials to which the publications referred. Compare *Cooke* v. *United States,* 267 U. S. 517, 539. So it is clear that a disinterested tribunal was furnished, and since the Constitution does not require a state to furnish jury trials, *Maxwell* v. *Dow,* 176 U. S. 581; *Palko* v. *Connecticut,* 302 U. S. 319, 324, and states have discretion in fashioning criminal remedies, *Tigner* v. *Texas,* 310 U. S. 141, the situation here is the same as though a state had made it a crime to publish utterance having a "reasonable tendency to interfere with the orderly administration of justice in pending actions," and not dissimilar from what the United States has done in § 135 of the Criminal Code.[9]

[9] 35 Stat. 1113, 18 U. S. C. § 241. "Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both."

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PIERCE *v.* UNITED STATES.

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

No. 36. Argued November 14, 17, 1941.—Decided December 8, 1941.

Fraudulently impersonating an officer or employee of a corporation owned or controlled by the United States was not an offense under § 32 of the Criminal Code, prior to its amendment by the Act of February 28, 1938. P. 310.

115 F. 2d 399, reversed.

CERTIORARI, 313 U. S. 552, to review the affirmance of a conviction under an indictment for violation of § 32 of the Criminal Code.

Mr. L. E. Gwinn for petitioner.

Assistant Attorney General Berge, with whom *Assistant Solicitor General Fahy* and *Mr. Oscar Provost* were on the brief, for the United States.

MR. JUSTICE REED delivered the opinion of the Court.

Petitioner was convicted under an indictment charging violation of § 32 of the Criminal Code. At the time of the alleged offense it read as follows:

"Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any Department, or any officer of the Government thereof, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any Department, or any officer of the Government thereof, any money, paper, document, or other valuable thing, shall be fined not more than one thousand dollars, or imprisoned not more than three years, or both." 35 Stat. 1095; 18 U. S. C. § 76.

The conviction was affirmed, 115 F. 2d 399, and certiorari granted, 313 U. S. 552, on account of petitioner's heretofore undecided contention of manifest error in the trial court's refusal of an instruction that the statute did not include within its scope false personation of officers or employees of a government corporation, i. e., the Tennessee Valley Authority (TVA).

The section has been upon the statute books since April 18, 1884. 23 Stat. 11. It was passed because of reports to Congress, by the Pension Office, of fraudulent practices affecting pension claimants. There is nothing in the legislative history which throws any light on the problem posed.[1] Nor do we find any fruitful comments in the various reports preliminary to the enactment of the Criminal Code, which adopted the original language without significant change.[2] Subsequently to the acts forming the basis of the respective counts of the indictment, the section was amended to include pretending to be an officer or employee "of any corporation owned or controlled by the United States." Act of Feb. 28, 1938, c. 37, 52 Stat. 82.

The counts of the indictment which were submitted to the jury charged the defendant with falsely pretending to be an officer "of the United States, to wit, [a representative] of the Government selling T.V.A Units" then and there taking upon himself to act as such officer with intent to defraud separate individuals named in the counts or with obtaining from the named individuals stated sums of money with intent to defraud. The indictment states crimes under the statute.

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[1] 15 Cong. Rec. 1285, 2256, 2627, 2676, 48th Cong., 1st Sess.

[2] Report of the Special Joint Committee on Revision of the Laws, Sen. Rep. No. 10, 60th Cong., 1st Sess., Part 1, p. 40; Final Report of the Commission to Revise and Codify the Laws of the United States, Vol. 1, p. 101, Vol. 2, p. 1776 (1906); Report of the Commission to Revise and Codify the Criminal Laws of the United States, Sen. Doc. No. 68, 57th Cong., 1st Sess., Part 2, pp. IX and 12, § 37.

On the trial it was stipulated that petitioner was not at any time an agent, employee or representative of the Government, or any department thereof, or of the TVA. It was shown that TVA was a government corporation and that it issued no stock or units for sale. The evidence further showed petitioner was editor and vice president of a newspaper, the Huntsville (Alabama) Daily Register, and that the representations occurred during "a community publicity advertising" campaign. He carried a letter from his paper introducing and identifying him as engaged in getting out "the Muscle Shoals series of page newspaper advertisements," and carried a bundle of the old issues of the paper as demonstrations of the publicity assistance to be given the TVA. The TVA units were participations in the cost of the page advertisements in the Daily Register, telling of the TVA benefits to the community, which cost the victims of the alleged swindle $10 each. Those who purchased by cash or check received on the spot receipts of the Daily Register, signed by petitioner, for the advertising cost paid. The wide publicity obtained from the construction of the TVA flood and power project had prepared the way for easy acceptance of the scheme by the credulous. Some subscribers to the units, who felt they had been duped by the salesman, testified to the circumstances of their fleecing on the occasions specified in the indictment. Their evidence showed to the satisfaction of the jury that Pierce, taking upon himself to act as a government employee, said or gave them the impression that he represented the Government, that the Government was contributing to the cost of the advertising for the development of TVA, and that, as one witness phrased it, the purpose was "Just the advancement of TVA in our country." Another witness testified "It never dawned on me that it was a personally owned newspaper."

All the counts included a charge of impersonation of a representative of the United States "selling TVA units." The evidence, as to some, was that Pierce said he represented TVA; as to others, it was that he represented the Government selling TVA or TVA units. In no instance is there testimony that Pierce represented himself as an employee or officer of the United States unconnected with the public enterprise of the TVA at Muscle Shoals. The instructions followed the charges and evidence. They made clear that the charges against Pierce were for false impersonation by assuming to act as an officer or employee of the United States with fraudulent intent, and not simply for obtaining money by false pretenses or false claim of stimulating the Tennessee Valley development. The instructions repeated, with many variations, the thought that Pierce must have actually and intentionally represented himself or assumed to be an officer of the United States, acting under its authority. References were made to TVA. It was said defendant was selling or attempting to sell TVA units. It was further pointed out that the mention of TVA in the copies of the Daily Register which were exhibited "by the defendant to any person, from whom funds were solicited, and in the sales talks made by him to such person should not be considered by you as evidence of a false claim or pretense of Federal Authority on the part of the defendant, Pierce, unless you further find and are satisfied from the proof, beyond a reasonable doubt, that such reference to TVA, in either the newspapers or sales talks, were made by the defendant with the intent of producing a belief on the part of the person from whom funds were solicited that he, the defendant Pierce, was acting as an officer or employee of the Federal Government."

There was a refusal by the trial court, however, to give the following instruction:

"At the request of the defendant, the Court further instructs the jury that the Tennessee Valley Authority, commonly designated as TVA, although an instrumentality of the Federal Government, is a corporate entity, separate and distinct from the Federal Government itself, and the officers and employees of that corporation are not within the scope of the statute on which the indictment in this case is based. Consequently, any claim or representation by the defendant, if you find that such claim or representation was made, that he was representing the TVA, or was connected with the TVA as an officer or employee, would not constitute the false impersonation of an officer or employee of the United States Government or any department thereof, TVA officers and employees not being officers and employees of the Federal Government or some department thereof, within the meaning of the statute which the defendant is alleged to have violated, in the several counts of the indictment."

Nor do we find any comparable statement which was given. In this refusal, we find material error.

So closely entwined were the TVA and the Government (the United States) in the instructions and the evidence on the various counts that any jury might well have thought a pretense that Pierce was an employee or officer of the TVA violated the statute, and have voted for conviction for that reason. This, however, in our view, is incorrect, and constitutes prejudicial error. Cf. *Warszower* v. *United States,* 312 U. S. 342; *Stromberg* v. *California,* 283 U. S. 359; *Nash* v. *United States,* 229 U. S. 373. The statute in effect at the time of the commission of the alleged offenses did not speak of pretenses of acting under authority of corporations owned or controlled by the United States. It was passed in 1884 before the United States owned or controlled corporations operating hotels, boat lines, or generating plants. The amendments, subsequent to the occasions fixed by the indictment, extended

its scope first to the Home Owners' Loan Corporation, 49 Stat. 298, and later to all corporations owned or controlled by the United States, 52 Stat. 82.[3] These legislative extensions of the scope of the Act were in accord with the growing importance of the administrative corporation, but a comparable judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness. Cf. *Lanzetta* v. *New Jersey,* 306 U. S. 451, and cases cited. While the act should be interpreted "so as . . . to give full effect to its plain terms," *Lamar* v. *United States,* 241 U. S. 103, 112; *United States* v. *Barnow,* 239 U. S. 74, we should not depart from its

[3] The reports of the Judiciary Committee of the Senate and of the House of Representatives bear upon their view of the proper interpretation of the act in its original form. The reports incorporated the following letter:

"OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., May 7, 1937.

Hon. WILLIAM B. BANKHEAD,
The Speaker, House of Representatives,
Washington, D. C.

MY DEAR MR. SPEAKER: The existing law makes it a crime to impersonate any officer or employee of the United States with intent to defraud (Criminal Code, sec. 32; U. S. Code, title 18, sec. 76). It seems desirable to extend the scope of the act so as to penalize impersonation of officers and employees of Government-owned and Government-controlled corporations.

The maximum penalty that may now be imposed for the offense of impersonation is imprisonment for a term of 3 years and a fine of $1,000. In aggravated cases a greater punishment may prove suitable, and I suggest increasing the maximum penalty to imprisonment for 5 years and a fine of $5,000.

A bill to effectuate this purpose is submitted herewith.

Sincerely yours,

JOSEPH B. KEENAN,
Acting Attorney General."

H. Rep. No. 1763, 75th Cong., 3d Sess.; S. Rep. No. 823, 75th Cong., 1st Sess.

words and context. Another section of the Criminal Code (§ 35) was amended to meet the new development, by the Act of October 23, 1918, 40 Stat. 1015. Cf. *United States* v. *Strang*, 254 U. S. 491. The TVA Act made certain federal penal statutes applicable to the Authority but pointedly omitted § 32.[4] This pointed omission is indicative of intention.

Previous cases as to identity between the Government and its corporations turned on considerations not here applicable. In *Emergency Fleet Corp.* v. *Western Union*, 275 U. S. 415, 426, the Corporation was held a department of the Government within the meaning of the Post Roads Act and so entitled to lower telegraph rates than private corporations. An indictment under Criminal Code § 37 for a conspiracy to defraud the United States "in any manner" was held to state a crime when the contemplated fraud was upon the United States Emergency Fleet Corporation. *United States* v. *Walter*, 263 U. S. 15, 17. But this decision is bottomed on the broad ground that fraud which interferes with the successful operation of the

[4] May 18, 1933, c. 32, § 21, 48 Stat. 68:

"(a) All general penal statutes relating to the larceny, embezzlement, conversion, or to the improper handling, retention, use, or disposal of public moneys or property of the United States, shall apply to the moneys and property of the Corporation and to moneys and properties of the United States intrusted to the Corporation.

"(b) Any person who, with intent to defraud the Corporation, or to deceive any director, officer, or employee of the Corporation or any officer or employee of the United States (1) makes any false entry in any book of the Corporation, or (2) makes any false report or statement for the Corporation, shall, upon conviction thereof, be fined not more than $10,000 or imprisoned not more than five years, or both.

"(c) Any person who shall receive any compensation, rebate, or reward, or shall enter into any conspiracy, collusion, or agreement, express or implied, with intent to defraud the Corporation or wrongfully and unlawfully to defeat its purposes, shall, on conviction thereof, be fined not more than $5,000 or imprisoned not more than five years, or both."

Government is within the statute. *Haas* v. *Henkel,* 216 U. S. 462, 479, 480. On the other hand, in *United States* v. *Strang, supra,* in construing Criminal Code § 41 [5] this Court held an employee of the Fleet Corporation was not an agent of the United States within the true intendment of the section. The *Strang* case had the approval of the Court in the opinion deciding the *Walter* case. The statute in the *Strang* case points directly at a particular class of persons as the object of the sanction. It leaves, as does the statute here, no room for enlargement of its meaning.

Reversed.

MR. JUSTICE DOUGLAS dissents on the ground that a false representation by the defendant that he was acting for the Tennessee Valley Authority constituted a false pretense that he was an officer or employee acting under the authority of the United States or a department thereof, within the meaning of § 32 of the Criminal Code.

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

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[5] "Sec. 41. No officer or agent of any corporation, joint stock company, or association, and no member or agent of any firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation, joint stock company, association, or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation, joint stock company, association, or firm. Whoever shall violate the provision of this section shall be fined not more than two thousand dollars and imprisoned not more than two years." 35 Stat. 1097; 18 U. S. C. § 93.

AMERICAN SURETY COMPANY OF NEW YORK *v.* BETHLEHEM NATIONAL BANK ET AL.

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

No. 29. Argued November 12, 1941.—Decided December 8, 1941.

1. In making the "ratable" distribution of assets of an insolvent national bank required by R. S. 5236, dividends must be declared proportionately upon the amounts of all claims as they stood on the date of insolvency. P. 317.
2. Where a claim against an insolvent national bank secured by a surety bond is paid in part by collateral and by dividends from the estate and the remainder by the surety company, the surety is subrogated to the right of the creditor in future dividends, and its proportion of future dividends is to be calculated, not upon the basis of what it paid, but upon the amount of the original claim. P. 318.

116 F. 2d 75, reversed.

CERTIORARI, 312 U. S. 677, to review the reversal of a judgment of the District Court fixing dividends in the winding up of an insolvent national bank.

Mr. Rutledge Slattery, with whom *Messrs. George P. Williams, Jr.* and *Frank P. Slattery* were on the brief, for petitioner.

Mr. George P. Barse, with whom *Messrs. H. P. McFadden* and *Lee Roy Stover* and *Miss Harriet Buckingham* were on the brief, for respondents.

The claim of the surety for reimbursement from the principal, or from the estate of the principal, must be measured by the amount paid by the surety under the bond, irrespective of whether reimbursement is sought upon a claim of indemnity or a claim of subrogation.

The amount of the provable claim for dividend purposes is the amount owing to the claimant by the bank as of the date of closing. *Merrill* v. *National Bank*, 173 U. S. 131, 146; *White* v. *Knox*, 111 U. S. 784, 786; *Scott* v. *Armstrong*,

146 U. S. 499, 511; *Fort Worth* v. *McCamey,* 93 F. 2d 964, 969, certiorari denied, 304 U. S. 571; *Steele* v. *Randall,* 19 F. 2d 40, 42; *McDonald* v. *Chemical National Bank,* 174 U. S. 610, 619; *McCandless* v. *Dyar,* 34 F. 2d 989, 991; *Ross* v. *Lee,* 15 F. Supp. 972, 973.

It would be inequitable to the general creditors of the bank to allow the surety, by subrogation or otherwise, a claim, as the basis of dividends, in the full amount of the deposit of the Commonwealth at the time of the suspension or closing of the bank.

The deposit balance to the credit of the Commonwealth on the date of the bank's closing was more than double the amount permitted by the state statute, and to the extent of that excess was illegal. A claimant seeking subrogation must act fairly and equitably and be free from fault in the transaction in connection with which he claims subrogation.

In balancing the equities, the general depositors and creditors of the bank are entitled to have the benefits of the surety bond, rather than to have it weighed in the balance against them.

The surety bond must be considered as an asset of the bank in receivership.

Merrill v. *National Bank,* 173 U. S. 131, to the extent applicable here, supports the position of respondents.

Mr. W. Page Dame, Jr. filed a brief on behalf of the U. S. Fidelity & Guaranty Co., as *amicus curiae,* urging reversal.

Mr. Justice Frankfurter delivered the opinion of the Court.

The facts of this case are simple. The Commonwealth of Pennsylvania had $135,000 on deposit in the Bethlehem National Bank. This deposit was secured by a $125,000 bond, upon which the plaintiff was surety, and by a pledge

of government bonds having a par value of $12,000. The bank became insolvent, and a receiver was appointed. Thereafter, the Commonwealth obtained, in round figures, $12,500 from the sale of the collateral and $54,000 as a 40% dividend on its claim, a total of $66,500. The remaining $68,500 was paid by the surety, thereby fully satisfying the Commonwealth's claim. The present suit arose out of three further dividends, of 20%, 10%, and 5%, respectively, declared by the receiver. The surety sought dividend payments on the basis of the original indebtedness, that is, $135,000. The receiver insisted that the extent of the surety's participation must be measured by the sum actually expended to discharge its principal's obligation, to wit, $68,500. Reversing the decision of the District Court, 33 F. Supp. 722, the Circuit Court of Appeals for the Third Circuit upheld the receiver's contention. 116 F. 2d 75. In view of conflicting expressions by the lower courts upon a question so important in the liquidation of national banks, cf. *Maryland Casualty Co.* v. *Cox,* 104 F. 2d 354; *Ward* v. *First National Bank,* 76 F. 2d 256; *Fouts* v. *Maryland Casualty Co.,* 30 F. 2d 357, we brought the case here. 312 U. S. 677.

The National Bank Act provides for the "ratable" distribution of assets of insolvent national banks. R. S. § 5236; 12 U. S. C. § 194. The question for decision is therefore one of federal law. *Deitrick* v. *Greaney,* 309 U. S. 190, 200–01; *Merrill* v. *National Bank of Jacksonville,* 173 U. S. 131; *Davis* v. *Elmira Savings Bank,* 161 U. S. 275; *Cook County Nat. Bank* v. *United States,* 107 U. S. 445, 448. Congress has seen fit not to anticipate by specific rules solution of problems that inevitably arise in national bank liquidations. Instead, it chose achievement of a "just and equal distribution" of an insolvent bank's assets through the operation of familiar equitable doctrines evolved by the courts. *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 284; *Jenkins* v. *National Surety Co.,*

277 U. S. 258, 267. Among the oldest of these doctrines is the rule of subrogation whereby "one who has been compelled to pay a debt which ought to have been paid by another is entitled to exercise all the remedies which the creditor possessed against that other." Sheldon, Subrogation (2d ed.) § 11; see *Hampton* v. *Phipps,* 108 U. S. 260, 263; *Hodgson* v. *Shaw,* 3 Myl. & K. 183, 191; *Hayes* v. *Ward,* 4 Johns. Ch. 123, 130.

Here the surety was compelled to pay to the Commonwealth $68,500 which ought to have been paid by the bank. Of course, it succeeds to the Commonwealth's right to receive payment of $68,500 from the bank—and in no event can the surety receive more. But as a means of enforcing this right the Commonwealth was entitled to share in all future dividends on the basis of its original claim of $135,000. *Merrill* v. *National Bank of Jacksonville,* 173 U. S. 131. Succeeding to the creditor's right, the surety also succeeds to the creditor's means for enforcing it. The surety is a special kind of secured creditor. For its claim against the principal is secured by its right of subrogation to the remedies of the creditor which it has been compelled to pay. Of course, this right can be availed of only by a surety alert in discharging its duty, *Jenkins* v. *National Surety Co.,* 277 U. S. 258, 267, and one not guilty of inequitable conduct, *United States* v. *Ryder,* 110 U. S. 729, 737. In other respects, a right of subrogation is as much in the nature of a security as is a mortgage.

A "ratable" distribution requires that dividends be declared proportionately upon the amount of all claims as they stand on the date of the insolvency. This is settled law. *White* v. *Knox,* 111 U. S. 784, 787; *Merrill* v. *National Bank of Jacksonville, supra,* at 143; *Ticonic Bank* v. *Sprague,* 303 U. S. 406, 411. "The distribution is to be 'ratable' on the claims as proved or adjudicated, that is,

on one rule of proportion applicable to all alike. In order to be 'ratable' the claims must manifestly be estimated as of the same point of time, and that date has been adjudged to be the date of the declaration of insolvency." *Merrill* v. *National Bank of Jacksonville, supra,* at 143. The basis of participation in the bank's assets by the Commonwealth was $135,000, the amount of the claim on the date of insolvency. The amount of the claim having been thus fixed on the date of insolvency, it did not shrink because of the extraneous circumstance of the creditor's forethought in securing partial satisfaction of its loss by going against the collateral and the surety.

To permit the surety to stand in the shoes of the secured creditor whose claim it has paid does not prejudice the rights of the general creditors. The extent of their participation in the distribution of the Bank's assets was fixed on the day it became insolvent. The surety will receive no greater share than would have been received by the Commonwealth had it not been for the circumstance that its claim was secured by a surety's bond. If, for one reason or another, the surety had withheld payment to the Commonwealth, the latter would have continued to receive dividends on the full amount of its claim, or if, on a nice calculation, the surety had at the outset satisfied its principal's obligation, it would have been entitled to share on the basis of the full amount. On the other hand, if the surety's participation should be limited to the extent now urged by the receiver, the other creditors would profit solely because of fortuitous circumstances and without any relation to reasons of intrinsic fairness. The extent of the participation of the surety, and therefore that of the other creditors, would depend on how, when, and against whom the secured creditor presses its claim. Cf. *In re Thompson,* 300 F. 215, 217–18; *Pace* v. *Pace,* 95 Va. 792, 799, 30 S. E. 361. Such a result leaves too much to

caprice or accident and is wholly at variance with the guiding criterion of "ratable" distribution.[1]

A final consideration needs mention. The receiver cites several instances in which the Comptroller of the Currency has stated that the basis of a surety's claim is to be measured by the amounts it has expended. But there is wanting here any long-continued practice which establishes its own law within the permissible area of administrative action. Cf. *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 524–25.

Reversed.

MR. JUSTICE DOUGLAS, dissenting:

The only virtue possessed by *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131, is the fact that it has been on the books for over forty years. It held that a secured creditor could receive dividends on the face amount of his claim even though that claim had been reduced by the value of the collateral between the date of insolvency and the date of distribution. That rule of distribution is inequitable and unfair to the run of depositors. It gives an advantage to the secured creditor unwarranted

[1] Reflecting the special policy of bankruptcy legislation favoring the general creditor against the secured creditor, the rule prevails in bankruptcy that dividends upon the claims of secured creditors "shall be paid only on the unpaid balance." § 57 (h), 30 Stat. 544, 560, 11 U. S. C. § 93 (h); 14 Stat. 517, 526. It is settled, however, that the "bankruptcy" rule is inapplicable to the distribution of assets of insolvent national banks. *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131. There is no occasion to reëxamine the correctness of that decision, the authority of which has never been questioned here and was again recognized very recently. *Ticonic Bank* v. *Sprague*, 303 U. S. 406, 412. Although the National Bank Act has been amended many times since its original enactment in 1864, 13 Stat. 114, the provision governing distribution of dividends has remained substantially intact. The construction given the provision in the *Merrill* case has been left unchanged by Congress.

by any provision of his contract. For it treats the claim as wholly unpaid even though it has been partially discharged by liquidation of the collateral. The impact on other creditors is oppressive. Under the rule of the *Merrill* case, a depositor with a $10,000 claim, secured by $5,000 worth of collateral, will be wholly paid if the insolvent bank pays a 50% dividend. On the other hand, an unsecured depositor with a $10,000 claim salvages under those circumstances only $5,000. A rule of distribution which sanctions such a discriminatory result violates the requirement for "ratable" dividends prescribed by the National Banking Act. R. S. § 5236, 12 U. S. C. § 194. This is no occasion, however, to elaborate on the point. It was fully covered in its historical and legal aspects by the dissenting opinions of Mr. Justice White and Mr. Justice Gray in the *Merrill* case.

The majority of the Court was of the view that whatever might be the power of Congress under the bankruptcy clause of the Constitution, the adoption of the bankruptcy rule [1] in equity would be an invasion of "prior" contract rights (173 U. S. at p. 146)—an impairment of obligation

[1] It should be noticed that the bankruptcy rule, now codified (Bankruptcy Act § 57 (h), 11 U. S. C. § 93 (h)), which allows the secured creditor to receive dividends only on the balance remaining after the value of the security has been deducted from the claim, did not derive from a special statutory provision. As pointed out by Mr. Justice Gray in his dissent in the *Merrill* case (173 U. S. at pp. 174–175) the Bankruptcy Act of 1841 (5 Stat. 440) had no such provision. Yet its requirement for "pro rata" distribution (§ 5) was recognized by Mr. Justice Story, its draftsman, as permitting a secured creditor to prove only for the balance of his claim as remained after crediting the value of the security. *Ex parte City Bank of New Orleans,* 3 How. 292, 315. That rule of construction followed the long established English bankruptcy rule. See Mr. Justice White, dissenting, 173 U. S. at pp. 153–155. As stated by Lord Eldon in *Ex parte Smith,* 2 Rose Bank. Rep. 63, 64, until the secured creditor's claim has been reduced by deducting the value of the security "it is impossible correctly to say what the actual Amount of it is."

of contract. And the reason for that conclusion was based on the theory that since "the creditor's rights in the trust fund are established when the fund is created, collections subsequently made from, or payments subsequently made on, collateral, cannot operate to change the relations between the creditor and his co-creditors in respect of their rights in the fund." (p. 140.) For that reason it was held that the claims of creditors are to be "determined as of the date of the declaration of insolvency." (p. 147.) There is serious question whether that foundation has not been swept away by *William Filene's Sons Co.* v. *Weed*, 245 U. S. 597.

Mr. Justice Holmes stated in the *Weed* case (p. 602): "But when the courts without statute take possession of all the assets of a corporation under a bill like the present and so make it impossible to collect debts except from the court's hands, they have no warrant for excluding creditors, or for introducing supposed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept. In order to make a distribution possible they must of necessity limit the time for the proof of claims. But they have no authority to give to the filing of the bill the effect of the filing of a petition in bankruptcy so as to exclude any previously made and lawful claim that matures within a reasonable time before distribution can be made."

That theory runs counter to the assumption in the *Merrill* case (173 U. S. at p. 136) that a creditor acquires a "vested interest in the trust fund" antedating distribution. For if that assumption were valid, the claim in the *Weed* case, which had matured after the proceedings had been instituted, would have been disallowed. Such an assumption would likewise fail to take heed of the admonition of Mr. Justice Holmes that "supposed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept" are not to be recognized.

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Yet, assuming *arguendo* that the premise of the *Merrill* case has survived, the answer to the proposition that application of the bankruptcy rule would result in impairment of obligation of contract was completely answered by Mr. Justice White (173 U. S. at p. 152): ". . . the preferential right arising from the contract of pledge is in nowise impaired by compelling the creditor to first exercise his preference against the security received from the debtor, and thus confine him to the specific advantage derived from his contract. Further, however, as the contract, construed in connection with the law governing it, restricts the secured as well as the unsecured creditor to a ratable dividend from the general assets, the secured creditor is prevented from enhancing the advantage obtained as a result of the contract for security, by proving his claim as if no security existed, since to allow him to so do would destroy the rule of ratable division, subject and subordinate to which the contract was made." And see Glenn, Liquidation (1935) § 530.

This analysis of the *Merrill* case is germane to the present problem not merely to focus the historical setting of the rule which we are asked to enforce. It is especially important because we are now asked to extend that rule to a special type of *unsecured* creditor.

The surety who seeks its protection has an *unsecured* claim for $68,500. It seeks to gain the advantages which a secured creditor with a claim of $135,000 would have, i. e. the right to receive dividends on that basis. To deny the surety that preference would be no invasion of "prior contract rights," no impairment of obligation of contract, under the theory of the majority in the *Merrill* case. This surety neither has nor had any claim which was secured. Nor did it have any fixed and liquidated claim at the date of the declaration of insolvency. Its claim was always unsecured and it matured, as in the *Weed* case, after the appointment of the receiver. Nevertheless, this

surety, though it would fail to gain the preferred position of a secured creditor under the test of the *Merrill* case, is allowed to reach that position through the back door of subrogation.

It is ordinarily true that a surety succeeds to all of the rights and remedies of the creditor, including the latter's priority. *Lidderdale's Executors* v. *Executor of Robinson,* 12 Wheat. 594. But that is no inexorable rule. As this Court stated in *Memphis & Little Rock R.* v. *Dow,* 120 U. S. 287, 301–302, "The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice." In determining whether it would be fair or equitable to allow the subrogation to the full extent of the creditor's rights and remedies, consideration will, of course, be given to the prejudice, if any, suffered by other creditors. But the mere fact that the other creditors will not be worse off than if the surety's principal had pressed the claim is not the sole solvent of the problem. We are not dealing with a mechanical rule. The question remains whether justice requires, or policy permits, the surety to succeed to his principal's privileged position.

Such considerations frequently are a barrier to any subrogation; at other times they may cut down the rights of the surety and give him less than his principal could exact. Illustrations of the former are *German Bank* v. *United States,* 148 U. S. 573, where subrogation was denied because it arose from conduct which was tortious; and *United States* v. *Ryder,* 110 U. S. 729, where a surety on recognizance bail was denied subrogation to the rights of the United States. In the *Ryder* case, subrogation was denied because, *inter alia,* its allowance "would be to aid the bail to get rid of their obligation, and to relieve them from the motives to exert themselves in securing the appearance of the principal. Subrogation to the latter

remedies would clearly be against public policy by subverting, as far as it might prove effectual, the very object and purpose of the recognizance." *Id.*, p. 737.

Closer in point, however, are those cases which award the surety less rights than his principal had. Thus, *South Philadelphia State Bank's Insolvency,* 295 Pa. 433, 145 A. 520, held that while a surety was entitled to be subrogated to the rights of a State against an insolvent bank, the surety did not, in absence of statute,[2] acquire the State's priority. See Arnold, An Inequitable Preference in Favor of Surety Companies, 36 W. Va. L. Q. 278; (note) 81 U. Pa. L. Rev. 441. The theory of that case is that "the State's right to a preference over other creditors, being a sovereign right enjoyed for the benefit of all the people, cannot be transferred to individuals except by express legislative sanction." (295 Pa. at p. 440.) Though that case represents the minority view in the state courts,[3] it is recognition of the healthy principle that application of the rule of subrogation should not be reduced to a conceptualistic formula.

The sweep of that principle is illustrated by *Memphis & Little Rock R. Co.* v. *Dow, supra.* In that case the prior lien creditor had a claim with interest at 8%. To allow the surety the same rate of interest would not have put the junior lienor in a worse plight. But this Court disallowed that rate, pointing out (120 U. S. at p. 302) that the surety was entitled only to reimbursement. A similar approach in this case would be to ascertain the equities of the sure-

[2] By statute a surety of the United States succeeds to the latter's priority. R. S. § 3468, 31 U. S. C. § 193. It should be noted, however, that though the United States has priority against an insolvent (R. S. § 3466, 31 U. S. C. § 191) that priority has been held not to extend to an insolvent national bank. *Cook County Nat'l Bank* v. *United States,* 107 U. S. 445.

[3] See Arant, Suretyship (1931), p. 363.

ty's claim, not by looking for the principal's rights under its contract but for reasons why this surety should be accorded priority over other unsecured creditors. Equity has regard not only for the rights of other creditors (*Jenkins* v. *National Surety Co.*, 277 U. S. 258) but also for the stake which the surety has and which it is asking a court of equity to protect. A court of equity should neither "come to the aid of one" whose equity is "subordinate until claims superior in equity" have been satisfied (*American Surety Co.* v. *Westinghouse Electric Mfg. Co.*, 296 U. S. 133, 136), nor create superior equities on behalf of one who can show no more compelling reasons for preferred treatment than can those with whom he competes. Under such an approach, this surety would be denied a superior equity.

Here, the surety has only an unsecured claim of $68,500. Any reason for continuation of the discrimination against the general depositors of this bank disappeared when the surety's creditor was paid. No equity has been suggested for allowing this surety preferred treatment. It was paid to assume the risk of insolvency of the bank. It was paid by the bank itself. And it has not been shown that it charged a lower rate because of the rule of the *Merrill* case. In view of those circumstances, it should not be allowed the lion's share. It is entitled to reimbursement but certainly in no greater an amount than the run of depositors. It is no answer to say that such a result would give the general depositors a windfall. Unless subrogation is to be a mechanical formula, this surety should be required to establish its special equity to preferred treatment—reasons why it, unlike any other unsecured creditor, should enjoy the benefits of the discriminatory rule of the *Merrill* case.

Finally, it is suggested that if the surety is not allowed this preference, much will be left to "caprice or accident,"

since the surety would have been entitled to share on the basis of the full amount if it had satisfied the creditor's obligation at the very outset. The answer to that is that we would then have to determine whether the *Merrill* case has survived the *Weed* case (See Clark, Proof by Secured Creditors in Insolvency and Receivership Proceedings, 15 Ill. L. Rev. 171), and, if so, whether it should be overruled. It is sufficient at this time to say that, in view of the flimsy basis on which the *Merrill* case rests, and the oppressive nature of the rule it fashioned, it should not be extended.

MR. JUSTICE BLACK concurs in this dissent.

TEXTILE MILLS SECURITIES CORP. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 34. Argued November 10, 1941.—Decided December 8, 1941.

1. A Circuit Court of Appeals may be composed of all the circuit judges of the circuit in active service, more than three in number, sitting *en banc*. P. 333.
2. The expenses of lobbying and propaganda paid by an agent employed to secure legislation from Congress authorizing the recovery of German properties seized during the World War under the Trading with the Enemy Act, are not deductible as "ordinary and necessary expenses" of the agent within the meaning of § 23 (a) of the Revenue Act of 1928, construed by Art. 262 of Treasury Regulations 74. P. 335.

117 F. 2d 62, affirmed.

CERTIORARI, 312 U. S. 677, to review a judgment reversing a decision of the Board of Tax Appeals, 38 B. T. A. 623, which had overruled a deficiency assessment based on the disallowance of certain deductions.

Mr. Edmund S. Kochersperger for petitioner.

Mr. Arnold Raum, with whom *Attorney General Biddle, Assistant Attorney General Clark,* and *Miss Helen R. Carloss* and *Mr. Samuel H. Levy* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case presents two problems: (1) whether a Circuit Court of Appeals may be composed of all the circuit judges of the circuit in active service, more than three in number, sitting *en banc;* (2) whether petitioner may deduct under the Revenue Act of 1928 (45 Stat. 791) certain expenses incurred by it under contracts in connection with the presentation of claims to Congress on behalf of former enemy aliens for the procurement and enactment of amendatory legislation authorizing the payment of the claims. We granted the petition for certiorari because of the public importance of the first problem and the contrariety of the views of the court below (117 F. 2d 62) and judges of the Circuit Court of Appeals for the Ninth Circuit (*Lang's Estate* v. *Commissioner,* 97 F. 2d 867) as respects its solution.

First: There are five circuit judges,[1] in active service,[2] of the Circuit Court of Appeals for the Third Circuit. All five heard and decided this case. Though they divided three to two on the deductibility of the expenses in question, they were unanimous in the conclusion that five were authorized to hear and decide the case.[3]

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[1] Judicial Code § 118, 28 U. S. C. § 213; Act of June 10, 1930, c. 438, 46 Stat. 538, 28 U. S. C. § 213d; Act of June 24, 1936, c. 753, 49 Stat. 1903, 28 U. S. C. § 213d–1.

[2] As distinguished from judges retired under the provision of § 260 of the Judicial Code, 28 U. S. C. § 375.

[3] The Circuit Court of Appeals for the Third Circuit has promulgated rules in accord with that view. Rule 4 (1) provides: "The court

The problem arises because § 117 of the Judicial Code (28 U. S. C. § 212; 36 Stat. 1131) provides that "There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, which shall be a court of record, with appellate jurisdiction, as hereinafter limited and established." That provision derives from § 2 of the Act of March 3, 1891, 26 Stat. 826, which established the circuit court of appeals.[4] Though Congress by that Act created these new courts, it did not make provision for the appointment to them of a new group of judges. It provided, however, by § 3 of that Act that the Chief Justice and Associate Justices of the Supreme Court assigned to each circuit and the circuit judges and district judges within each circuit "shall be competent to sit as judges of the circuit court of appeals within their respective circuits." Thus it is apparent that the newly created circuit court of appeals was to be composed of only three judges[5] who were to be

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consists of the circuit justice, when in attendance, and of the circuit judges of the circuit who are in active service. District judges and retired circuit judges of the circuit sit in the court when specially designated or assigned as provided by law. Three judges shall sit in the court to hear all matters, except those which the court by special order directs to be heard by the court *en banc*."

[4] Sec. 2 provided in part: "That there is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with appellate jurisdiction, as is hereafter limited and established."

[5] Sec. 3 of that Act provided: "In case the full court at any time shall not be made up by the attendance of the Chief-Justice or an associate justice of the Supreme Court and circuit judges, one or more district judges within the circuit shall be competent to sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court . . ." And it should be noted that after the passage of the Act of March 3, 1891, there were three circuit judges in the Second Circuit and two in each of the others. Act of April 10, 1869, c. 22,

drawn from the three existing groups of judges—the circuit justice, the circuit judges, and the district judges.

That arrangement continued until enactment of the Judicial Code. Act of March 3, 1911, c. 231, 36 Stat. 1087. The Judicial Code abolished the existing circuit courts. § 297. It carried over into § 117 without substantial change the provision of § 2 of the Act of March 3, 1891 that there should be a circuit court of appeals in each circuit "which shall consist of three judges." Though this section was said merely to represent existing law,[6] § 118 of the Judicial Code provided for four circuit judges in the Second, Seventh, and Eighth Circuits, two in the Fourth Circuit, and three in each of the others. An anomalous situation was presented if § 117 were to be taken at that juncture as meaning that the circuit court of appeals would continue to be composed of only three, in face of the fact that there were more than three circuit judges in some circuits. Though § 3 of the Act of March 3, 1891, made the circuit judges "competent to sit as judges of the circuit court of appeals within their respective circuits," § 120 of the Judicial Code into which the provisions of § 3 were carried eliminated the circuit judges from the groups of judges "competent to sit." Yet it retained the provision that the circuit justices and the district judges were so qualified. We agree, however, with the view of the court below that the circuit judges became *ex officio* judges of the respective circuit courts of appeals when the circuit courts were abolished. Though § 120 did not designate them as "competent to sit," its other provisions made clear that they were intended to sit. Thus, it was provided that the district judges should be drawn upon only in case the court could not be made up by the

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§ 2, 16 Stat. 44; Act of March 3, 1887, c. 347, 24 Stat. 492; Act of March 3, 1891, c. 517, § 1, 26 Stat. 826.

[6] S. Rep. No. 388, 61st Cong., 2d Sess., Pt. 1, p. 49, Pt. 2, p. 310.

circuit justices and the circuit judges.[7] Yet, if § 117 were to be ready literally, the circuit court of appeals was to "consist" of only three judges in spite of the fact that Congress had already provided in some circuits for more than three circuit judges. Clearly, where there were four, all could not be members of a court of three. Yet there was plainly inferable a Congressional purpose to constitute in some circuits a circuit court of appeals of four judges.[8]

Any doubts on that score[9] were resolved by the Act of January 13, 1912, c. 9, 37 Stat. 52, which amended § 118 of the Judicial Code by the addition of the provision that "The circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit, and it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law." Senator Sutherland who had charge of the bill in the Senate stated on the floor: "It makes no change whatever in the existing law except to make it clear that the circuit judges in the various circuits of the United States shall constitute the circuit

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[7] "In case the Chief Justice or an associate justice of the Supreme Court shall attend at any session of the circuit court of appeals, he shall preside. In the absence of such Chief Justice, or associate justice, the circuit judges in attendance upon the court shall preside in the order of the seniority of their respective commissions. In case the full court at any time shall not be made up by the attendance of the Chief Justice or the associate justice, and the circuit judges, one or more district judges within the circuit shall sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court . . ."

[8] Thus the Senate Report, *supra* note 6, in speaking of § 118 (§ 116 in the bill) stated, p. 50: ". . . the section states in concise language the number of judges now provided by law for the several judicial circuits."

[9] See the letter by Albert H. Walker in 74 Central L. J. 12.

court of appeals." [10] The purpose seems plain: the size of each circuit court of appeals was not to be less than the number of circuit judges authorized by law.[11]

And so we reach the question as to whether the avowed purpose of § 118 was defeated by § 117. We do not think it was.

That purpose was not thwarted by the provision in the 1912 amendment to § 118 that "it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law." It has been suggested that "ac-

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[10] 47 Cong. Rec., Pt. 3, p. 2736. Senator Sutherland also said: "It has been thought, as I said, that the existing law did not make it quite clear that the circuit judges shall be the constituent members of the circuit court of appeals, and it is to remove that doubt, and that only, that this bill has been reported from the Judiciary Committee." *Id.*, p. 2736. H. Rep. No. 199, 62d Cong., 2d Sess., stated, "This bill deals with a defect in existing law. It makes it clear that the circuit judges shall constitute the circuit court of appeals." And see the statements on the floor of the House by Representative Clayton, chairman of the House Judiciary Committee (48 Cong. Rec., Pt. 1, p. 667) and Representative Moon, chairman of the House Committee on the Revisions of the Laws, who had been in charge of the House bill providing for the Judicial Code. *Id.*, p. 668.

Possible inferences looking the other way are such statements by Representative Mann that "in those circuits where there were four circuit judges, one of them might be put at work in the district court." 48 Cong. Rec., Pt. 1, p. 667. And see 48 Cong. Rec., Pt. 2, p. 1272. Yet such statements are not inconsistent with the conclusion that while the ordinary complement of circuit judges would be three, all might sit.

[11] In this connection it should be noted that § 120 of the Judicial Code makes the "Chief Justice and the associate justices of the Supreme Court assigned to each circuit . . . competent to sit as judges of the circuit court of appeals within their respective circuits." Thus while the circuit court of appeals is composed primarily of circuit judges, the circuit justice is made a "component part" of that court. See statement by Representative Moon, *op. cit.*, *supra*, note 10, p. 668.

cording to law" refers to § 117. In our view, however, it is the time of the sitting which is to be "according to law." Hence, the reference must be to § 126 of the Judicial Code (28 U. S. C. § 223) which regulates the times when the circuit courts of appeals shall sit.

If § 117 could reasonably be construed to provide that the court, *when sitting,* should consist of three judges drawn from a panel of such larger number as might from time to time be authorized, reconciliation with § 118 would be obvious. Sec. 117, however, contains no such qualification. And since it establishes the court as a "court of record, with appellate jurisdiction," it cannot readily be inferred that the provision for three judges is a limitation only on the number who may hear and decide a case. There are numerous functions of the court, as a "court of record, with appellate jurisdiction," other than hearing and deciding appeals. Under the Judicial Code these embrace prescribing the form of writs and other process and the form and style of its seal (§ 122); the making of rules and regulations (§ 122); the appointment of a clerk (§ 124) and the approval of the appointment and removal of deputy clerks (§ 125); and the fixing of the "times" when court shall be held. § 126. Furthermore, those various sections of the Judicial Code provide that each of these functions shall be performed by the "court." In that connection it should be noted that most of them derive, as does § 117, from § 2 of the Act of March 3, 1891. The first sentence of § 2 provided that the court "shall consist of three judges." The next sentence stated that "Such court shall prescribe the form and style of its seal and the form of writs and other process and procedure," etc. In that setting it is difficult to perceive how the word "court" in the second sentence was used in a different sense than in the preceding sentence. And we look in vain for any indication [12] that when those separate sentences were

[12] Sec. 122 of the Judicial Code (§ 120 in the bill) giving the court power to prescribe the form of writs and other process and the form

sectionalized in the Code, they acquired a meaning which they did not have in § 2 of the Act of March 3, 1891.

We cannot conclude, however, that the word "court" as used in those other provisions of the Judicial Code means only three judges. That would not only produce a most awkward situation; it would on *all* matters disenfranchise some circuit judges against the clear intendment of § 118. Nor can we conclude that the word "court" means only three judges when the court is sitting, but all the judges when other functions are performed. Certainly there is no specific authority for that construction. And it is difficult to reach that conclusion by inference. For to do so would be to imply that Congress prohibited some circuit judges from participation in the most important function of the "court" (the hearing and the decision of appeals), though allowing all of them to perform the other functions. Such a prohibition as respects the ordinary responsibilities of a judicial office should be inferred only under compelling necessity, since a court usually will consist of all the judges appointed to it. That necessity is not present here. The ambiguity in the statute is doubtless the product of inadvertence. Though the problem of construction is beset with difficulties, the conclusion that § 117 provides merely the permissible complement of judges for a circuit court of appeals results in greater harmony in the statutory scheme [13] than if the language of

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and style of its seal, and the power to make rules and regulations was stated in S. Rep. No. 388, *supra,* note 6, p. 51, to represent "existing law."

[13] It is suggested by respondent that if the Circuit Court of Appeals may sit *en banc,* difficulties arise in connection with that provision of § 120 of the Judicial Code which reads: "In case the full court at any time shall not be made up by the attendance of the Chief Justice or the associate justice, and the circuit judges, one or more district judges within the circuit shall sit in the court according to such order or provision among the district judges as either by general or particular

§ 117 is taken too literally. And any sacrifice of literalness for common sense does no violence to the history of § 117. That history is largely negative in the sense that there is no clear statement by sponsors of this legislation that § 118, read in light of § 117, prevents the conclusion which we have reached.[14] Certainly, the result reached makes for

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assignment shall be designated by the court . . ." The difficulty suggested is that § 120 would imply that, if all the circuit judges compose the "court," then district judges should be called in whenever the court was composed of less than that number. And the argument goes further and suggests that since the circuit justice is "competent to sit" (see note 11, *supra*) then a district court judge could be brought in, when the circuit justice is absent, to make up the "full court" even though all circuit judges sat. The answer, however, is that "full court" as used in § 120 refers to the court which contains the permissible complement of judges as distinguished from a quorum of two. Under our interpretation, a bench of three judges is the permissible complement under § 117.

[14] Beginning in 1938 the Judicial Conference of Senior Circuit Judges recommended an amendment to the Code which would enable a majority of the circuit judges in circuits where there were more than three to provide for a court of more than three judges. Report of the Attorney General (1938) p. 23; *id.* (1939) pp. 15–16; Report of the Judicial Conference of Senior Circuit Judges (1940) p. 7. A bill was introduced during the present session of Congress in both the House (H. R. 3390) and the Senate (S. 1053) to amend § 117 of the Judicial Code by adding thereto the following: *"Provided,* That, in a circuit where there are more than three circuit judges, the majority of the circuit judges may provide for a court of all the active and available circuit judges of the circuit to sit in banc for the hearing of particular cases, when in their opinion such action is advisable."

This bill has passed the House. 87 Cong. Rec. 8328. In the House, the Committee on the Judiciary reported the bill favorably (H. Rep. No. 1246, 77th Cong., 1st Sess.) stating:

"Under existing law provision is made that there shall be in each circuit a circuit court of appeals which shall consist of three judges, of whom two shall constitute a quorum. The bill adds a provision that in a circuit where there are more than three circuit judges, the majority of the circuit judges may provide for a court of all the active and

more effective judicial administration.[15] Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases. Such considerations are, of course, not for us to weigh in case Congress has devised a system where the judges of a court are prohibited from sitting *en banc.* But where, as here, the case on the statute is not foreclosed, they aid in tipping the scales in favor of the more practicable interpretation.

Second: The expenses in question are sought to be deducted as "ordinary and necessary expenses" within the meaning of § 23 (a) of the Revenue Act of 1928. Petitioner, a Delaware corporation, was employed to represent certain German textile interests, whose properties in this

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available circuit judges of the circuit to sit in banc for the hearing of particular cases, when in their opinion such action is advisable.

"If the court can sit in banc the situation where two three-judge courts may reach conflicting conclusions is obviated. It also will obviate the situation where there are seven members of the court and as sometimes happens a decision of two judges (there having been a dissent) sets the precedent for the remaining judges. A similar result would be avoided with a court of five judges.

"It seems desirable that where the judges feel it advisable they might sit in banc for hearing particular cases. Legislation to this effect has been recommended by the judicial conference of senior circuit judges since 1938, and at its January 1941 session the conference approved the form of the present bill."

But we do not deduce that this effort at clarification was or purported to be any definitive interpretation that § 117 as it stands prohibits a circuit court of appeals of more than three judges from sitting *en banc.*

[15] See H. Rep. No. 1246, *supra,* note 14; 69 Central L. J. 217. And see the testimony of Chief Justice Taft and Mr. Justice Van Devanter, Hearings, Committee on the Judiciary, House of Representatives, 70th Cong., 2d Sess., Serial 23, Pt. 2, on H. R. 5690, 13567, 13757, pp. 69, 72.

country had been seized during the World War under the provisions of the Trading with the Enemy Act. 40 Stat. 411. Petitioner's employment was made with a view towards procuring legislation which would permit ultimate recovery of the properties. The estimated aggregate value of the properties was $60,000,000. Petitioner was to be compensated on a percentage basis in case it was successful. It, however, was to bear all the costs and expenses. Petitioner launched its campaign. A publicist was retained to arrange for speeches, news items, and editorial comment. Two legal experts were retained to prepare propaganda concerning international relations, treaty rights and the policy of this nation as respects alien property in time of war. The objective of the campaign was accomplished by the passage of the Settlement of War Claims Act of 1928, 45 Stat. 254. Deductions for the amount paid to the publicist and the two lawyers were taken in 1929 and 1930, thereby producing a net loss in each of those years. Pursuant to § 117 of the 1928 Act, the net loss was carried forward two years and applied against income for 1931. The Commissioner disallowed the deductions and determined a deficiency. The Board of Tax Appeals disagreed, holding that there was no deficiency. 38 B. T. A. 623. The Circuit Court of Appeals reversed the Board.

We agree that the expenses in question were not deductible. Art. 262 of Treasury Regulations 74, promulgated under the 1928 Act, was entitled "Donations by corporations" and provided:

"Corporations are not entitled to deduct from gross income contributions or gifts which individuals may deduct under section 23 (n). Donations made by a corporation for purposes connected with the operation of its business, however, when limited to charitable institutions, hospitals, or educational institutions conducted for the benefit of its employees or their dependents are a proper

deduction as ordinary and necessary expenses. Donations which legitimately represent a consideration for a benefit flowing directly to the corporation as an incident of its business are allowable deductions from gross income. For example, a street railway corporation may donate a sum of money to an organization intending to hold a convention in the city in which it operates, with the reasonable expectation that the holding of such convention will augment its income through a greater number of people using the cars. Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income."

If this is a valid and applicable regulation, the sums in question were not deductible as "ordinary and necessary expenses" under § 23 (a), since they clearly run afoul of the prohibition in the last sentence of the regulation.

Plainly, the regulation was applicable. The ban against deductions of amounts spent for "lobbying" as "ordinary and necessary" expenses of a corporation derived from a Treasury Decision in 1915. T. D. 2137, 17 Treas. Dec., Int. Rev., pp. 48, 57–58. That prohibition was carried into Art. 143 of Treasury Regulations 33 (Revised, 1918) under the heading of "Expenses" in the section on "Deductions." [16] Beginning in 1921 the regulation was entitled "Donations." (Art. 562, Treasury Regulations 45.) And in the regulations here in question Art. 262 appeared under § 23 (n), which covered "Charitable and other contribu-

[16] Art. 143 provided: "Lobbying expenses.—Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, and contributions for campaign expenses are held not to be an ordinary and necessary expense in the operation and maintenance of the business of a corporation, and are therefore not deductible from gross income in arriving at the net income upon which the income tax is computed."

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tions" by individuals. It assumed that form and content in 1921 and appeared since then without change in all successive regulations.[17] Sec. 23 (n) and § 23 (a) both deal with deductions; and a "donation" by a corporation though not deductible under the former might be under the latter. Art. 262 purports to specify when a certain type of expenditure or donation by a corporation may or may not be deducted as an "ordinary and necessary" expense. The argument that it was not applicable because it was not specifically incorporated under § 23 (a) is frivolous.

Petitioner's argument that the regulation is invalid likewise lacks substance. The words "ordinary and necessary" are not so clear and unambiguous in their meaning and application as to leave no room for an interpretative regulation. The numerous cases which have come to this Court on that issue bear witness to that. *Welch* v. *Helvering,* 290 U. S. 111; *Deputy* v. *du Pont,* 308 U. S. 488, and cases cited. Nor has the administrative agency usurped the legislative function by carving out this special group of expenses and making them non-deductible. We fail to find any indication that such a course contravened any Congressional policy.[18] Contracts to spread such insidious influences through legislative halls have long been condemned. *Trist* v. *Child,* 21 Wall. 441; *Hazelton* v. *Sheckells,* 202 U. S. 71. Whether the precise arrangement here in question would violate the rule of those cases is not

[17] Art. 562, Regulations 62, Revenue Act of 1921; Art. 562, Regulations 65, Revenue Act of 1924; Art. 562, Regulations 69, Revenue Act of 1926; Art. 262, Regulations 74, Revenue Act of 1928.

[18] In the Revenue Act of 1936 (26 U. S. C. § 23 (q), 49 Stat. 1648) Congress specifically provided for deductions of certain contributions by corporations to specified corporations, trusts, funds, or foundations, "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation." And see the Revenue Act of 1938, 26 U. S. C. § 23 (q), 52 Stat. 447.

material. The point is that the general policy indicated by those cases need not be disregarded by the rule-making authority in its segregation of non-deductible expenses. There is no reason why, in absence of clear Congressional action to the contrary, the rule-making authority cannot employ that general policy in drawing a line between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction. The exclusion of the latter from "ordinary and necessary" expenses certainly does no violence to the statutory language. The general policy being clear it is not for us to say that the line was too strictly drawn.

Affirmed.

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

UNITED STATES, AS GUARDIAN OF THE HUALPAI INDIANS OF ARIZONA, *v.* SANTA FE PACIFIC RAILROAD CO.

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

No. 23. Argued November 12, 13, 1941.—Decided December 8, 1941.

1. Lands included in the grant made to the Atlantic & Pacific Railroad Company by the Act of July 27, 1866, were subject to any existing Indian right of occupancy until such right was extinguished by the United States through a voluntary cession of the Indians, as provided by § 2 of the Act. P. 344.
2. Indian occupancy necessary to establish aboriginal possession is a question of fact. P. 345.
3. "Indian title" exists where it is established as a fact that the lands in question were included in the ancestral home of a tribe of Indians, in the sense that they constituted definable territory occupied exclusively by that tribe as distinguished from being wandered over by many tribes. P. 345.

4. By the policy of the Government, the Indian right of occupancy is as sacred as the fee and can be interfered with or terminated only by the United States. P. 345.
5. Lands within the Mexican Cession were not excepted from this policy. P. 345.
6. A tribal claim to any particular lands need not be based upon treaty, statute, or other formal governmental action. P. 347.
7. In the matter of the extinguishment of Indian title based upon aboriginal occupancy, the power of Congress is supreme and its exercise is not open to inquiry by the courts. P. 347.
8. If the right of occupancy of the Walapai Indians to lands within the area granted to the Atlantic & Pacific Railroad Company in Arizona was not extinguished prior to the definite location of the railroad in 1872, then the grantee took the fee subject to the encumbrance of Indian title. On that date the title of the railroad attached as of July 27, 1866, the date of the Act. P. 347.
9. The Act of February 27, 1851, by extending the Indian Trade and Intercourse Act of June 30, 1834, over the Indian tribes in the Territories of New Mexico (then including Arizona) and Utah, exhibited the desire of Congress to continue in those Territories the general policy of the Government to recognize the Indian right of occupancy, but did not create such rights where they did not previously exist. P. 347.
10. The Act of July 22, 1854, which established the office of Surveyor General of New Mexico, etc., and the Act of July 15, 1870, which directed the Surveyor General of Arizona (then separated as a Territory from New Mexico) to ascertain and report upon land claims under the laws, usages and customs of Spain and Mexico for the information of Congress, did not extinguish any Indian title based upon aboriginal occupancy, such as may have been had by the Walapai Indians. P. 348.
11. The Act of March 3, 1865, which provided for setting aside a tract of land in Arizona as a reservation for certain tribes on the Colorado River, including the Walapais, was not intended, in default of their voluntary acceptance, to extinguish their right of occupancy of other lands. P. 351.

    Forcible removal of the Walapais to this Reservation in 1874 was not sanctioned by Congress and could not affect their right of occupancy over lands outside the Reservation.
12. The creation of the Walapai Indian Reservation in Arizona by Executive Order, January 4, 1883, at the request of the Walapais, and its acceptance by them, amounted to a relinquishment of any

tribal claims which they might have had to lands outside that Reservation, and that relinquishment was tantamount to an extinguishment by "voluntary cession," within the meaning of § 2 of the Act of July 27, 1866, *supra*. P. 357.

13. The United States is entitled to an accounting from the Railroad Company on behalf of the Walapais for any rents, issues and profits derived from leasing or use of lands in their Reservation which can be proved to have been occupied by the Walapais from time immemorial. P. 359.

114 F. 2d 420, affirmed, with a modification.

CERTIORARI, 312 U. S. 675, to review a decree affirming a decree which dismissed a bill, by the Government, seeking to establish the right of the Walapai Indians to lands claimed by the Railroad Company inside and outside of the Indians' Reservation, and for an accounting.

Mr. Nathan R. Margold, with whom *Messrs. Richard H. Hanna, William A. Brophy,* and *Felix S. Cohen* were on the brief, for the United States. *Assistant Solicitor General Fahy* filed a memorandum.

The term "Indian title" used in § 2 of the Act of 1866, had a well-understood meaning. It connoted the Indian possessory right based on aboriginal occupancy, whether or not that occupancy had been recognized by treaty, statute, or otherwise. *Johnson* v. *McIntosh,* 8 Wheat. 543; *United States* v. *Shoshone Tribe,* 304 U. S. 111. The Act applied within a roughly located area from Missouri to the Pacific Coast, and the term "Indian title" applied equally to all lands within that area and hence to all Indian rights of occupancy which then existed within that area. The provision had the same meaning and application with respect to lands in the Mexican Cession area as with respect to any other lands. *United States* v. *Candelaria,* 271 U. S. 432. The right was preserved and safeguarded until extinguished by the United States in conformity with the provisions of the Act. *Buttz* v. *Northern Pacific Railroad,* 119 U. S. 55.

This Court has consistently held that, in the absence of express language to the contrary, a federal grant of public lands does not constitute an extinguishment of Indian occupancy rights. *Johnson* v. *McIntosh, supra,* 574.

This Court has continuously recognized that aboriginal possession creates a possessory right legally enforceable against everyone except the United States. *Worcester* v. *Georgia,* 6 Pet. 515; *Mitchel* v. *United States,* 9 Pet. 711; *Choteau* v. *Molony,* 16 How. 203; *Holden* v. *Joy,* 17 Wall. 211, 244; *Buttz* v. *Northern Pacific Railroad,* 119 U. S. 55; *Cramer* v. *United States,* 261 U. S. 219.

This Court has consistently rejected attempts to exclude Indians of the Mexican Cession area from the benefit of rules generally applicable outside that area for the protection of Indian rights. *United States* v. *Joseph,* 94 U. S. 614; *United States* v. *Chavez,* 290 U. S. 357; *United States* v. *Sandoval,* 231 U. S. 28; *United States* v. *Candelaria,* 271 U. S. 432; *United States* v. *Kagama,* 118 U. S. 375; *Cramer* v. *United States, supra; Lane* v. *Pueblo of Santa Rosa,* 249 U. S. 110; *Pueblo of Santa Rosa* v. *Fall,* 273 U. S. 315, 321.

Federal legislation applicable to the Walapai Tribe as well as to other tribes protects the Indian right of occupancy based on aboriginal possession. [Referring to numerous statutes.]

Except in the present case, no considered decision has ever been made by the Executive branch of the Government as to the relative rights of the Walapai Tribe and the respondent railroad.

Spanish and Mexican law was at least as generous in its recognition of the legality of Indian aboriginal occupancy as the law of the United States. Indeed, experts on this subject have concluded that the law of the United States, recognizing the occupancy rights of Indian tribes, was derived from Spanish sources. See *Johnson* v. *Mc-*

Intosh, 8 Wheat. 543, 573; *Worcester* v. *Georgia,* 6 Pet. 515, 546; *Choteau* v. *Molony,* 16 How. 203, 229; *Mitchel* v. *United States,* 9 Pet. 711, 759; *Carino* v. *Insular Government,* 212 U. S. 449.

Such rights of the Walapai Tribe as existed on July 27, 1866, have not been extinguished or abandoned. [Referring to the 1870 Act appointing a Surveyor General for Arizona; the temporary removal in 1874 of part of the Tribe to the Colorado River Reservation; the establishment of an Executive order reservation of the Walapai Indians in 1883; the 1925 Exchange Act.]

The United States and the Walapai Tribe have been deprived of a right to trial upon issues of fact, through a misapplication of the doctrine of judicial notice.

Messrs. Joyce Cox and *Max Radin,* with whom *Messrs. Charles H. Woods, Lawrence Cake,* and *Richard M. Fennemore* were on the brief, for respondent.

Messrs. Joe Conway, Attorney General of Arizona, and *Earl Anderson,* Assistant Attorney General, filed a brief on behalf of that State and Coconino, Mohave, and Yavapai Counties, Arizona, as *amici curiae,* in support of respondent.

Mr. Justice Douglas delivered the opinion of the court.

This is a suit brought by the United States, in its own right and as guardian of the Indians of the Walapai (Hualpai) Tribe in Arizona (28 U. S. C. § 41 (1), § 24 Judicial Code) to enjoin respondent from interfering with the possession and occupancy by the Indians of certain land in northwestern Arizona. Respondent claims full title to the lands in question under the grant to its predecessor, the Atlantic and Pacific Railroad Co., provided for in the Act of July 27, 1866, 14 Stat. 292. The bill sought to establish that respondent's rights under the grant of 1866

are subject to the Indians' right of occupancy both inside and outside their present reservation which was established by the Executive Order of President Arthur, January 4, 1883. The bill consists of two causes of action—the first relating to lands inside, and the second, to lands outside, that reservation. The bill prayed, *inter alia*, that title be quieted and that respondent "account for all rents, issues and profits derived from the leasing, renting or use of the lands subject to said right of occupancy" by the Indians. Respondent moved to dismiss on the ground that the facts alleged were "insufficient to constitute a valid cause of action in equity." The District Court granted that motion. The Circuit Court of Appeals affirmed. 114 F. 2d 420. We granted the petition for certiorari because of the importance of the problems raised in the administration of the Indian laws and the land grants.

Sec. 2 of the Act of July 27, 1866, the Act under which respondent's title to the lands in question derived,[1] provided: "The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act."

Basic to the present causes of action is the theory that the lands in question were the ancestral home of the Walapais, that such occupancy constituted "Indian title" within the meaning of § 2 of the 1866 Act, which the United States agreed to extinguish, and that in absence of such extinguishment the grant to the railroad "conveyed

[1] Earlier cases involving this grant are *United States* v. *Southern Pacific R. Co.*, 146 U. S. 570; *Atlantic & Pacific R. Co.* v. *Mingus*, 165 U. S. 413; *Santa Fe Pacific R. Co.* v. *Lane*, 244 U. S. 492; *Santa Fe Pacific R. Co.* v. *Fall*, 259 U. S. 197; *Santa Fe Pacific R. Co.* v. *Work*, 267 U. S. 511.

the fee subject to this right of occupancy." *Buttz* v. *Northern Pacific Railroad,* 119 U. S. 55, 66. The Circuit Court of Appeals concluded that the United States had never recognized such possessory rights of Indians within the Mexican Cession [2] and that in absence of such recognition the Walapais had no such right good against grantees of the United States.

Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then the Walapais had "Indian title" which, unless extinguished, survived the railroad grant of 1866. *Buttz* v. *Northern Pacific Railroad, supra.*

"Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." *Cramer* v. *United States,* 261 U. S. 219, 227. This policy was first recognized in *Johnson* v. *M'Intosh,* 8 Wheat. 543, and has been repeatedly reaffirmed. *Worcester* v. *Georgia,* 6 Pet. 515; *Mitchel* v. *United States,* 9 Pet. 711; *Chouteau* v. *Molony,* 16 How. 203; *Holden* v. *Joy,* 17 Wall. 211; *Buttz* v. *Northern Pacific Railroad, supra; United States* v. *Shoshone Tribe,* 304 U. S. 111. As stated in *Mitchel* v. *United States, supra,* p. 746, Indian "right of occupancy is considered as sacred as the fee simple of the whites." Whatever may have been the rights of the Walapais under Spanish law, the *Cramer* case assumed that lands within the Mexican Cession were not excepted from the policy to respect Indian right of occupancy. Though the *Cramer*

[2] See Treaty of Guadalupe Hidalgo, 9 Stat. 922.

case involved the problem of individual Indian occupancy, this Court stated that such occupancy was not to be treated differently from "the original nomadic tribal occupancy." (p. 227.) Perhaps the assumption that aboriginal possession would be respected in the Mexican Cession was, like the generalizations in *Johnson* v. *M'Intosh, supra,* not necessary for the narrow holding of the case. But such generalizations have been so often and so long repeated as respects land under the prior sovereignty of the various European nations, including Spain,[3] that, like other rules governing titles to property (*United States* v. *Title Insurance & Trust Co.,* 265 U. S. 472, 486–487) they should now be considered no longer open. Furthermore, treaties [4] negotiated with Indian tribes, wholly or partially within the Mexican Cession, for delimitation of their occupancy rights or for the settlement and adjustment of their boundaries, constitute clear recognition that no different policy as respects aboriginal possession obtained in this area than in other areas. And see *United States* v. *Kagama,* 118 U. S. 375, 381. Certainly it would take plain and unambiguous action to deprive the Walapais of the benefits of that policy. For it was founded on the desire to maintain just and peaceable relations with Indians. The reasons for its application to other tribes are no less apparent in case of the Walapais, a savage tribe which in early days caused the military no end of trouble.

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[3] *Chouteau* v. *Molony, supra; Buttz* v. *Northern Pacific Railroad, supra; Cramer* v. *United States, supra; United States* v. *Shoshone Tribe, supra.* See Royce, Indian Land Cessions in the United States, 18 Publications of the Bureau of American Ethnology, Smithsonian Institution, Pt. 2 (1899) pp. 539–561, 639–643.

[4] Treaty of July 1, 1852, 10 Stat. 979 (Apache Nation); Treaty of October 7, 1863, 13 Stat. 673, 674 (Tabeguache Band of Utah Indians); Treaty of March 2, 1868, 15 Stat. 619, Act of April 29, 1874, 18 Stat. 36, Act of June 15, 1880, 21 Stat. 199 (Ute Indians); Treaty of June 1, 1868, 15 Stat. 667 (Navajo Tribe). For a schedule of Indian land cessions see Royce, *op. cit., supra* note 3, pp. 648 *et seq.*

Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the *Cramer* case, "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive." 261 U. S. at 229.

Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. *Buttz* v. *Northern Pacific Railroad, supra,* p. 66. As stated by Chief Justice Marshall in *Johnson* v. *M'Intosh, supra,* p. 586, "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. *Beecher* v. *Wetherby,* 95 U. S. 517, 525.

If the right of occupancy of the Walapais was not extinguished prior to the date of definite location of the railroad in 1872, then the respondent's predecessor took the fee subject to the encumbrance of Indian title. *Buttz* v. *Northern Pacific Railroad, supra.* For on that date the title of respondent's predecessor attached as of July 27, 1866. *United States* v. *Southern Pacific R. Co.,* 146 U. S. 570; *Nelson* v. *Northern Pacific Ry. Co.,* 188 U. S. 108.

Certainly, prior to 1865 any right of occupancy of the Walapais to the lands in question was not extinguished; nor was the policy of respecting such Indian title changed. The Indian Trade and Intercourse Act of June 30, 1834, 4 Stat. 729, was extended over "the Indian tribes in the Territories of New Mexico and Utah" by § 7 of the Act of February 27, 1851, 9 Stat. 574, 587. The 1834 Act, which derived from the Act of July 22, 1790, 1 Stat. 137, made it an offense to drive stock to range or feed "on any land

belonging to any Indian or Indian tribe, without the consent of such tribe" (§ 9); gave the superintendent of Indian affairs authority "to remove from the Indian country all persons found therein contrary to law" (§ 10); made it unlawful to settle on "any lands belonging, secured, or granted by treaty with the United States to any Indian tribe" (§ 11); and made invalid any conveyance of lands "from any Indian nation or tribe of Indians." § 12. The Act of 1851 obviously did not create any Indian right of occupancy which did not previously exist. But it plainly indicates that in 1851 Congress desired to continue in these territories the unquestioned general policy of the Federal Government to recognize such right of occupancy. As stated by Chief Justice Marshall in *Worcester* v. *Georgia, supra,* 6 Pet. p. 557, the Indian trade and intercourse acts "manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States."

The court below laid considerable stress upon the Act of July 22, 1854, 10 Stat. 308, as indicating that Congress recognized no rights of the Indians in Arizona and New Mexico other than those existing under Mexican law or created by reservations after the Mexican Cession. But we do not agree that, so far as the respondent's rights are concerned, that Act instituted a policy of non-recognition of Indian title. Nor do we think that it effected any extinguishment of that title.

The Act of 1854 established the office of Surveyor General of New Mexico. It donated land to certain qualified citizens (§ 2) with the exception, *inter alia,* of "military or other reservations." § 4. Unlike the Pre-emption Act of September 4, 1841, § 10, 5 Stat. 453, the 1854 Act did not extend only to "the public lands to which the Indian

title had been at the time of such settlement extinguished." It did provide, however, that "any of the lands not taken" under it should "be subject to the operation" of the Preemption Act. § 7. Moreover, the 1854 Act provided as respects the Territories of Nebraska and Kansas that the grants should extend only to lands "to which the Indian title has been or shall be extinguished." § 12.

From that it is argued that since Congress recognized Indian title in Nebraska and Kansas and under the Preemption Act but did not recognize it as respects the lands in this area, a shift of policy in the Mexican Cession was indicated. The issue here, however, is not between a settler claiming under the 1854 Act and the Walapais. Whether in such a case the 1854 Act should be construed as extinguishing any Indian title to land taken under it we need not decide.[5] Respondent does not claim under that Act and hence can derive no rights from it.

Some stress is likewise placed on § 8 of the Act of July 22, 1854, and on the Act of July 15, 1870, 16 Stat. 291, 304. The former required the Surveyor General for New Mexico "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico"; and to make a report "on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo . . . denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States." Such report was to be "laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona*

[5] The Act of 1854 is cited in Cohen, Handbook of Federal Indian Law (1941) p. 308, for the statement that, "Only where it was necessary to give emigrants possessory rights to parts of the public domain, has Congress ever granted tribal lands in disregard of tribal possessory rights."

fide grants, and give full effect" to the treaty. It was also provided that "until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act." The 1870 Act directed the Surveyor General for Arizona (which was separated as a Territory from New Mexico in 1863, 12 Stat. 664) "to ascertain and report upon the origin, nature, character, and extent of the claims to lands in said Territory under the laws, usages, and customs of Spain and Mexico." His report was to be "laid before Congress for such action thereon as shall be deemed just and proper."

These Acts did not extinguish any Indian title based on aboriginal occupancy which the Walapais may have had. In that respect they were quite different from the Act of March 3, 1851, 9 Stat. 631, passed to ascertain and settle certain land claims in California. Under § 13 of that Act "all lands the claims to which shall not have been presented" to the commissioners, appointed to receive and act upon all petitions for confirmation of land claims, "within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States." This Court passed on that Act in *Barker* v. *Harvey*, 181 U. S. 481. The plaintiff there claimed under two Mexican grants. The defendants were Indians who claimed a right of permanent occupancy; but they had not presented their claims to the commissioners within the time specified by § 13. This Court held that as a result of that failure their claims were barred. And see *United States* v. *Title Insurance & Trust Co.*, *supra*, 265 U. S. 472. That is to say, the Act of 1851 was interpreted as containing machinery for extinguishment of claims, including those based on Indian right of occupancy. Since Congress had provided a method for extinguishment, its appropriateness raised only a political,

not a justiciable, issue. The Acts of 1854 and 1870, unlike the Act of 1851, merely called for a report to Congress on certain land claims. If there was an extinguishment of the rights of the Walapais, it resulted not from action of the Surveyor General but from action of Congress based on his reports.[6] We are not advised that Congress took any such action. In its absence we must conclude that these Acts were concerned not with the problem of ascertaining the boundaries of Indian country but with the problem of quieting titles originating under Spanish or Mexican grants. For it should be noticed that § 8 of the 1854 Act contemplated confirmation by Congress of "*bona fide* grants."

This brings us to the Act of March 3, 1865, 13 Stat. 541, 559, which provided: "All that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River, containing about seventy-five thousand acres of land, shall be set apart for an Indian reservation for the Indians of said river and its tributaries." It is plain that the Indians referred to included the Walapais. The suggestion for removing various Indian tribes in this area to a reservation apparently originated with a former Indian agent, Superintendent Poston, who was a Territorial Representative in Congress in 1865. His explanation[7] on the floor of the

[6] The various reports of the Surveyor General are found in the annual reports of the Secretary of the Interior from 1855 through 1890, when the Court of Private Land Claims was constituted. Act of March 3, 1891, 26 Stat. 854. Sec. 15 of that Act repealed § 8 of the Act of 1854. Under § 13 of the 1891 Act it was provided: "No claim shall be allowed that shall interfere with or overthrow any just and unextinguished Indian title or right to any land or place."

[7] Cong. Globe, 38th Cong., 2d Sess., March 2, 1865, p. 1320: "As superintendent of Indian affairs, I called the confederated tribes of the Colorado in council together. The council was attended by the principal chiefs and headmen of the Yumas, Mojaves, Yapapais, Hualapais, and Chemihuevis. These tribes have an aggregate of ten thousand

House of the bill, which resulted in the creation of the 1865 reservation, indicates that he had called a council of the confederated tribes of the Colorado, including the Walapais, and had told them that "they should abandon" their lands and confine themselves to the place on the Colorado river which was later proposed for a reservation. He entered into no agreement with them nor did he propose a treaty. He merely stated that if elected to Congress he would try to get Congress to provide for them. As stated by the Commissioner of Indian Affairs in 1864, "Assuming that the Indians have a right of some kind to the soil, Mr. Poston's arrangement proposes a compromise with these Indians, by which on their confining themselves to their reservation, and yielding all claims to lands beyond it, they shall, in lieu of an annuity in money or supplies,

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souls living near the banks of the Colorado, from Fort Yuma to Fort Mojave. . . .

"But as the representative of the Government of the United States at that time, I did not undertake to make a written treaty with these Indians, because I considered that the Government was able and willing to treat them fairly and honestly without entering into the form of a written treaty, which has been heretofore so severely criticised in both Houses of Congress, and with some reason. These Indians there assembled were willing, for a small amount of beef and flour, to have signed any treaty which it had been my pleasure to write. I simply proposed to them that for all the one hundred and twenty thousand square miles, full of mines and rich enough to pay the public debt of the United States, they should abandon that Territory and confine themselves to the elbow in the Colorado river, not more than seventy-five thousand acres. But I did not enter into any obligation on account of the United States to furnish them with seeds and agricultural implements. I simply told them that if I was elected to represent that Territory in this Congress, I would endeavor to lay their claims before the Government, which they understood to be magnanimous, and that I hoped that this Congress would have the generosity and the justice to provide for these Indians, who have been robbed of their lands and their means of subsistence, and that they may be allowed to live there where they have always made their homes. They desire to live as do the Pueblo Indians of New Mexico and

be furnished by government with an irrigating canal, at a cost estimated at something near $100,000, which, by insuring them their annual crops, will enable them to support themselves, independently of other aid by the government." [8]

We search the public records in vain for any clear and plain indication that Congress in creating the Colorado River reservation was doing more than making an offer to the Indians, including the Walapais, which it was hoped would be accepted as a compromise of a troublesome question. We find no indication that Congress by creating that reservation intended to extinguish all of the rights which the Walapais had in their ancestral home.[9] That

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Arizona. Those Pueblo Indians live in settlements, in towns, in reservations, according to the wise policy of the Spanish Government, which colonized the Indians in reservations and made their labor valuable in building improvements for their own sustenance, for churches, and public improvements, and in that manner made them peaceable Indians, instead of having everlasting and eternal war with the people whom they had robbed of their land.

"These people having been citizens of the Mexican Government, are not, according to our theory, entitled to any right in the soil; and therefore no treaty with these Indians for the extinction of their title to the soil would be recognized by this Government. It is a fiction of law which these Indians, in their ignorance, are not able to understand. They cannot see why the Indians of the Northeast have been paid annuities since the foundation of this Government for the extinction of their title, while the Indians who were formerly subject to the Spanish and Mexican Governments are driven from their lands without a dollar. It is impossible for these simple-minded people to understand this sophistry. They consider themselves just as much entitled to the land which their ancestors inhabited before ours landed on Plymouth Rock as the Indians of the Northeast. They have never signed any treaty relinquishing their right to the public domain."

[8] Report of the Secretary of the Interior, Dec. 5, 1864, p. 165.

[9] Respondent also places some stress on the Act of April 20, 1871, 17 Stat. 19, in which Congress permitted respondent's predecessor to mortgage its property. But as stated in *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 753, "... title to lands is not strengthened

Congress could have effected such an extinguishment is not doubted. But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards. As stated in *Choate* v. *Trapp*, 224 U. S. 665, 675, the rule of construction recognized without exception for over a century has been that "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." And see *Minnesota* v. *Hitchcock*, 185 U. S. 373, 395–396. Nor was there any plain intent or agreement on the part of the Walapais to abandon their ancestral lands if Congress would create a reservation. Furthermore, the Walapais did not accept the offer which Congress had tendered. In 1874 they were, however, forcibly removed to the Colorado River reservation on order from the Indian Department.[10] But they left it in a body the next year.[11] And it was decided "to allow them to remain in their old range during good behavior."[12] They did thereafter remain in their old country and en-

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by giving a mortgage upon them; nor can the fact that it has been given throw any light upon the prior estate of the mortgagor." And see *Atlantic & Pacific R. Co.* v. *Mingus*, 165 U. S. 413, 430, where this Court in speaking of the purpose of the Act of April 20, 1871, said: "The original act being silent upon the subject of mortgaging the grant, there is reason to suppose that Congress passed the act for the purpose of resolving any doubts that capitalists may have entertained with respect to such power. The mortgagees, standing in the place of the mortgagor, had no greater rights than it had, and must be held to have known that they were taking an estate which was defeasible upon condition broken."

[10] Walapai Papers, S. Doc. No. 273, 74th Cong., 2d Sess., pp. 96–98. Though the Walapais were at peace with the whites prior to 1866 (*id.* p. 92) the killing of their head chief by a white led to hostilities which continued for a few years. *Id.* pp. 37–94.

[11] Walapai Papers, *op. cit.*, p. 104.

[12] Walapai Papers, *op. cit.*, p. 104.

gaged in no hostilities against the whites. No further attempt was made to force them onto the Colorado River reservation, even though Congress had made various appropriations to defray the costs of locating the Arizona Indians in permanent abodes (Act of March 3, 1865, 13 Stat. 541, 559; Act of July 27, 1868, 15 Stat. 198, 219; Act of July 15, 1870, 16 Stat. 335, 357), including the Colorado River reservation. Act of March 2, 1867, 14 Stat. 492, 515; Act of May 29, 1872, 17 Stat. 165, 188. On these facts we conclude that the creation of the Colorado River reservation was, so far as the Walapais were concerned, nothing more than an abortive attempt to solve a perplexing problem. Their forcible removal in 1874 was not pursuant to any mandate of Congress. It was a high-handed endeavor to wrest from these Indians lands which Congress had never declared forfeited.[13] No forfeiture can be

[13] See Walapai Papers, *op. cit.*, p. 108. General Schofield reported on May 24, 1875, to the Adjutant General as follows:

"The Hualpai Indians have been our firm friends for many years, and our active allies whenever their services have been required against the hostile Apaches. In return for their fidelity they have been treated with great injustice and cruelty. They were forced to leave their homes in the mountains and go upon a reservation in the Colorado desert, where they have suffered from the extreme heat, to which they were unaccustomed, from disease, and from hunger.

"This was done in spite of the protest of the Military commanders who were familiar with the wants of these Indians and were anxious to repay by kind treatment the faithful services they had rendered. The Indians were bitterly opposed to this change, and it was only the great influence which Gen'l. Crook and Captain Byrne had acquired over them that enabled the removal to be made without war.

"The Indian Agent, having seen fit to relinquish the aid of this powerful influence, the effect was at once manifest in the return of the Hualpais to their former homes.

"I am decidedly opposed to the use of any coercive measures to force them back upon the Colorado reservation.

"The injustice and bad faith shown by the government toward the Hualpais and the Indians which Gen'l. Crook had collected upon the Verde reservation are calculated to undo as far as possible the

predicated on an unauthorized attempt to effect a forcible settlement on the reservation, unless we are to be insensitive to the high standards for fair dealing in light of which laws dealing with Indian rights have long been read. Certainly, a forced abandonment of their ancestral home was not a "voluntary cession" within the meaning of § 2 of the Act of July 27, 1866. *Atlantic & Pacific R. Co.* v. *Mingus*, 165 U. S. 413, 438–439.

The situation was, however, quite different in 1881. Between 1875 and that date there were rather continuous suggestions for settling the Walapais on some reservation.[14] In 1881 the matter came to a head. A majority of the tribe, "in council assembled," asked an officer of the United States Army in that region "to aid them and represent to the proper authorities" the following proposal:[15] "They say that in the country, over which they used to roam so free, the white men have appropriated all the water; that large numbers of cattle have been introduced and have rapidly increased during the past year or two; that in many places the water is fenced in and locked up; and they are driven from all waters. They say that the Railroad is now coming, which will require more water, and will bring more men who will take up all the small springs remaining. They urge that the following reservation be set aside for them while there is still

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good work which Gen'l. Crook and his troops had accomplished with so much wisdom and gallantry. It is useless to attempt to disguise the fact that such treatment of the Indians is in violation of the just and humane policy prescribed by the President and a disgrace to any civilized country."

[14] Walapai Papers, *op. cit.*, pp. 113–131.

[15] Walapai Papers, *op. cit.*, pp. 134–135. For a strikingly close version of this episode as related in 1931 by a member of the Walapai tribe who was present at the conference in 1881 between the council of the tribe and the United States Army officer, see Walapai Papers, pp. 247–249.

time; that the land can never be of any great use to the Whites; that there are no mineral deposits upon it, as it has been thoroughly prospected; that there is little or no arable land; that the water is in such small quantities, and the country is so rocky and void of grass, that it would not be available for stock raising. I am credibly informed, and from my observations believe, the above facts to be true. I, therefore, earnestly recommend that the hereafter described Reservation be, at as early a date as practicable, set aside for them."

Pursuant to that recommendation, the military reservation was constituted on July 8, 1881, subject to the approval of the President.[16] The Executive Order creating the Walapai Indian Reservation was signed by President Arthur on January 4, 1883.[17] There was an indication that the Indians were satisfied with the proposed reservation.[18] A few of them thereafter lived on the reservation; many of them did not.[19] While suggestions recurred for the creation of a new and different reservation,[20] this one was not abandoned. For a long time it remained unsurveyed.[21] Cattlemen used it for grazing, and for some years the Walapais received little benefit from it.[22] But in view of all of the circumstances, we conclude that its creation at the request of the Walapais and its acceptance by them amounted to a relinquishment of any tribal claims

[16] Walapai Papers, *op. cit.*, pp. 135–136.

[17] Walapai Papers, *op. cit.*, p. 146. As to the validity of a reservation established by Executive Order, see *United States* v. *Midwest Oil Co.*, 236 U. S. 459. *Spalding* v. *Chandler*, 160 U. S. 394. General Indian Allotment Act of February 8, 1887, 24 Stat. 388, § 1; 34 Op. A. G. 181, 186–189.

[18] Walapai Papers, *op. cit.*, p. 136.

[19] Walapai Papers, *op. cit.*, pp. 163, 165–168, 178, 198.

[20] Walapai Papers, *op. cit.*, pp. 151, 161–165.

[21] Walapai Papers, *op. cit.*, pp. 192, 196.

[22] Walapai Papers, *op. cit.*, pp. 179, 183.

to lands [23] which they might have had outside that reservation and that that relinquishment was tantamount to an extinguishment by "voluntary cession" within the meaning of § 2 of the Act of July 27, 1866. The lands were fast being populated. The Walapais saw their old domain being preëmpted. They wanted a reservation while there was still time to get one. That solution had long seemed desirable in view of recurring tensions between the settlers and the Walapais. In view of the long standing attempt to settle the Walapais' problem by placing them on a reservation, their acceptance of this reservation must be regarded in law as the equivalent of a release of any tribal rights which they may have had in lands outside the reservation. They were in substance acquiescing in the penetration of white settlers on condition that permanent provision was made for them too. In view of this historical setting, it cannot now be fairly implied that tribal rights of the Walapais in lands outside the reservation were preserved. That would make the creation of the 1883 reservation, as an attempted solution of the violent problems created when two civilizations met in this area, illusory indeed. We must give it the definitiveness which the exigencies of that situation seem to demand. Hence, acquiescence in that arrangement must be deemed to have been a relinquishment of tribal rights in lands outside the reservation and notoriously claimed by others. Cf. *Marsh* v. *Brooks*, 14 How. 513; *Shoshone Tribe* v. *United States*, 299 U. S. 476.

On January 23, 1941, the date of the filing of this petition for certiorari, respondent quitclaimed to the United States, under § 321 (b), Pt. III of the Interstate Commerce Act

[23] As distinguished from individual rights of occupancy, if any, as were involved in *Cramer* v. *United States*, *supra*, 261 U. S. 219, but which, not being in issue here, are not foreclosed or affected by the judgment in this case.

(Transportation Act of 1940, 54 Stat. 929, 954), all lands claimed by it under the Act of July 27, 1866, within the Walapai Indian Reservation. Since the decree below must stand as to the second cause of action and since by virtue of the quitclaim deeds the United States has received all the lands to which the first cause of action relates, the decree will not be reversed. It is apparent, however, that it must be modified so as to permit the accounting as respects lands in the first cause of action. It does not appear whether those lands were included in the ancestral home of the Walapais in the sense that they were in whole or in part occupied exclusively by them or whether they were lands wandered over by many tribes. As we have said, occupancy necessary to establish aboriginal possession is a question of fact. The United States is entitled to an accounting as respects any or all of the lands in the first cause of action which the Walapais did in fact occupy exclusively from time immemorial.[24] Such an accounting is not precluded by the Act of February 20, 1925, 43 Stat. 954, which authorized the Secretary of the Interior "to accept reconveyances to the Government of privately owned and State school lands and relinquishments of any valid filings, under the homestead laws, or of other valid claims within the Walapai Indian Reservation." The implication is that there may be some land within the reservation that is not subject to Indian occupancy. But that Act certainly cannot be taken as an extinguishment of any and all Indian title that did exist or as a repeal by implication of § 2 of the Act of July 27, 1866, requiring such extinguishment by "voluntary cession."

[24] In case of any lands in the reservation which were not part of the ancestral home of the Walapais and which had passed to the railroad under the 1866 Act, the railroad's title would antedate the creation of the reservation in 1883 and hence not be subject to the incumbrance of Indian title.

It was passed so that lands "retained for Indian purposes may be consolidated and held in a solid area so far as may be possible." [25] Such statements by the Secretary of the Interior as that "title to the odd-numbered sections" was in the respondent [26] do not estop the United States from maintaining this suit. For they could not deprive the Indians of their rights any more than could the unauthorized leases in *Cramer* v. *United States, supra.*

Hence, an accounting as respects such lands in the reservation which can be proved to have been occupied by the Walapais from time immemorial can be had. To the extent that the decree below precludes such proof and accounting, it will be modified. And as so modified, it is

Affirmed.

NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO. *v.* FRANK.

APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF NEW YORK.

No. 15. Reargued October 16, 17, 1941.—Decided December 8, 1941.

The attempt of a consolidated interstate carrier to escape liability for debts of a constituent, upon the ground that permission to assume such liability was never applied for or obtained under § 20a of the Interstate Commerce Act, although according to the state law under which the consolidation took place the liability was one which attached to the consolidated corporation upon its creation, can not be upheld in this case in view of a consistent and long-standing interpretation placed upon § 20a by the Interstate Commerce Commission, in relation to this particular carrier system, and with full knowledge of its affairs, as not requiring such

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[25] H. Rep. No. 1446, 68th Cong., 2d Sess., p. 1. So far as appears there were no reconveyances under that Act. It apparently was, however, the occasion for precipitating the present litigation.

[26] *Id.* And see Walapai Papers, *op. cit.*, pp. 320–321.

permission, and in view of the fact that to reject that interpretation now would result in the enrichment of a stockholder equity which itself was capitalized, with no thorough scrutiny by the Commission, by virtue of that interpretation. P. 372.

24 N. Y. S. 2d 854, affirmed.

APPEAL from a judgment affirming a judgment of the municipal court of the City of New York in favor of the above-named appellee, in an action against the appellant to recover interest due on bonds issued by the Northern Ohio Railway Company which were guaranteed by the Lake Erie & Western Railroad Company. 175 Misc. 902, 24 N. Y. S. 2d 846. The latter company was a constituent of the appellant in this case, a consolidated railroad corporation embracing a number of railroad systems. The case was first argued at the 1940 Term and the judgment below was affirmed by an equally divided Court, 313 U. S. 538. Rehearing was granted, 313 U. S. 596.

Mr. William J. Donovan, with whom *Messrs. John H. Agate, Ralstone R. Irvine,* and *Theodore S. Hope, Jr.* were on the brief for appellant.

Mr. Louis J. Vorhaus, with whom *Messrs. David Vorhaus* and *Joseph Fischer* were on the brief, for appellee.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The appellant, commonly known as the Nickel Plate Road, was organized in 1923 as a consolidated corporation under the laws of five states: New York, Pennsylvania, Ohio, Indiana, and Illinois. The agreements and articles of consolidation provided that it should succeed to all of the properties and franchises, contracts, and obligations owned by its constituent companies. Section 143 of the New York Railroad Law, under which the new corporation came into being, provided that "all debts and liabili-

ties incurred by either of such corporations shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if incurred or contracted by it." [1] Among the constituent companies was the Lake Erie & Western Railroad. In connection with a lease of certain properties from the Northern Ohio Railway it had guaranteed payment of principal and interest upon the latter's bonds secured by mortgage on the leased property. Because of the contention that the state law "attached" the obligations of this guaranty to the Nickel Plate, it has now been held liable upon defaulted coupons by a Municipal Court of the City of New York.

The appellant defended on two grounds: *First,* that the original guaranty by the Lake Erie was *ultra vires.* This defense was overruled by the state court and nothing of that issue survives for our consideration. *Second,* that approval by the Interstate Commerce Commission was necessary under § 20a of the Interstate Commerce Act before appellant legally could "assume" the obligation,[2]

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[1] The complete text of § 143 of the New York Railroad Law was as follows:

"The rights of all creditors of, and all liens upon the property of, either of such corporations, parties to such agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if incurred or contracted by it. No actions or proceedings in which either of such corporations is a party shall abate or be discontinued by such agreement and act of consolidation, but may be conducted to final judgment in the names of such corporations, or such new corporation may be, by order of the court, on motion substituted as a party."

[2] § 20a (2) of the Interstate Commerce Act provided that:

"It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness

and that such approval had not been given. This defense, too, was overruled by the state court, and this federal question comes here by appeal.

In support of this defense the appellant set forth a letter, dated November 25, 1939, from the Secretary of the Interstate Commerce Commission, which advised "that the New York, Chicago & St. Louis Railroad Company has never applied for, nor received authorization pursuant to section 20 (a) of the Interstate Commerce Act to assume any obligation or liability as lessor, lessee, guarantor, endorser, surety, or otherwise in respect of bonds of the Northern Ohio Railway Company." But it added that "for further information I would refer" to a reported case in which the Commission had said: "That the consolidation had the effect of transferring the guaranty of the Lake Erie to the Nickel Plate appears to be generally assumed by the parties to the reorganization proceeding . . ." [3]

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of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

[3] Akron, C. & Y. Ry. Co. & Northern O. Ry. Co. Reorganization, 236 I. C. C. 214, 216–217.

Compare the following, from a letter written by the Director of the Commission to one Zinman, dated March 19, 1940, referring to

This reference suggests an examination of the administrative history of the Nickel Plate consolidation and financing to learn what administrative application has been made of the statutes in question to the debt structure of this particular appellant.

Shortly after its consolidation the appellant asked the Interstate Commerce Commission to certify under § 1 of the Interstate Commerce Act that public convenience and necessity required the acquisition and operation by it of the railroad lines owned by the constituent companies. It also asked authority under § 20a to issue preferred and common capital stocks in the amounts fixed by the agreements and articles of consolidation. It did not, however, ask under § 5 of the Act for approval of its consolidation. Acquisition and Stock Issue by N. Y., C. & St. L. R. Co., 79 I. C. C. 581.

This application required the Commission to construe the Transportation Act of 1920, which had recently introduced a wide range of innovations into the Interstate Commerce Act. Section 5 of the Interstate Commerce Act, as amended by the Transportation Act of 1920, directed the Commission to formulate "as soon as practicable" a complete plan for the consolidation of the railways into a limited number of systems. As so amended, § 5 also subjected voluntary consolidations to the ap-

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the Nickel Plate Guaranty on the Northern Ohio bonds, and appearing in the Commission's file in Acquisition and Stock Issue by N. Y., C. & St. L. R. Co., 79 I. C. C. 581:

"As to the matter of assumption of obligation and liability in respect of the securities of others, it is our understanding that no authority was sought nor granted in connection with the application recorded under the above Finance Docket number. It is our further understanding that the consolidated company took the properties, rights, and franchises of the constituent companies, subject to all their debts, obligations, and liabilities, such as might be imposed by the consolidation statutes of the states of the constituent companies. See 82 I. C. C. 365 (366)."

proval of the Commission and required that they be approved if found, among other things, to be in harmony with such complete plan for general consolidation and if it appeared that the bonds of the consolidated corporations at par together with the outstanding capital stock at par would not exceed the value of the consolidated properties as determined by the Commission. By adding § 20a, the Transportation Act placed the issue of new securities and the assumption of obligations under the control of the Commission. The Act did not, however, provide for federal incorporation or for federal consolidation of carriers, but left the creation of new or consolidated corporations to state laws.

At the time of the Nickel Plate's application for approval of its acquisition and operation of properties and the issue of its stock, the Commission had not completed its valuation of the constituent companies nor adopted a complete plan of consolidation. The question arose, therefore, whether under the peculiarities of the statute the Commission was yet authorized to exercise any control over voluntary consolidations and the legal incidents and consequences thereof. On this question the Commission was divided in opinion. Commissioner Eastman, supported by Commissioners Esch and Hall, thought the amendment to § 5 of the Interstate Commerce Act should be construed as being immediately effective to make any consolidation not approved by the Commission unlawful. Had such a view prevailed, the terms of the Nickel Plate consolidation would have been subject to scrutiny at that time. Each item of its debt would have been examined and approved or rejected, and its capital structure, including stock issue as well as debts, would have been tested by the valuation of its properties. The majority opinion, however, held that the Commission's approval under § 5 was unnecessary. It stated: "Applicable State laws afford means to effect the consolidation. Such laws

are in force. They are, in fact, the laws to which resort must be had to effectuate consolidations which the interstate commerce act is designed to facilitate. We can not conclude that they have been nullified or superseded. As valid existing laws we have no power to suspend them. Whether State corporations in matters regarding their status as legal entities as distinguished from their participation in interstate commerce may avail themselves of such laws does not depend upon our election or anything we do. Authority in us to withhold approval in the public interest of security issues when State laws permit consolidation does not mean that we may not grant approval when public interest requires that we do so. Furthermore, in the absence of mandatory provisions of a Federal statute we should give full faith and credit to the acts of sovereign States, especially when, as in this case, their action is unanimous." 79 I. C. C. at pp. 585–586. The majority opinion added that the Act did not provide for "compulsory consolidation," that such a provision had been "considered by the Congress and rejected," and that accordingly "it does not seem we should conclude that the Congress intended to prevent voluntary consolidations under available State laws in order thereby to force consolidation under such general plan as we may ultimately adopt." *Id.*, p. 586. It said that "if the Congress had intended to suspend State laws until we should at some later time elect to permit their use, such intent would have been manifested in plain terms." *Ibid.* The majority of the Commission concluded that by virtue of the state proceedings and notwithstanding the lack of approval by the Interstate Commerce Commission "all things necessary to the completion and consummation of the consolidation have been effected." 79 I. C. C. at p. 583.

The Commission thereupon entered an order giving appellant its formal approval to the issue of new stock, including that to be exchanged share for share for upwards

of $23,000,000 par value of the shares in the old Lake Erie Company, subject to an agreement to contribute a relatively small part of it to the treasury of the new company, all as provided in the agreements and articles of consolidation.

The Commission did not, in authorizing this stock issue, make any finding that such stock at par together with bonds at par did not exceed the value of the consolidated properties. It made no order approving assumption of any indebtedness of any kind. It appears that the appellant at that time sought no such authority. Approaching maturity of some issues of bonds eventually forced it to take some corporate action, and upon such later occasions it sought and obtained authorization to extend maturity dates and in connection with such extensions to make an express assumption of liability as *primary* obligor.

One of the constituent companies—the old Nickel Plate—had outstanding at consolidation $16,381,000 of a bond issue dated October 1, 1887, maturing October 1, 1937. The assumption of this obligation was not approved until September 17, 1937, at which time the Commission approved a proposal to extend the maturity date for ten years and to assume obligation as primary obligor in respect of the extended bonds. N. Y., C. & St. L. R. Co. Bonds and Assumption, 221 I. C. C. 772. The published reports of the Commission disclose two instances of similar approval of extension and assumption of primary liability with respect to bonds of the Lake Erie & Western outstanding at the date of consolidation, one as recent as June 7, 1941. N. Y., C. & St. L. R. Co. Assumption of Obligation, 217 I. C. C. 598; N. Y., C. & St. L. R. Co. Assumption of Obligation, 247 I. C. C. 71.

It does not appear that either the Nickel Plate or the Commission questioned the Nickel Plate's obligation to pay either interest or principal of the debts of the con-

stituent companies, although for long periods after the consolidation they were without the Commission's approval. Instead, the Commission has indicated that it regarded the state law as adequate to attach liability to the new company for such debts. In 1923, shortly after the consolidation, the Nickel Plate applied under § 20a of the Interstate Commerce Act to endorse its guaranty of payment upon certain bonds to be issued by a constituent company, and the premise upon which relief was granted was stated by the Commission: "It appears that the consolidation was completed on April 11, 1923, and that the new company is now vested with the property, rights, and franchises of the Nickel Plate and other constituent companies, *subject to all their debts, obligations, and liabilities.*" (Italics supplied.) N. Y., C. & St. L. R. R. Bonds, 82 I. C. C. 365, 366. The following year, in dealing with another constituent company, the Commission defined the status of this appellant as follows: "The applicant is the successor, by consolidation, of the Toledo, St. Louis & Western Railroad Company and other companies, and *by virtue of such consolidation* has acquired all property, rights, and powers, *and has assumed all obligations* of the Toledo, St. Louis & Western Railroad Company." (Italics supplied.) Pledge of Bonds by N. Y., C. & St. L. R. R., 86 I. C. C. 465.

The Commission, as well as appellant, as recently as 1938 gave unmistakable recognition to the validity of the guaranty on which appellee has recovered. This appears from the reorganization proceedings under § 77 of the Bankruptcy Act involving the properties of the Northern Ohio, the original obligor whose payments were guaranteed by appellant's constituent company, the Lake Erie & Western. The Commission stated that: "*From the consolidation* of the Lake Erie & Western with the New York, Chicago & St. Louis, *resulting liability* of the latter on the Lake Erie's guaranty of the Northern's bonds *thus is ap-*

parently admitted." (Italics supplied.)[4] Upon that premise the Commission made allowance in the plan of reorganization for the indemnification of the appellant because, if required to make good on the guaranty, it would become subrogated to the rights of the Northern Ohio bondholders as a mortgage creditor and would become a general creditor in the amount of any deficiency.

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[4] Akron, C. & Y. Ry. Co. and Northern O. Ry. Co. Reorganization, 228 I. C. C. 645, 647.

The plan approved by the Commission provided:

"Appropriate securities of the new company as hereinafter noted, consistent with the other provisions of the plan, with which to recompense the New York, Chicago and St. Louis Railroad Company for the debtor's and the intervening debtor's liability to it for amounts expended in the performance of its guaranty of the first-mortgage bonds of the intervening debtor, shall be issued and held in treasury." *Id.*, pp. 679–680. Also, "The New York, Chicago & St. Louis Railroad Company, upon presentation to the treasurer of the new company of appropriate proof of loss sustained in the performance of its contract of guaranty of bonds of the intervening debtor, shall receive of the new company stock issued in reorganization and held in treasury, for each $100 of loss so proved, $22.79, par value, of new common stock; and shall participate equally and ratably with the holders of class A warrants in any distribution of stock pursuant thereto, each $100 of proved loss entitling the New York, Chicago & St. Louis Railroad Company to participate in the distribution to the same extent as one class A warrant." *Id.*, pp. 681–682.

The true inwardness of these provisions of the reorganization plan appears from the opinion:

"The New York, Chicago & St. Louis should be treated as though having a claim equal to the losses it will sustain in the performance of its guaranty. The mathematical maximum of this claim would be equal to the principal of the outstanding Northern bonds plus the four years of overdue interest thereon, or $3,000,000. The probable maximum would be very much less, but cannot be determined on any definite basis. Securities should accordingly be reserved pending performance of the New York, Chicago & St. Louis guaranty on the basis of its having a $3,000,000 claim." *Id.*, p. 673.

The securities, however, thus set aside to the Nickel Plate were to come back to others "as may be made possible through the New York,

We draw the following conclusions from this history of the Nickel Plate's experience before the Interstate Commerce Commission:

By its decision in Acquisition and Stock Issue by N. Y., C. & St. L. R. Co., 79 I. C. C. 581, the Commission adopted the construction of the Transportation Act which the Nickel Plate urged upon it and held itself precluded from supervision of the consolidation under § 5. This Court subsequently approved that construction in *Snyder* v. *N. Y., C. & St. L. R. Co.*, 118 Ohio St. 72, 160 N. E. 615, 278 U. S. 578, holding that the Nickel Plate had the rights of a *de jure* corporation notwithstanding its failure to have its creation by consolidation approved by the Commission, on the ground that the consolidation took place at a time when § 5 had "not as yet become applicable."

It seems clear that the Commission applied a like construction of its powers under § 20a over the assumption of the debts and liabilities of the constituent companies. That it deliberately deferred to a later day consideration of all debts seems the correct inference from its express

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Chicago & St. Louis settling with the Northern bondholders, or otherwise discharging its liabilities, for less than the maximum. . . ." *Id.*, pp. 673–674.

An effort was apparently made to get rid of this obligation, in part at least, in the reorganization; but the Commission held that this guaranty ran to each Northern bondholder individually, and that the Nickel Plate could not deal with the bondholders as a class, on the ground that there appeared to be no provision in § 77 "for enforcing on all in lieu of the guaranty a compromise that may be agreeable to a majority but not acceptable to a minority, and no provision for discharging in these proceedings the New York, Chicago & St. Louis, a solvent obligor able to meet its debts as they mature, from any of its obligations. It follows that a provision in a plan of reorganization of the debtors, pursuant to section 77, releasing the guaranty, would be of such doubtful validity as to require our disapproval, and that settlements for this guaranty should be made separately from the plan of reorganization. . . ." *Id.*, p. 667.

caveat that "Nothing in this report shall be construed as restricting the commission in its action with respect to the promulgation of a complete consolidation plan or upon the subject of valuation." 79 I. C. C. at p. 585. Even apart from this *caveat*, it is clear that the Commission's failure at this time to make either order or investigation with reference to any debts or liabilities was due to no delusion that the Nickel Plate was being launched as a debt-free railroad. It was a matter of common knowledge that the constituent companies were heavily in debt for which no provision had been made other than by attachment to the new corporation under state law. This and the resulting burden of fixed charges on the revenues of the new company were well known to the Commission.[5] The disappearance of all debt from consideration by the Commission cannot be accounted for except on the ground that the Commission held itself without jurisdiction to deal with it until the company should propose some action of its own, such as extension, endorsement, or issue of sub-

[5] The application of the Nickel Plate asked authority to issue 327,200 shares of preferred stock and 462,479 shares of common stock to be exchanged share for share for the stocks of the constituent companies. It included a general balance sheet of each constituent company and a consolidated balance sheet showing long-term debts of the constituent companies aggregating $78,897,000, which items and exact amounts were carried into the consolidated balance sheet.

The Lake Erie & Western Railroad Company was shown to have outstanding capital stocks with a par value of $23,680,000, $13,895,600 of long-term debt, and $4,996,944 of "deferred liabilities." The stock was replaced with a like amount of stock in the new company, and the debt and "deferred liabilities" were carried in full into the consolidated balance sheet under the same headings. The obligation in suit was not specified; perhaps it was included in "deferred liabilities."

A Stockholders' Protective Committee of the old Nickel Plate filed objections to the plan of consolidation, one of the grounds of which was the alleged assumption of a heavy bond indebtedness ahead of the stock, and complaint was specifically made of the indebtedness of the Lake Erie & Western.

stitute securities—as distinguished from the effect of the law of consolidation on the fact of pre-existing debts. That such was the holding is further indicated by the Commission's subsequent handling of the obligations of the constituent companies.

Whether we would agree with the Commission's interpretation of the Act as an original matter, it is not necessary to decide. Considerations of public interest certainly should have weighed heavily in favor of the Commission, had it asserted power to review the debts of the new company before giving even tentative and formal approval to capitalization of its equity. What we must now decide is the present effect of the Commission's interpretation of its powers as to the indebtedness of this particular appellant, woven, as it has been, by a series of actions by the Commission, into the whole financial fabric of this important carrier system. We are now asked blindly to unravel we know not what, by reversing a consistent and long-standing interpretation of § 20a by the administrative body to which its enforcement was committed.[6] We are asked to do this to the enrichment of a stockholder equity which itself was capitalized with no thorough scrutiny by virtue of the same interpretation. We are asked to do this

[6] This interpretation is not inconsistent with the Commission's practice in other cases. Assumption of Obligation by Hudson River Connecting R. R., 72 I. C. C. 595, dealt with assumption of liability on a mortgage which the applicant had agreed to assume as part of the purchase price of a piece of land. It had no connection with any consolidation proceeding. Rock Island System Consolidation, 193 I. C. C. 395, was decided after amendment of § 5 by the Emergency Railroad Transportation Act approved June 16, 1933. The Commission had by the time of that decision promulgated a plan of consolidation, and it found that the Rock Island consolidation would be "in harmony with and in furtherance of the plan." *Id.*, p. 403. It was the absence of such a plan that defeated jurisdiction of the Commission to approve the Nickel Plate consolidation. *Snyder* v. *N. Y., C. & St. L. R. Co., supra.*

although the Commission, with knowledge of the claim of illegality, has set aside securities in the Akron reorganization to compensate it in some measure and has made no effort to enjoin the Nickel Plate from using its revenues to satisfy, in part at least, the claims of these bondholders.

Under the circumstances of this case, the administrative interpretation on which the Commission has acted in its long course of dealing with Nickel Plate affairs should not be upset. *United States* v. *Chicago North Shore R. Co.*, 288 U. S. 1.

The judgment appealed from is

Affirmed.

MR. JUSTICE DOUGLAS:

While I agree with the opinion of the Court, I think an elaboration of the point, which is the nub of the case, is desirable in view of certain observations in the dissenting opinion.

Appellant is a corporation formed under § 141 of New York Railroad Law, which provides for consolidation of railroad corporations. On the filing of the articles or agreement of consolidation, the several constituent companies "shall be one corporation by the name provided in such agreement." And § 141 also provides that "such act of consolidation shall not release such new corporation from any of the restrictions, liabilities or duties of the several corporations so consolidated." By § 143 all debts of the constituent companies "shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if incurred or contracted by it." We are pointed to no provision of the New York law which would permit the creation of the new consolidated corporation without the attachment of the debts of the constituent companies.

Snyder v. *New York, C. & St. L. R. Co.*, 118 Oh. St. 72, 160 N. E. 615, aff'd 278 U. S. 578, held that authority from

the Commission was not necessary to create this consolidated corporation. A necessary and inherent incident of its creation was the attachment of these obligations. Hence, I do not see how we can say that, although authority from the Commission was not necessary to create appellant, such authority was necessary in order for this consolidated corporation to meet the requirements which the New York law exacted as conditions to its creation. But if we held that an attachment of liability under the New York Consolidation Act was an "assumption" of liability within the meaning of § 20 (a), we would be doing just that. Hence, I feel forced to conclude that, in case of this type of consolidation, "assumption" in § 20 (a) does not include attachment of liability by virtue of the filing of articles of consolidation under a state statute, though it would, of course, include the issuance of any security or the incurrence or extension of any obligation subsequent to consolidation. Such is one consequence of the failure to follow Commissioner Eastman's views in Acquisition and Stock Issue of N. Y., C. & St. L. R. Co., 79 I. C. C. 581. But I do not see how, in all fairness, we can reopen at this late stage the unfortunate decision in the *Snyder* case.

MR. CHIEF JUSTICE STONE:

I think the judgment should be reversed, but without prejudice to any right of appellee to recover under § 20 (a) (11) of the Interstate Commerce Act.

I am not now prepared to say that appellee could not have recovered under the provisions of § 20 (a) (11) had counsel seen fit to present the question for decision.[1] But

[1] 49 U. S. C. § 20 (a) (11), after providing that assumptions of obligations not approved by the Commission are void, declares:

"If . . . any security in respect to which the assumption of obligation or liability is so made void, is acquired by any person for value and in good faith and without notice that the . . . assumption is void, such person may in a suit or action in any court of competent jurisdiction,

the only question which they have briefed and argued here is whether § 20 (a) (2) precludes the imposition of the asserted liability upon appellant where, as is the case here, its assumption by appellant has not been approved by order of the Commission as required by that section. The Court avoids decision of this question by declaring that the Commission has declined to give its approval because it has construed § 20 (a) (2) as inapplicable and that we are bound by that construction.

Examination of the Commission's opinions and orders from which the Court draws its cryptic answer to the question before us makes it plain that the Commission has placed no such construction on the statute in any case, and that, in the cases cited relating to the Nickel Plate consolidation, it has never had any occasion to construe § 20 (a) (2). On the contrary, in several cases, the Commission has construed § 20 (a) (2) as applicable to obligations like the present, which "attach" by operation of state law to the acquisition by the carrier of the property of other roads, and in conformity to that section has approved the "assumption" of such liability by the carrier.

In the cases before the Commission on which the Court relies, it appears that the Commission was not asked to pass upon the question now before us and did not purport to pass upon it. The opinion of the Court thus rests on no more substantial basis than the circumstance that the Commission has acted favorably on an application of ap-

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hold jointly and severally liable for the full amount of the damage sustained by him in respect thereof, the carrier which . . . assumed the obligation or liability so made void, and its directors, officers, attorneys, and other agents, who participated in any way . . . in the authorizing of the assumption of the obligation or liability so made void."

It appears from the record, in an affidavit upon which summary judgment was granted, that in 1936, after the consolidation, appellee purchased the bonds from a broker for value "without notice of any defense thereto or to the guarantee thereof."

pellant to be permitted to operate the consolidated lines and to issue securities in conformity to the plan of consolidation, in a proceeding in which the Commission was neither asked to take, nor took, any action with respect to assumption of liabilities; and this under a statutory scheme of control which plainly contemplates that a consolidation may go into effect without adoption of its assumption of liability feature, which in any case can become operative only by order of the Commission approving it upon application and on findings that the public interest will be served. Rock Island System Consolidation, 193 I. C. C. 395, 403–04; Acquisition and Stock Issue by P., O. & D. R. R., 105 I. C. C. 189, 193. The Court infers the Commission's refusal to approve the assumption of liability for want of jurisdiction from the silence and inaction of the Commission when it was not called upon to speak or to act, either by the statute or by any application pending before it.

Section 20 (a) (2) of the Interstate Commerce Act contains two prohibitions. One is imposed on the issuance of securities by railroads without approval of the Commission. The other makes it unlawful for such a carrier to assume any obligation in respect of securities issued by others, "even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of . . . the proposed assumption of obligation . . . the Commission by order authorizes such issue or assumption." The statute commands with particularity that "The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair

its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

It will be noted that there is no requirement of the statute that applications for the acquisition of other roads or for the approval of security issues, and applications for approval of the assumption of guarantee obligations, shall be united in a single proceeding. Indeed, it is clear that the statute leaves the Commission free to approve the one and reject an application for the other. And it appears that the uniform practice of the Commission has been, as the statute directs, to entertain neither, except on an application asking the desired approval. And where more than one is asked, the Commission has by its order separately dealt with those upon which it intended to act. E. g., Acquisition of C. & O. Northern Ry. Co. by C. & O. Ry., 70 I. C. C. 550; Gainesville Midland Reorganization, 131 I. C. C. 355; Control of Greenbrier, Cheat & Elk R. R., 131 I. C. C. 525; Chicago, M., St. P. & P. R. Co. Acquisition, 158 I. C. C. 770; Elmira & L. O. R. Co. Acquisition, 170 I. C. C. 127.

The Commission has pointed out that its action in passing on applications under each of the paragraphs 18 to 20 inclusive, of § 1, or under § 5 (2), of the Act, is limited to the particular provision of the Act on which the application is founded, and is not to be construed as a decision on any other provision. See Acquisition of Line by O. C. S. I. Ry., 86 I. C. C. 273, 274; Acquisition by A., T. & S. F. Ry., 138 I. C. C. 787, 789; Acquisition by St. L.-S. F. Ry., 145 I. C. C. 110, 114; Chicago, M. & St. P. Reorganization, 131 I. C. C. 673, 691–92; New York Central R. Co. Assumption, 158 I. C. C. 317, 320–23; Pacific Coast R. Co. Acquisition, 187 I. C. C. 563 and 189 I. C. C. 79. Cf. Keeshin Transcon. Freight Lines, Inc.—Debentures, 5 M. C. C. 349, 351. In fact, the Commission has said that § 20 (a) (2) "confers upon us power to grant or deny authority to issue securities or to assume obligation or liability . . . only upon ap-

plication by the carrier for such authority." New York Central R. Co. Assumption, 158 I. C. C. 317, 322.

In the Commission's view, authority to consolidate includes the authority to acquire and operate properties of other roads, but neither that authority nor the authority to issue securities upon consolidation includes authority to assume liabilities of the constituent companies. Rock Island System Consolidation, 193 I. C. C. 395, 403–04; Santa Fe Trail Transp. Co.—Merger, 5 M. C. C. 324, 328; cf. Illinois Terminal R. Co. Consolidation and Securities, 221 I. C. C. 676. The Court's suggestion that this was not so before the Commission promulgated its general plan of consolidation under § 5, is contrary to the ruling in Acquisition & Stock Issue by P., O. & D. R. R., 105 I. C. C. 189. In that case, before the promulgation of the plan, the Commission was at pains to warn (p. 193) that its approval of an issue of securities to carry out a consolidation under state law did not involve any decision on assumption of liability of the obligations of the consolidated company's constituents. Assumption of Obligation by L. S. & I. R. R., 86 I. C. C. 640, and Grand Trunk W. R. Co. Unification and Securities, 158 I. C. C. 117, 138, 142–43, both decided before the promulgation of the plan, granted permission to assume the obligations of the constituents and thus gives further proof that the Commission, when it intended to take any position with respect to the assumption of obligations in connection with a consolidation, did so by action affirmatively expressed rather than by silence.

The Commission has entertained applications for the approval, under § 1 of the Act, of the operation of acquired properties, or for approval of security issues upon consolidation, without any application for the approval of the assumption of the liabilities involved. See Acquisition and Stock Issue by N. Y., C. & St. L. R. Co., 79 I. C. C. 581; Pacific Coast R. Co. Acquisition, 187

I. C. C. 563; cf. Rock Island System Consolidation, 193 I. C. C. 395, 403–04. And in the case of this appellant, as of other roads, it has later entertained and disposed of separate applications for the approval of the assumption of the obligations involved. N. Y., C. & St. L. R. Co. Assumption of Obligation, 217 I. C. C. 598; N. Y., C. & St. L. R. Co. Bonds and Assumption, 221 I. C. C. 772; N. Y., C. & St. L. R. Co. Assumption of Obligation and Liability, 247 I. C. C. 71; St. Louis-S. F. Readjustment, 145 I. C. C. 218; Pacific Coast R. Co. Securities, 189 I. C. C. 79; Cincinnati Union Term. Co. Securities, 166 I. C. C. 419 and 499, and 184 I. C. C. 619; West Jersey & S. R. Co. Bonds, 217 I. C. C. 125; cf. Assumption of Obligation by N. O., T. & M. Ry., 94 I. C. C. 218.

Such action by the Commission plainly precludes any inference that, in approving an application for the operation of the consolidated lines or an issue of securities under a consolidation, it was doing more than responding to the petition presented to it or that it was undertaking to pass on the legality or propriety of the assumption by the consolidated road of guarantee obligations of its constituent companies. We are pointed to nothing suggesting that the Commission has ever regarded such approvals as involving an unasked determination with respect to the assumption by the consolidated carrier of the obligation of its constituent companies.

There is thus no plausible ground for saying that there was lurking in the Commission's decision in 79 I. C. C. 581 some implied ruling as to the construction of § 20 (a) (2) and some implied refusal to act because of that construction, in a situation in which it was not asked or expected to act and in which, for reasons already stated, it was under no duty to act. In none of the cases cited in the opinion of the Court as hinting at a possible construction by the Commission of § 20 (a) (2) was it asked to make any finding or order with respect to the assump-

tion by appellant of obligations of its constituent companies. In none did it make or decline to make any of the findings or the order required by § 20 (a) (2) with respect to such obligations. In none did it express any opinion whether obligations attaching to a consolidated carrier are within the prohibition of the statute, or as to its duty to approve or disapprove of their assumption.

In Operation of Lines and Issue of Capital Stock by the N. Y., C. & St. L. R. Co., 79 I. C. C. 581, the Commission was asked to, and did, specifically approve the operation by appellant of the consolidated line and the issuance of certain stock by appellant, pursuant to the consolidation plan, and nothing more. It made no mention of any assumption of obligation by appellant or of the assumption provisions of § 20 (a) (2). It neither took nor declined to take action affecting such assumption. For all that appears, the Commission, in its examination of the capital structure and the balance sheet of appellant, may have disregarded the guarantee obligation as one not affecting the consolidated company because its assumption had not been approved by the Commission.

It construed the consolidation provisions in § 5 of the Act as permitting carriers to consolidate under state law without first securing the Commission's authorization for the consolidation itself. Whether or not this was the necessary interpretation of the consolidation provisions, cf. *Snyder* v. *New York, C. & St. L. R. Co.*, 278 U. S. 578, nothing in the report of the Commission's decision suggests that if it was essential, in order to carry out the consolidation under state law, that obligations be "assumed," then the assumption could be accomplished without compliance with § 20 (a) (2). Its decision is in fact inconsistent with any such theory, and affords affirmative evidence that the Commission thought § 20 (a) (2)

was operative notwithstanding the narrow interpretation which it gave to § 5.

The Commission authorized appellant to issue, under § 20 (a) (2), certain preferred and common stock, to be exchanged for the stock of its five constituent companies in carrying out the consolidation. If consolidations under state law could, in the Commission's view, be effected at that time wholly without regard to § 20 (a) (2), then the granting of authority to issue the stock would have been superfluous. That the Commission deemed such authority necessary is persuasive that it regarded § 20 (a) (2) as applicable to all issues of securities, or assumptions of obligations, which occurred in connection with a consolidation. Freedom to consolidate, in the Commission's view, plainly did not include freedom to make adjustments in capital structure without the authorization required by § 20 (a) (2). Hence, the only real question is whether an obligation assumed or attaching merely by operation of law is an "assumption" within the meaning of § 20 (a) (2)—a question which, as will presently appear, the Commission has consistently answered in the affirmative, whenever it has been called upon to give an answer.

Subsequent proceedings before the Commission affecting appellant, in the cases on which the Court relies, presented no question of its liability upon the guarantee obligations of its constituent companies, and are equally barren of any indication that the Commission considered the meaning and application of the assumption provisions of § 20 (a) (2) or that it had any occasion to do so. In N. Y., C. & St. L. R. R. Bonds, 82 I. C. C. 365, and in Pledge of Bonds by N. Y., C. & St. L. R. R., 86 I. C. C. 465, next cited by the Court as sustaining its decision, the questions presented to the Commission had not even a remote relation to any assumption by appellant of guarantee obligations, resulting from the consolidation, which the

Commission had not by its order approved. In the one case the application was for authority to make a new bond issue; in the other for permission to pledge some of its own assets to secure a new note issue. Passing references by the Commission, in recounting the history of the consolidation, to the fact that appellant had acquired the properties of constituent companies "subject to all their debts, obligations and liabilities," and that it "has assumed all obligations" of a different constituent company from that here involved, can hardly be accepted as evidence of an unasked administrative construction of a provision of a statute which it was not administering and with respect to which it expressed no opinion.

The Court gains no support for its conclusion from the supposed recognition by the Commission, in the Akron case, that the "resulting liability" from appellant's consolidation had been "apparently admitted." Akron, C. & Y. Ry. Co. & Northern O. Ry. Co. Reorganization, 228 I. C. C. 645, 647. The bankruptcy reorganization, whose approval by the Commission was there sought, was that of the Northern Ohio Railway, the guarantee of whose bonds is presently involved. What had "apparently" been "admitted" by the proposed reorganization was that, so far as appellant should perform or be compelled to perform the guarantee, it would become a creditor of the new company, entitled to participate in the new securities to be issued to creditors under the reorganization. The only action taken by the Commission with respect to the obligation was to approve (p. 673) the provision of the plan, which reserved new securities of the reorganized company for the satisfaction of appellant's claim "pending performance," if any, of the guarantee, by appellant, and to order (p. 684) the reorganized company to issue to appellant its proportion of the new securities upon "appropriate proof" by appellant "of loss sustained in the performance of its contract of guarantee." The Commission thus had no oc-

casion to determine the question which appellant asks to have determined here, and pointedly left it undecided. Obviously, the approved plan gave appellant a powerful incentive to resist performance of the guarantee and manifestly did not purport to foreclose appellant from securing the adjudication of the liability which it seeks here.

Not only do these cases fail to disclose any self-denying construction of § 20 (a) (2) by the Commission, but in others, where the Commission has been called on to consider the question, it has taken the position that the word "assumption" in § 20 (a) (2) includes an obligation placed upon the carrier merely by operation of the state law under which it had acquired property.

Three times since its decision in 79 I. C. C., the Commission has granted the application of appellant to be permitted to extend and also to assume obligations of its constituent companies. N. Y., C. & St. L. R. Co. Assumption of Obligation, 217 I. C. C. 598; N. Y., C. & St. L. R. Co. Bonds and Assumption, 221 I. C. C. 772; N. Y., C. & St. L. R. Co. Assumption of Obligation and Liability, 247 I. C. C. 71. In two of these cases, the Commission authorized appellant to assume obligations of the Lake Erie & Western—the same constituent company whose obligation is now said to have been assumed without the necessity of the Commission's authorization. If appellant was already personally liable on the obligations, permission to assume them was unnecessary. And since the Commission does not entertain applications for authority to assume obligations where it is of the opinion that the obligation is not one to which § 20 (a) (2) applies, Southern Pacific Co. Assumption of Obligation, 189 I. C. C. 212, 213; Bonds of A. & M. Railway Bridge & Term. Co., 94 I. C. C. 79, 81; Missouri-K.-T. R. Co. Assumption of Obligation, 212 I. C. C. 217; Pittsburgh & Shawmut R. Co. Securities, 166 I. C. C. 503, 505, its action in authorizing the assumptions, in addition to the extensions, is inconsistent with any in-

ference on our part that it had previously ruled that the obligations assumed were not required to comply with § 20 (a) (2).

On the contrary, the Commission applied that section to obligations like the present soon after enactment of the Transportation Act of 1920. In Assumption of Obligation by Hudson River Connecting R. R., 72 I. C. C. 595, decided nine months before its decision in 79 I. C. C., the Commission took jurisdiction of an application for approval of an assumption of obligation resulting by operation of New York law from a carrier's acquisition of property. In granting the application and in authorizing the carrier to "assume" the attached obligation the Commission stated, page 596:

"While the applicant does not propose to make any indorsement on the bonds, or execute any agreement in respect of the payment of them, it appears that, under the laws of New York, the acceptance of a deed conveying land subject to a mortgage indebtedness, which the grantee agrees to assume, has the effect of making the land the primary fund for the payment of the mortgage indebtedness, so that the grantee becomes the principal debtor and the grantor a surety."

The Commission made the findings prescribed by § 20 (a) (2) and ordered that the applicant be "authorized to assume obligation and liability" in respect of the mortgaged bonds, "said assumption of obligation and liability . . . to be accomplished by the acceptance by the applicant of a deed of said lands."

More recently, in Public Service Coordinated Transport—Assumption of Obligation, 15 M. C. C. 406, a motor carrier case under § 214 of the Interstate Commerce Act, which incorporates by reference § 20 (a) (2), the Commission reaffirmed its earlier construction of § 20 (a) (2) as applying to obligations like the present, saying (p. 408):

"Prior to consummation of the merger, applicant's liability in respect of the bonds of said companies was of a contingent nature. Under the statutes of New Jersey all debts and liabilities of merged or consolidated corporations shall thenceforth attach to the consolidated corporation and may be enforced against it to the same extent as if said debts and liabilities had been incurred or contracted by it. Thus, through completion of said merger, applicant has, by operation of law, become the principal obligor in respect of these bonds, and, as such, has obligations and liabilities in respect thereof which differ from the contingent liability previously existent. In our opinion assumption of such obligations and liabilities as successor in title is a matter over which we have jurisdiction." [2]

While courts are not necessarily bound by the Commission's construction of the Interstate Commerce Act, *Mitchell* v. *United States*, 313 U. S. 80; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, they rightly pay deference to the Commission's considered construction of it, especially when it is of long standing and has

[2] See also Elmira & L. O. R. Co. Acquisition, 170 I. C. C. 127, where the Commission approved an "assumption" of liability which was apparently to attach (see p. 128) solely by operation of the New York stock corporation laws. Cf. Assumption of Obligation by L. S. & I. R. R., 86 I. C. C. 640, where in authorizing an "assumption" the Commission stated: "Under the agreement and the laws of Michigan the debts, liabilities, and duties of the last two companies named attach to the applicant and are enforceable against it to the same extent and in the same manner as if originally incurred by it. The applicant accordingly seeks authority to assume obligation and liability in respect of the securities of these companies." Cf. also Union R. Co. Assumption of Obligation and Liability, 217 I. C. C. 635, where, in authorizing an assumption the Commission stated: "Pursuant to the terms of the joint agreement of merger dated October 1, 1936, and the provisions of the laws of the Commonwealth of Pennsylvania, the applicant will assume all the debts and obligations of the" constituent corporations.

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never been departed from. But it is novel doctrine that a provision of an act of Congress may be nullified by a construction of the Interstate Commerce Commission which can be inferred only from the fact that the Commission ignored the provision in a proceeding in which, by its settled practice, it was not called upon to construe or apply it. Certainly, the Commission does not appear ever to have acted upon any such view, nor has it come before us to advocate it. It seems plain that the rulings of the Commission that § 20 (a) (2) is applicable to those obligations which state law attaches to the carrier in consequence of its participation in a consolidation, as well as to those which attach to it by reason of its expressed promise, carry out the purposes of the statute and are consistent with its language. Section 20 (a) (2) was enacted to prevent the imposition on the railroads of the country, through consolidation or otherwise, personal liability for the obligations of other roads, such as had occurred in certain well known consolidations notorious for their disregard of the interests of security holders and the public. See 58 Cong. Rec. 8317–18. As the effective means of prevention it prescribed that all such obligations should be void, unless the Commission orders their approval as compatible with the public interest.

But even if we assume that the silence of the Commission in 79 I. C. C. can be taken to intimate a view of the meaning of § 20 (a) (2), with respect to which it took no action and made no order, it seems still more novel to say that such an inference must control our decision here, in the face of its explicit construction of the statute in other cases as applicable to situations like the present. Even sporadic and inconsistent administrative decisions, where the parties have relied upon them, may sometimes both be followed by courts when applied to those parties. But the unarticulated intimations of opinion of an administrative body, unacted upon, are too inconclusive

to control judicial decision. Courts are not like weathercocks, changing with every administrative wind that blows. They cannot on the same day rightly decide that the same statute means different things in different cases, merely because the Commission may on different days have had shifting impressions which it has not thought sufficiently important to express in any ruling, opinion, decision or order.

United States v. *Chicago North Shore R. Co.*, 288 U. S. 1, upon which the Court relies, has no significance here. It is one thing to accept judicially the Commission's decision that a particular carrier is an "interurban electric railway," a determination unquestionably within its power and peculiarly within its administrative competence. It is quite another to bind the courts by a construction of the statute which the Commission has never voiced, but which, on the contrary, it has consistently denied, namely, that obligations may be assumed without conscious and express permission of the Commission and in defiance of the declared will of Congress.

It is impossible to believe that the all-inclusive provisions of § 20 (a) (2), passed in response to a general and long-felt need for the federal regulation of railroad capitalization, were intended to exclude assumptions of obligations which attach by virtue of state law. The statute makes § 20 (a) (2) subject only to one exception—short-term notes maturing in not more than two years, § 20 (a) (9)—and even in that instance the carrier is required to file with the Commission a certificate of notification. No other exception was provided, and it is apparent that none was intended.[3]

[3] Examination of the historical background of § 20 (a) can leave no genuine doubt that the financial provisions of § 20 (a) (2) were meant to be all-inclusive. Abuses in railroad financing had been a continuous subject of public concern. See the report of the Windom Committee in 1874, S. Rep. No. 307, 43rd Cong., 1st Sess., Vol. I, pp. 71–76; the

We are not concerned here with doubts whether appellant is validly organized under New York law. No such issue is presented by the record. The only question before

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report of the Cullom Committee in 1886, S. Rep. No. 46, 49th Cong., 1st Sess., part I, pp. 51–52. In 1907 the Interstate Commerce Commission, reporting upon its investigation of the Union Pacific and the Chicago & Alton railroads, recommended federal regulation of security issues. In re Consolidations and Combinations of Carriers, 12 I. C. C. 277; and see also the Commission's Annual Report for 1907, p. 24. In 1910 President Taft urged upon Congress federal regulation of railroad securities, 45 Cong. Rec. 380, but the Senate's opposition prevented the proposal from being included in the Mann-Elkins Act. In 1913 the Commission concluded its New England Investigation, 27 I. C. C. 560, 616, with the recommendation that "No interstate railroad should be permitted to lease or purchase any other railroad, nor to acquire the stocks or securities of any other railroad, *nor to guarantee the same, directly or indirectly*, without the approval of the federal government." Senate opposition again proved too strong in 1914, as well as in 1916, but by the end of the war opposition to the regulation of railroad capitalization practically disappeared. See Locklin, Regulation of Security Issues by the Interstate Commerce Commission, pp. 12–22; Sharfman, The Interstate Commerce Commission, Vol. I, pp. 86–94, 189–93; and the Commission's Annual Report for 1919, pp. 4–5.

Section 20 (a) when finally enacted was thus a thoroughgoing reform, long considered and at last virtually unopposed, designed to vest in the Commission "exclusive and plenary" jurisdiction, § 20 (a) (7), over changes in the capital structures of the railroads. Its enactment, see Sharfman, *op. cit., supra*, Vol. I, p. 190, "was not only a fulfilment of the Commission's repeated recommendations, but grew out of a practical unanimity of opinion among the numerous and diverse interests that sought to influence the character of the new legislation. While this extension of the Commission's authority was designed, indirectly, to protect the investing public against the dissipation of railroad resources through faulty or dishonest financing, its dominant purpose was to maintain a sound structure for the rehabilitation and support of railroad credit, and for the consequent development of the transportation system. It aimed to render impossible the recurrence of the various financial scandals, with their destruction of confidence in railroad investment, which had become notorious, and to prevent the subordination of the carriers' stake as transportation agencies to the financial advantage of alien interests."

us is whether personal liability can be assumed by appellant without complying with the statute, which makes such an assumption void "even though permitted by the authority creating the carrier corporation" "unless and until, and then only to the extent that" the Commission has approved the assumption after making the prescribed findings.

The statute does not deprive the holders of obligations of the constituent companies of any rights against them or their property. It only prevents the acquisition by such holders, contrary to the public interest, of new rights against the consolidated carrier without the consent of the Commission, and by § 20 (a) (11) the statute gives a remedy to those who, like appellee, become innocent purchasers of such securities, after consolidation, for the loss of such rights through the operation of § 20 (a) (2). The application of the statute in this case no more involves enriching stockholder equities than in any other. The question in every case is whether the public, and railroad security holders, shall be burdened, through repeated reorganizations of railroads, with excessive indebtedness which it was the purpose of the statute to prohibit. It is obvious that the statute would fail of its proclaimed purpose unless, as the Commission has ruled, its prohibitions extend to those obligations which the consolidated carrier assumes by virtue of its entering into a consolidation under state law, as well as those which it assumes by its expressed promise. The words of the statute neither compel nor persuade to the decision now given, which seems to rest on nothing more substantial than a far-fetched surmise. It defeats the Congressional purpose and conflicts with the legislative history and administrative construction of the statute.

MR. JUSTICE REED, MR. JUSTICE FRANKFURTER and MR. JUSTICE BYRNES join in this opinion.

DUCKWORTH *v.* ARKANSAS.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 43. Argued November 17, 18, 1941.—Decided December 15, 1941.

A statute of Arkansas, requiring a permit for the transportation of intoxicating liquor through the State, which may be obtained upon application, for a nominal fee—the object of the regulation being merely to identify those who engage in such transportation, their routes and points of destination, thus enabling local officials to insure transportation without diversion, in conformity with the permit—is not violative of the commerce clause of the Federal Constitution. P. 396.

201 Ark. 1123, 148 S. W. 2d 656, affirmed.

APPEAL from a judgment affirming a conviction and sentence for transportation of liquor without a permit in violation of a State law.

Mr. Harold R. Ratcliff, with whom *Mr. Cecil B. Nance* was on the brief, for appellant.

The Acts of Congress dealing with interstate commerce in intoxicating liquors do not confer upon the State any power whatsoever to regulate a shipment of intoxicants which is merely passing through the State. These Acts use the word "into" as distinguished from "through," and there is no basis for a regulation such as that here involved.

Each State has power to prohibit the manufacture of liquors within its borders and to prohibit or condition their export from the State, *Ziffrin, Inc.* v. *Reeves,* 308 U. S. 132; also the power to condition or absolutely prohibit the importation into it of all intoxicants. Const., 21st Amendment; *State Board of Equalization* v. *Young's Market Co.,* 299 U. S. 59. But there is nothing in the Federal Constitution or statutes, nor in the decisions of this Court, which sanctions the Arkansas regulation.

If the State may demand a permit from one class of transporter, it may demand it from all. Every auto-

mobile, truck, train, wagon, or boat, and indeed every person, is subject to search and possible arrest upon entering the State. This is what Art. I, § 8, Cl. 3, of the Constitution was designed to prevent.

Messrs. Jno. P. Streepey, Assistant Attorney General of Arkansas, and *Leffel Gentry* argued the cause, and *Mr. Jack Holt,* Attorney General, was with *Mr. Streepey* on the brief, for appellee.

Arkansas has built through roads across the State and has provided for police protection, inspection, etc., thereon. The statute requires persons transporting liquor into the State and across it, on these through roads, to take out a permit from the State Commissioner of Revenues. One of the purposes in requiring such a permit is to enable the State to check up on bootleggers using the highways, to see that they do not dump their stocks into the State. When a permit is obtained, a state policeman can be assigned to each shipment of liquor as it comes into and across the State, and there is no chance for anything to go wrong. It is otherwise if those transporting liquor may cross the State without supervision.

The regulation applies to interstate and intrastate traffic without discrimination. Congress has not acted in this particular matter; therefore, the State had the right to do so, even though interstate commerce was burdened to some extent.

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

Appellant was convicted and fined by an Arkansas court for transporting intoxicating liquor through the state without a permit as required by an Arkansas statute. The question for decision is whether this statutory requirement and its penal sanction unduly encroach upon the power over interstate commerce delegated to Congress.

The Arkansas Supreme Court sustained the requirement of the permit as a local police regulation permissible under the commerce clause. 201 Ark. 1123, 148 S. W. 2d 656. The case comes here on appeal under the provisions of § 237 (a) of the Judicial Code, 28 U. S. C. § 344 (a), § 861 (a) (b).

Section 14177, Pope's 1937 Digest of Arkansas Statutes, § 5, Act 109 of 1935, under which appellant was convicted, makes it unlawful for any person to ship into the state any distilled spirits without first having obtained a permit from the state commissioner of revenue. The statute provides that the form of permit and the shipments into the state shall be governed by rules and regulations promulgated by the commissioner. Appellant was tried upon a stipulation of facts which tended to show that, when arrested in Arkansas, he was engaged in transporting by motor truck, without a permit, a load of distilled spirits from a point in Illinois to a point in Mississippi. The state court held that this violated § 14177. At the time of the offense, there were no regulations specifically applicable to transportation passing through the state, the regulations then in force being adapted to transportation for delivery within the state or from point to point within the state.

We have no occasion to decide whether the Arkansas statute, when applied to transportation passing through that state for delivery or use in another, derives support from the Twenty-first Amendment, which prohibits the "transportation or importation" of intoxicating liquors "into any state . . . for delivery or use therein" in violation of its laws, cf. *United States* v. *Gudger*, 249 U. S. 373. Nor need we decide whether appellant's admission that the transported liquor was intended for importation into Mississippi for illegal use there establishes a violation of the Twenty-first Amendment while he was in Arkansas, so as to deprive him of the right to seek protection of the

commerce clause on his journey through Arkansas, cf. *McFarland* v. *American Sugar Rfg. Co.*, 241 U. S. 79, 84–5. We may also assume that appellant's admission no more deprives him of the right to invoke the protection of the commerce clause against the Arkansas statute than did intended violation by the importer of the liquor laws of the state of destination before the adoption of the Webb-Kenyon Act, 37 Stat. 699, and the Twenty-first Amendment. See *Bowman* v. *Chicago & N. W. Ry. Co.*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100. For we are of the opinion that, upon principles of constitutional interpretation consistently accepted and followed by this Court ever since the decisions in *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley* v. *Board of Wardens*, 12 How. 299, the commerce clause does not foreclose the Arkansas regulation with which we are now concerned.

The commerce here is transportation alone, there being no question of sale or use within the state of regulation. We may therefore put to one side the cases in which local restrictions or prohibitions on sale or use of intoxicating liquor or other articles of commerce, unaided by Acts of Congress, have been deemed a prohibited burden on interstate commerce, see *Bowman* v. *Chicago & N. W. Ry. Co.*, *supra*; *Leisy* v. *Hardin*, *supra*. The present scheme of regulation is narrower in operation and has a less restrictive effect upon the commerce. It does not forbid the traffic in liquor, nor does it impede it more than is reasonably necessary to inform the local authorities who is to effect the transportation through the state, and to afford opportunity for them to police it.

The Arkansas Supreme Court in this case has declared that under the statute appellant was entitled to a permit on application, which he does not appear to have made; that the permit requirement is in its nature an inspection measure for which only a nominal fee, necessary to defray the cost of issuing it and of police inspection

and of necessary reports, is charged.[1] It also said that any failure by the state commissioner to act reasonably and promptly in administering the law would be controlled by the courts through mandamus. In a later case, *Hardin* v. *Spiers,* 152 S. W. 2d 1010, arising under regulations not in force at the time of appellant's conviction, the same court declared that the commissioner must exercise this power in a reasonable, not an arbitrary, manner.

While the commerce clause has been interpreted as reserving to Congress the power to regulate interstate commerce in matters of national importance, that has never been deemed to exclude the states from regulating matters primarily of local concern with respect to which Congress has not exercised its power, even though the regulation has some effect on interstate commerce. As we had occasion to point out at the last term of Court, there are many matters which are appropriate subjects of regulation in the interest of the safety, health and well-being of local communities which, because of their local character and their number and diversity, and because of the practical difficulties involved, may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control over the commerce in matters of national concern and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the commerce clause. Such regulations, in the absence of supervening Congressional action, have for the most part been sustained by this Court,

[1] The regulations promulgated by the commissioner on February 3, 1941, after appellant's conviction, provided for the payment of a license fee for the permit. It does not appear that there was any prescribed fee at the time of appellant's offense. Moreover, his sole contention is that the commerce clause precludes the state from exacting any form of permit, either with or without a fee, for the interstate transportation of liquor through the state.

notwithstanding the commerce clause. See *California* v. *Thompson,* 313 U. S. 109, 113, *et seq.,* and cases cited. See also cases collected in *DiSanto* v. *Pennsylvania,* 273 U. S. 34, 39, 40, and in *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 188, Note 5, and 191.

In the cases referred to, the Court has sustained a variety of local regulations designed to safeguard the states from injurious local effects that may attend interstate transportation. Familiar examples are inspection and quarantine laws for the protection of local health and safety, applicable to persons, animals, and merchandise moving in interstate commerce. Again, a state may insure the safe and convenient use of its harbors and navigable waterways by controlling the movement of vessels in interstate and foreign commerce; in the interests of safety it may control the operations of interstate trains and of their employees and appliances.

Of recent years, the Court has sustained state regulations of the size and weight of motor cars moving interstate, designed to insure the safe and economical use of the states' highways. *South Carolina Highway Dept.* v. *Barnwell Bros., supra,* and cases cited. A state may police "caravans" of motor vehicles moving over its highways in interstate commerce and charge a compensatory license fee for doing it. *Morf* v. *Bingaman,* 298 U. S. 407; *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583. It may, in the interest of public safety and convenience, restrict particular types of motor vehicles, moving in interstate commerce, to particular areas. *Sproles* v. *Binford,* 286 U. S. 374, 393–5; cf. *Clark* v. *Paul Gray, Inc., supra,* 598. And a state may undertake to insure the fitness and integrity of those negotiating contracts for interstate transportation, by licensing them and requiring a bond to insure their good behavior. *California* v. *Thompson, supra.*

While the subject matter of the present regulation, transportation of liquor, with its attendant dangers to the

communities through which it passes, differs in many respects from those which we have mentioned, all are alike in their tendency, if unregulated, to affect the public interest adversely in varying ways depending on local conditions. The efforts at effective regulation, state and national, of intoxicating liquor, evidenced by the long course of litigation in this Court, have not left us unaware of the peculiar difficulties of controlling it or of its tendency to get out of legal bounds. The present requirement of a permit is not shown to be more than a means of establishing the identity of those who are to engage in the transportation, their route and point of destination, and affords opportunity for local officials to take appropriate measures to insure that the liquor is transported without diversion, in conformity to the permit. The permit device is not unlike state requirements of health certificates for animals or certificates of inspection for goods, which have been sustained here both as to transportation into a state, *Savage* v. *Jones,* 225 U. S. 501, 528; *Mintz* v. *Baldwin,* 289 U. S. 346; and through it, *Reid* v. *Colorado,* 187 U. S. 137; cf. *Morf* v. *Bingaman, supra.* Where the power to regulate commerce for local protection exists, the states may adopt effective measures to accomplish the permitted end. The Arkansas statute does not conflict with any act of Congress. It does not forbid or preclude the transportation, or interfere with the free flow of commerce among the states beyond what is reasonably necessary to protect the local public interest in preventing unlawful distribution or use of liquor within the state. It does not violate the commerce clause. Cf. *Ziffrin, Inc.* v. *Reeves,* 308 U. S. 132.

What we have said is restricted to the statute as applied under the regulations in force at the time of petitioner's alleged offense. It will be time enough to deal with abuses of the permit system if and when they arise. Nor have we occasion to consider the state's authority to regulate other

articles of commerce less susceptible to uses injurious to the communities through which they pass. Cf. *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 332; *Ziffrin, Inc.* v. *Reeves, supra*, 138.

Affirmed.

MR. JUSTICE JACKSON, concurring in result:

I agree that this Court should not relieve Duckworth of his conviction, but I would rest the decision on the constitutional provision applicable only to the transportation of liquor, and refrain from what I regard as an unwise extension of state power over interstate commerce.

I

Appellant was convicted for transporting a load of intoxicating liquor through Arkansas, without permit from that State, on the way from Illinois to Mississippi. The owner of the liquor testified, and his testimony was treated as a stipulation of fact, "that the liquor was intended to be sold in the State of Mississippi in violation of the state laws of Mississippi."

The Twenty-first Amendment provides:

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Duckworth now contends that it is our duty to assure him safe conduct as against the action of Arkansas, although his goal is to violate both the laws of Mississippi and the Federal Constitution. He asks us to hold that one provision of the Constitution guarantees him an opportunity to violate another. The law is not that tricky.

Whether one transporting liquor across Arkansas to a legal destination might not have some claim to federal protection, we do not need to consider. One who assails the constitutionality of a statute must stand on his own

right to relief.[1] Since this appellant had no rightful claim to constitutional protection for his trip, the whole purpose of which was to violate the Constitution which he invokes, we should leave him where we find him, and for this reason I concur in the judgment of this Court affirming the conviction.

II

If we yield to an urge to go beyond this rather narrow but adequate ground of decision, we should then consider whether this liquor controversy cannot properly be determined by guidance from the liquor clauses of the Constitution. These clauses of the Twenty-first Amendment create an important distinction between state power over the liquor traffic and state power over commerce in general. The people of the United States knew that liquor is a lawlessness unto itself. They determined that it should be governed by a specific and particular Constitutional provision. They did not leave it to the courts to devise special distortions of the general rules as to interstate com-

[1] Mr. Justice Holmes, speaking for a unanimous Court, laid down the rule as to tax cases, equally applicable to this, if, indeed, this is not itself something of a tax case. He pointed out that the Court does not consider arguments on constitutional grounds "unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected . . ." *Hatch* v. *Reardon*, 204 U. S. 152, 160.

Mr. Justice Cardozo has stated for the Court that those who attack the constitutionality of state statutes "are not the champions of any rights except their own." *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 583.

Mr. Justice Brandeis has given expression to the same view for the Court in these terms:

"We have no occasion to consider the constitutional question, because it appears that the plaintiff is without standing to present it. One who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him." *Premier-Pabst Co.* v. *Grosscup*, 298 U. S. 226, 227.

merce to curb liquor's "tendency to get out of legal bounds." It was their unsatisfactory experience with that method that resulted in giving liquor an exclusive place in constitutional law as a commodity whose transportation is governed by a special, constitutional provision.

Transportation itself presented no special dangers or hazards, but it might be a step in evading and undermining a policy as to use and sale of liquor which the state has a right to prescribe for itself. Regulated transportation of liquor is a necessary incident of regulated consumption and distribution. So the Twenty-first Amendment made the laws as to delivery and use in the state of destination the test of legality of interstate movement. This obviously gives to state law a much greater control over interstate liquor traffic than over commerce in any other commodity.

If the Twenty-first Amendment is not to be resorted to for the decision of liquor cases, it is on the way to becoming another "almost forgotten" clause of the Constitution. Compare *Edwards* v. *California, ante,* p. 183. It certainly applies to nothing else. We should decide whether this Arkansas statute is sustainable under the Twenty-first Amendment. Does it authorize a state to exact some assurance that all liquor entering its territory either is imported for lawful delivery under its own laws or will pass through without diversion? The Amendment might bear a construction that would allow a state to prohibit liquor from entering its borders at all unless by responsible carrier under consignment to some lawful destination within or beyond the state. I should not at all object to considering all of the potential evils which the Court's opinion associates with the liquor traffic, and some more that I could supply, to be sufficient reasons for giving a liberal interpretation to the Twenty-first Amendment as to state power *over liquor.* But the Court brushes aside the liquor provisions of the Twenty-first Amendment.

III

The opinion of the Court solves the present case through a construction of the interstate commerce power. It regards this liquor as a legitimate subject of a lawful commerce, and then, because of its special characteristics, approves this admittedly novel permit system and thus expands the power of the state to regulate such lawful commerce beyond anything this Court has yet approved.

The extent to which state legislation may be allowed to affect the conduct of interstate business in the absence of Congressional action on the subject has long been a vexatious problem. Recently the tendency has been to abandon the earlier limitations and to sustain more freely such state laws on the ground that Congress has power to supersede them with regulation of its own. It is a tempting escape from a difficult question to pass to Congress the responsibility for continued existence of local restraints and obstructions to national commerce. But these restraints are individually too petty, too diversified, and too local to get the attention of a Congress hard pressed with more urgent matters. The practical result is that in default of action by us they will go on suffocating and retarding and Balkanizing American commerce, trade and industry.

I differ basically with my brethren as to whether the inertia of government shall be on the side of restraint of commerce or on the side of freedom of commerce. The sluggishness of government, the multitude of matters that clamor for attention, and the relative ease with which men are persuaded to postpone troublesome decisions, all make inertia one of the most decisive powers in determining the course of our affairs and frequently gives to the established order of things a longevity and vitality much beyond its merits. Because that is so, I am reluctant to see any new local systems for restraining our national commerce

get the prestige and power of established institutions. The Court's present opinion and tendency would allow the states to establish the restraints and let commerce struggle for Congressional action to make it free. This trend I am unwilling to further in any event beyond the plain requirements of existing cases.

If the reaction of this Court against what many of us have regarded as an excessive judicial interference with legislative action is to yield wholesome results, we must be cautious lest we merely rush to other extremes The excessive use for insufficient reason of a judicially inflated due process clause to strike down states' laws regulating their own internal affairs, such as hours of labor in industry, minimum wage requirements, and standards for working conditions, is one thing. To invoke the interstate commerce clause to keep the many states from fastening their several concepts of local "well-being" onto the national commerce is a wholly different thing.

Our national free intercourse is never in danger of being suddenly stifled by dramatic and sweeping acts of restraint. That would produce its own antidote. Our danger, as the forefathers well knew, is from the aggregate strangling effect of a multiplicity of individually petty and diverse and local regulations. Each may serve some local purpose worthy enough by itself. Congress may very properly take into consideration local policies and dangers when it exercises its power under the commerce clause. But to let each locality conjure up its own dangers and be the judge of the remedial restraints to be clamped onto interstate trade inevitably retards our national economy and disintegrates our national society. It is the movement and exchange of goods that sustain living standards, both of him who produces and of him who consumes. This vital national interest in free commerce among the states must not be jeopardized.

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I do not suppose the skies will fall if the Court does allow Arkansas to rig up this handy device for policing liquor on the ground that it is not forbidden by the commerce clause, but in doing so it adds another to the already too numerous and burdensome state restraints of national commerce and pursues a trend with which I would have no part.

GRAY, DIRECTOR OF THE BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF THE INTERIOR, ET AL. *v.* POWELL ET AL., RECEIVERS.

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

No. 18. Argued October 21, 22, 1941.—Decided December 15, 1941.

1. Upon the facts of this case, a determination by the Director of the Bituminous Coal Division that a railroad company was not the "producer" of certain coal consumed by it, and therefore that the coal was not exempt, under §§ 4–II (l), and 4–A, from the provisions of the Bituminous Coal Act of 1937, should not be disturbed on review under § 6 (b). P. 411.
2. On review under § 6 (b) of the Bituminous Coal Act of 1937, of an administrative determination that the consumer of certain coal was not the "producer" thereof and that therefore the coal was not exempt under §§ 4–II (l) and 4–A of the Act, the function of the court is fully performed when it determines that there has been a fair hearing, with notice and an opportuntiy to present the circumstances and arguments to the administrative body, and an application of the statute in a just and reasoned manner. P. 411.
3. In order that the Bituminous Coal Act of 1937, § 4–II, may apply to particular transactions in coal, it is not essential that there be a sale or other transfer of title by the producer. P. 414.
4. It is within the power of Congress to provide for the determination of who are "producers" under the Bituminous Coal Act of 1937. P. 417.

114 F. 2d 752, reversed.

CERTIORARI, 311 U. S. 644, to review a decree reversing an order of the Director of the Bituminous Coal Division

denying a claim of exemption under the Bituminous Coal Act of 1937. The decree below was affirmed here by an equally divided court, 312 U. S. 666; subsequently, a petition for rehearing was granted, 313 U. S. 596.

Mr. Robert L. Stern, with whom *Assistant Solicitor General Fahy, Assistant Attorney General Arnold,* and *Messrs. Richard H. Demuth, Arnold Levy, Jesse B. Messitte,* and *Abe Fortas* were on the brief, for petitioners.

Mr. W. R. C. Cocke, with whom *Messrs. Jos. F. Johnston* and *Wm. H. Delaney* were on the brief, for respondents.

Mr. Justice Reed delivered the opinion of the Court.

Respondents, receivers of the Seaboard Air Line Railway Company, seek from the Bituminous Coal Division of the Department of the Interior an exemption of certain coal from the Bituminous Coal Code on the ground that they were both the producer and consumer of the coal. If Seaboard is held to be a producer-consumer, it is entitled to an exemption by virtue of § 4–II (1) and § 4–A. These sections, together with others pertinent to the discussion, are set out in a note below.[1]

[1] Bituminous Coal Act of 1937, 50 Stat. 72, 15 U. S. C. § 828 *et. seq.* (1940). "Sec. 3. (a) There is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States when sold or otherwise disposed of by the producer thereof an excise tax of 1 cent per ton of two thousand pounds.

"The term 'disposal' as used in this section includes consumption or use (whether in the production of coke or fuel, or otherwise) by a producer, and any transfer of title by the producer other than by sale.

"(b) In addition to the tax imposed by subsection (a) of this section, there is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States, when sold or otherwise disposed of by the producer thereof, which would be subject to the

The application for exemption was filed before the National Bituminous Coal Commission August 4, 1937. The first hearing was in September, 1937, before the examiners for the Commission. After the passage of the Reorganization Act of 1939, 53 Stat. 561, and the acquiescence of Congress in Reorganization Plan No. II, 53 Stat. 1433, a

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application of the conditions and provisions of the code provided for in section 4, or of the provisions of section 4–A, an excise tax in an amount equal to 19½ per centum of the sale price at the mine in the case of coal disposed of by sale at the mine, or in the case of coal disposed of otherwise than by sale at the mine, and coal sold otherwise than through an arms' length transaction, 19½ per centum of the fair market value of such coal at the time of such disposal or sale. In the case of any producer who is a code member as provided in section 4 and is so certified to the Commissioner of Internal Revenue by the Commission, the sale or disposal by such producer during the continuance of his membership in the code of coal produced by him shall be exempt from the tax imposed by this subsection.

. . . . . .

"SEC. 4. The provisions of this section shall be promulgated by the Commission as the 'Bituminous Coal Code', and are herein referred to as the code.

"Producers accepting membership in the code as provided in section 5 (a) shall be, and are herein referred to as, code members, and the provisions of such code shall apply only to such code members, except as otherwise provided by subsection (h) of part II of this section.

"For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions and provisions, which are intended to regulate interstate commerce in bituminous coal and which shall be applicable only to matters and transactions in or directly affecting interstate commerce in bituminous coal:

. . . . . .

PART II—MARKETING.

. . . . . .

"(e) No coal subject to the provisions of this section shall be sold or delivered or offered for sale at a price below the minimum or above the maximum therefor established by the Commission, and the sale or delivery or offer for sale of coal at a price below such minimum or above such maximum shall constitute a violation of the code: *Pro-*

division headed by a Director was established by the Secretary of the Interior, known as the Bituminous Coal Division. Order No. 1394, as amended by Order No. 1399 of July 5, 1939, 4 F. R. 2947. Thereafter, the hearings proceeded before the Division, and the order denying the exemption was passed by the Director, June 14, 1940.

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vided, That the provisions of this paragraph shall not apply to a lawful and bona fide written contract entered into prior to June 16, 1933.

. . . . .

"(l) The provisions of this section shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him.

"SEC. 4–A. Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdivision thereof, or the consumers' counsel, after hearing finds that transactions in coal in intrastate commerce by any person or in any locality 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, the Commission shall by order so declare and thereafter coal sold, delivered or offered for sale in such intrastate commerce shall be subject to the provisions of section 4.

"Any producer believing that any commerce in coal is not subject to the provisions of section 4 . . . may file with the Commission an application, verified by oath or affirmation for exemption, setting forth the facts upon which such claim is based. . . . Within a reasonable time after the receipt of any application for exemption the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application. . . . Any applicant aggrieved by an order denying or otherwise disposing of an application for exemption by the Commission may obtain a review of such order in the manner provided in subsection (b) of section 6.

. . . . .

"SEC. 6. . . . (b) Any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the

Better practice might have suggested a dismissal, since the Director found Seaboard was not a producer. Subsequently, Seaboard sought review under § 6 (b) and obtained the decree, now under consideration, reversing the Director's order. The opinion accompanying the decree held that the facts of this case brought the Seaboard under the classification of producer. 114 F. 2d 752. As the question of federal law was important [2] and unsettled by any decision of this Court, certiorari was granted, J. C. § 240 (a), 311 U. S. 644, and the decree below affirmed by an equally divided Court, 312 U. S. 666. The present consideration is upon a petition for rehearing. 313 U. S. 596.

Seaboard, a coal-burning railroad, is a large consumer of bituminous coal. The arrangements here in question

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District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged below. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. . . .

. . . . . .

"SEC. 17. As used in this Act—

. . . . . .

"(c) The term 'producer' includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal."

The Bituminous Coal Act of 1937, 50 Stat. 72, has been extended to April 26, 1943. Act of April 11, 1941, c. 64, 55 Stat. 134.

[2] Cf. *Consolidated Indiana Coal Co.* v. *National Bituminous Coal Commission*, 103 F. 2d 124; *Keystone Mining Co.* v. *Gray*, 120 F. 2d 1, decided after allowance of certiorari.

are with three mines; but as there are no significant differences in the plans by which the coal is extracted, we shall describe the contracts relating to one only, the William-Ann Mine, owned by the United Thacker Coal Company and the Cole and Crane Real Estate Trust.

This was the earliest arrangement. It originated in May, 1934, when the coal code of the National Industrial Recovery Act was in effect.[3] The first step was a lease of coal lands by the Seaboard from the landowners which granted to Seaboard the right to mine coal for fourteen months, with the privilege of yearly renewals, which originally were not to run beyond June 30, 1939. Successive extensions have continued its effect since that time. During the spring of 1936, two extensions of six weeks each were agreed upon, specifically in view of the case of *Carter* v. *Carter Coal Co.*, 298 U. S. 238, decided May 18, 1936. The *Carter* case involved the Bituminous Coal Act of 1935, the predecessor of the present act. A per-ton royalty, as rent, was reserved to the landowners with an annual minimum of $16,200 payable quarterly. The lease was terminable on fifteen days notice, if the landowners terminated the contractor's lease, about to be referred to, for the contractor's default.

The second step in this arrangement was for the landowner lessors of the lease just described to lease simultaneously to a contractor selected by Seaboard the mining equipment on the demised premises, consisting of buildings, tipples, machinery and other appurtenances necessary or convenient for extracting the coal. This equipment was sufficient for reasonably economical mining. It was further provided in the coal lease that the term and

[3] National Recovery Administration, Registry No. 702–45, Approved Code No. 24, Code of Fair Competition for the Bituminous Coal Industry, promulgated September 18, 1933. Article VI listed selling below code price as an unfair practice.

the renewal privileges of the equipment lease should be coëxtensive with those of the coal lease.

The final step was an operating contract between the contractor, Daniel H. Pritchard, referred to in the land lease as the lessee of the facilities for mining, and Seaboard for the extraction of the coal by the contractor or supplier and the delivery of it to Seaboard for consumption. This contract also was made simultaneously with the coal lease. It contained a provision requiring the contractor to obtain a lease of the mining equipment, in accordance with that segment of the entire plan referred to in the preceding paragraph. For a flat per-ton cost on a sliding scale dependent upon volume, the supplier agreed to mine the coal. His compensation was subject to variation by fluctuations in costs beyond his control, such as taxes, wages, machinery and explosives. Alternatively, payment could be made on a cost basis plus ten cents per ton for the contractor's compensation. This operating contract ran for the same term and had the same renewal privileges as the coal lease contract heretofore described and has been continued in effect by extensions made for the same terms as the extensions of the coal lease. The supplier was called an independent contractor in the document. This he was, at least in the sense that he managed the mining in his own way without a right of direction in Seaboard. He agreed that the coal supplied would be clean, *i. e.*, free of non-combustible matter, and would pass inspection of Seaboard for compliance with its specifications. The supplier paid and assumed all obligations to the landowner except the royalty, including taxes. He carried employer's liability and casualty insurance, and agreed to bear the cost of all repairs, additions or betterments, even under the alternate cost-plus plan, as well as those described as commissary or welfare expenses. Seaboard, in an extension agreement, obtained the privilege of termination on sixty days' notice, if the supplier

defaulted by not lowering his contract price to meet the market price of similar coal.

The landowner, the contractor and Seaboard, by this series of coördinated and synchronized contracts, caused the entire output of the mine to be delivered to Seaboard for its consumption, at a fixed price, subject to variations for factors beyond the supplier contractor's control. The alternative cost-plus plan was not employed. Under the contractor's agreement, the contractor assumed all risks of operation, as heretofore explained, and all obligations of Seaboard to the landowner, except the royalty payments. This made a fixed cost to Seaboard, for coal, of supplier's contract price plus the royalty per ton as rent. It was a short term, one year, contract with the price controlled by the market in view of the competitive price provision. Seaboard furnished no facilities or equipment for mining or loading.

The other two arrangements, one with the Glamorgan Coal Lands Corporation, landowner, and Glamorgan Coals, Inc., the operator, for which latter corporation Peerless Coal Corporation is substituted by consent, and the other with Chilton Block Coal Company and the Dingess-Rum Coal Company, landowners by lease and in fee, and Daniel H. Pritchard, operator, vary only in details from the William-Ann contracts set out above.

From the several arrangements the Seaboard obtained about half of its annual requirements, estimated for 1936 at one million tons. There is no question as to the interstate character of the commerce involved. The coal is mined in Virginia and West Virginia, and consumed in a number of other South Atlantic states.

The Bituminous Coal Act of 1937 followed the invalidation of the Bituminous Coal Conservation Act of 1935 by *Carter* v. *Carter Coal Co.*, 298 U. S. 238, and the abandonment of the N. R. A. Code of Fair Competition after the decision in *Schechter Corp.* v. *United States,* 295 U. S.

495. These legislative enactments sought a solution of the economic difficulties of the soft coal industry, which were bringing bankruptcy to operators and an even worse condition, unemployment, to the miners. Each time legislation was attempted, the conclusion was reached that price stabilization offered the best remedy. The industry found the same answer. *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344. This Court has determined that the present 1937 act is within the constitutional powers of Congress. *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381.

This purpose of stabilization of conditions through a fixed price scheme met a difficult problem in the captive coal mines. The 1935 act taxed the value of such coal at the mine. It defined captive coal as including "all coal produced at a mine for consumption by the producer or by a subsidiary or affiliate thereof." 49 Stat. 1008. As the coal consumed by a producer apparently was deemed by Congress, when considering the present act, not to offer the same disturbing effect to prices as non-code, open market coal,[4] a method of exemption was provided. §§ 4–II (l) and 4–A, note 1, *supra.* Congress, however, did not define exempt coal as it had captive coal in the 1935 act. While a definition was inserted in the Senate,[5] it

[4] Testimony of Chairman Hosford of the Bituminous Coal Commission, Hearings before Committee on Interstate Commerce, U. S. Senate, 74th Cong., 2nd Sess., on S. 4668, pp. 32 and 33.

[5] 81 Cong. Rec. 3136, 75th Cong., 1st Sess.

"It is proposed, on page 30, line 17, to strike out the period after the word 'him', and to insert a comma and the words 'and for the purpose of this subsection the term 'producer' also includes all individuals, partnerships, and corporations which are found by the Commission, upon the effective date of this act, bona fide and not for the purpose of evading the provisions of this act, to be owned by, or to be under common ownership with, a producer, provided such a producer does not sell any part of his production on the commercial market.' . . . The purpose of the amendment is simply to extend the exception

was eliminated in the conference report.[6] As a result, the determination of exempt coal was left to the administrative body. § 4–A, note 1, *supra.*

Determination of Producer.—We are thus brought squarely to decide whether the Director's finding that Seaboard is not the producer of this coal is to be sustained. By § 4–A, note 1, *supra,* the determination of this issue rests with the Director, subject to the review, as obtained herein, by a Circuit Court of Appeals, provided by § 6 (b). Section 4–A states: "Any producer believing that any commerce in coal is not subject to the provisions of section 4 . . . may file with the Commission an application, verified by oath or affirmation for exemption, setting forth the facts upon which such claim is based. . . . Within a reasonable time after the receipt of any application for exemption the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application." In a matter left specifically by Congress to the determination of an administrative body, as the question of exemption was here by §§ 4–II (l) and 4–A, the function of review placed upon the courts by § 6 (b) is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner. *Shields* v. *Utah Idaho R. Co.,* 305 U. S. 177, 180, 181, 184, 185, 187.

Such a determination as is here involved belongs to the usual administrative routine. Congress, which could have

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carried by subsection (l), on page 30, so as to include under the definition of the word 'producer' a wholly owned subsidiary or other legal entity having identical ownership. That is the whole purpose.

"The question is on agreeing to the amendment offered by the Senator from Ohio.

"The amendment was agreed to."

[6] H. Rep. No. 578, 75th Cong., 1st Sess., pp. 1, 8.

legislated specifically as to the individual exemptions from the code, found it more efficient to delegate that function to those whose experience in a particular field gave promise of a better informed, more equitable, adjustment of the conflicting interests of price stabilization upon the one hand and producer consumption upon the other. By thus committing the execution of its policies to the specialized personnel of the Bituminous Coal Division, the Congress followed a familiar practice.[7] Of course, there is no difference between the skill of employees in a division of a department and those in a board, commission or administration.

Where, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched. Certainly, a finding on Congressional reference that an admittedly constitutional act is applicable to a particular situation does not require such further scrutiny. Although we have here no dispute as to the evidentiary facts, that does not permit a court to substitute its judgment for that of the Director. *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304; *Helvering* v. *Clifford*, 309 U. S. 331, 336. It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action.

Congress could not "define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations." *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 194. Just as in the *Adkins* case [310 U. S. 381] the determination of the sweep of the term "bituminous

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[7] Treasury—*United States* v. *Johnston*, 124 U. S. 236, 249; Interior—Swamp lands—*Northern Pacific Ry. Co.* v. *McComas*, 250 U. S. 387, 392; Customs Appraisers—*Passavant* v. *United States*, 148 U. S. 214, 219; Post Office—*Bates & Guild Co.* v. *Payne*, 194 U. S. 106.

coal" was for this same administrative agency, so here there must be left to it, subject to the basic prerequisites of lawful adjudication, the determination of "producer." The separation of production and consumption is complete when a buyer obtains supplies from a seller totally free from buyer connection. Their identity is undoubted when the consumer extracts coal from its own land with its own employees. Between the two extremes are the innumerable variations that bring the arrangements closer to one pole or the other of the range between exemption and inclusion. To determine upon which side of the median line the particular instance falls calls for the expert, experienced judgment of those familiar with the industry. Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept "producer" is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed.

Consumers of bituminous coal are naturally desirous of obtaining supplies free of the tax and free of the risk and investment typical of production. If independent contractors are employed for extraction, there is an obvious breach in the full consumer-producer identity. This may create consequences which would not follow if the enterprise itself, through its own employees, accomplished the same ultimate result. Often in the law, the selection of a particular business form as, for instance, carrying on a common business through two corporations, may create legal liability, *Edwards* v. *Chile Copper Co.*, 270 U. S. 452, 456, although such relation to other connections may result in diversity of legal treatment. Compare, for instance, *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, and *United States* v. *Delaware, L. & W. R. Co.*, 238 U. S. 516.

The shortness of the leases, the freedom from investment in coal lands or mining facilities, the improbability of profit or loss from the mining operations, the right to cancel when cheaper coal may be obtained in the open market, all deny the position of producer to the railroad.

We view it as immaterial that the Company might have itself operated a captive mine and so escaped the price provisions of the act by virtue of the exception of § 4–II (l), note 1, *supra*. It chose to employ the scheme in question here. It considered it advantageous to avoid the risks of production and now must bear the burdens of a determination that other entities than itself are the producers. Cf. *Superior Coal Co.* v. *Department of Finance,* 377 Ill. 282, 36 N. E. 2d 354, 358, 360. The choice of disregarding a deliberately chosen arrangement for conducting business affairs does not lie with the creator of the plan. *Higgins* v. *Smith,* 308 U. S. 473, 477.

Code Coverage.—Seaboard contends that the coal here involved is not affected by the code § 4–II because there is no sale or other transfer of the title to the coal by the producer. As to this point, in Seaboard's view, since it as lessee of the mineral rights is the owner of the coal when it is extracted and until it is consumed and therefore no title ever passes, it is immaterial whether or not it or its suppliers of the coal are determined to be the producer. Support for the conclusion that there must be a transfer of title to bring the coal under the code, § 4–II, is found by Seaboard in the preoccupation of Congress in sales, which attitude it feels is shown by the continuous reference in the provisions of the Act to sales or other transfers of title. Further support is drawn for the position by reference to § 3 (a), where "disposal" is declared to include consumption by a producer or any transfer of title other than by sale. Reliance is placed also on § 3 (b), which by a tax of 19½ per cent of the selling price impels adherence to the code when 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" is sold or otherwise disposed of by the producer.

Had we held that Seaboard was the producer, the pertinency of this argument would disappear because Seaboard would be both producer and consumer, and therefore this coal would be entitled to exemption under §§ 4–II (1) and 4–A. As we determine otherwise, however, it is essential to examine the soundness of the position asserted by Seaboard, to wit, that coal produced by the instrumentalities is not subject to the provisions of § 4–II for the reason that it is not sold nor otherwise disposed of by the producers. We conclude that coal extracted under the circumstances of this case is within the scope of the code provisions of § 4–II.

Examination of the code discloses that minimum prices for code coal are fixed by joint action of the district boards and the Director. § 4–I (a), II (a). Thereafter no code coal may be sold at prices less than the fixed minimum except at the risk of severe penalties. Code coal is that produced by code members, *i. e.,* coal producers who accept membership in the code. § 5 (a). All producers of bituminous coal within the statutory districts are eligible for membership, and therefore all coal produced by any of these producers is potentially code coal. The code regulates the coal and not the producer. In order to force the eligible coal within the code, an excise tax of 19½% of the sale price is placed upon all bituminous coal "sold or otherwise disposed of by the producer thereof, which would be subject to the application of the conditions and provisions of the code," with a blanket exemption from this tax of sales or other disposal by code members.

The core of the Act is the requirement that coal be put under the code or pay the 19½ per cent excise. We said in *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 392, that the

sanction tax applied to non-code members. Since they were not members, it was there contended that their coal would not be subject to the code, but it was explained in the *Adkins* case that the code was intended to apply to sales "in or directly affecting interstate commerce in bituminous coal," § 4, 3rd paragraph, and that non-code coal "would be" subject to the code when it was interstate coal or coal affecting interstate commerce and therefore subject to the regulatory power of Congress. So here, the purpose of Congress, which was to stabilize the industry through price regulation, would be hampered by an interpretation that required a transfer of title, in the technical sense, to bring a producer's coal, consumed by another party within the ambit of the coal code. We find no necessity to so interpret the act. This conclusion seems to us in accord with the plain language of § 3 (a) and (b) providing for a tax on "other disposal" as well as sale. The definition of disposal as including "consumption or use by a producer, and any transfer of title by the producer other than by sale" cannot be said to put a meaning on disposal limited to the inclusion. Cf. *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co., ante,* p. 95, and cases cited at 99–100. It is true that § 4–II (e) speaks of a violation of the price provisions by "sale or delivery or offer for sale of coal at a price below" the minimum, without reference to "other disposition," the phrase generally used; but the failure to include those words at that point does not, we think, justify an interpretation that coal covered by the code may be disposed of otherwise than by a transfer of title without penalty. We think the language of § 5 (b) relating to findings on orders punishing for violation of the code shows this to be true. It reads, so far as pertinent, as follows:

". . . the Commission shall specifically find . . . the quantity of coal sold or otherwise disposed of in violation of the code . . .; the sales price at the mine or the market value at the mine if disposed of otherwise than by sale at

the mine, or if sold otherwise than through an arms' length transaction, of the coal sold or otherwise disposed of by such code member in violation of the code or regulations thereunder." 50 Stat. 84.

This conclusion is fortified by an examination of the tax section of the 1935 act from which the present § 3 is obviously derived. In the first or 1935 act, captive coal was taxed along with other coal. The tax was laid upon the "sale or other disposal of all bituminous coal produced within the United States." It was "15 per centum on the sale price at the mine, or in the case of captive coal the fair market value of such coal at the mine." 49 Stat. 993, § 3. Evidently the draftsman thought of the sale of free coal and of the "other disposal" of captive coal. See further, on the question of the meaning of a sale, *In re Bush Terminal Co.*, 93 F. 2d 661, 663.

Finally, respondent contends that, if the act is construed to apply to the contractual arrangements just considered, it is beyond the power of Congress under the Commerce and Due Process Clauses of the Constitution. This is said to be so because there is no power in Congress to regulate the price paid for the service of mining coal or the consideration for mining rights, and to do so would violate the Fifth Amendment. We are, in this review by certiorari, determining only the question of whether the Seaboard is a producer under the Act. Congressional power over that problem is beyond dispute. *Currin* v. *Wallace*, 306 U. S. 1; *United States* v. *Darby*, 312 U. S. 100; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381.

Reversed.

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

MR. JUSTICE ROBERTS:

I think the judgment should be affirmed. There are limits to which administrative officers and courts may ap-

propriately go in reconstructing a statute so as to accomplish aims which the legislature might have had but which the statute itself, and its legislative history, do not disclose. The present decision, it seems to me, passes that limitation.

The case involves an Act of Congress which, in implementing its declared purpose and intent, carefully delimits by inclusive and exclusive definition those who shall and those who shall not be subject to its regulatory provisions. Upon a record in which there is not a single disputed fact, the bare question is presented whether the words the Congress used bring the respondents within the Bituminous Coal Code or exclude them from its operation. In answering that question, the Director made no controverted finding of fact, exercised no judgment as to what the relevant circumstances were, but merely decided that the meaning of the statute was that the respondents' transactions required that they become members of the Code or suffer the penalty of the 19½% tax for failing to join the Code. If the Director was in error, his error was a misconstruction of the Act which created his office; and that error, under all relevant authorities, is subject to court review. It is specifically made so subject to review by the statute in question.[1]

The Bituminous Coal Act, as its preamble declares, is aimed at the regulation of prices and unfair methods of competition in the marketing of bituminous coal in interstate commerce,[2] as the means of promoting that commerce and relieving it from practices and methods which burden and obstruct it. The body of the Act is confined to the enforcement of these purposes and none other.

To accomplish the declared end, the statute adopts a comprehensive scheme for the regulation of prices and

[1] Section 6 (b) and (d).

[2] *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 388, 393.

trade practices in the marketing of bituminous coal in interstate commerce. It creates a Commission and, by § 4, directs the Commission to promulgate a Bituminous Coal Code, to which coal producers who are "code members" are made subject. By Part II of § 4, the Commission is given authority to fix minimum and maximum prices for code members in conformity to specified standards. Subdivision (i) of § 4, Part II, specifies methods of competition in the marketing of coal which are declared to be unfair and violations of the Code.

Section 3 (a) imposes a tax of 1 cent per ton on all coal "sold or otherwise disposed of by the producer" and defines disposal, for the purposes of this section alone, as including "consumption or use" by a producer and any transfer of title by a producer other than by sale. The acknowledged purpose of this subsection is the levy on all coal taken out of the ground, and used by whomsoever, of a small tax to pay the expense of the administration of the Act. The respondents admit their liability for this exaction. They have paid this tax and no question arises in respect of it.

Section 3 (b), as a means of securing compliance with the regulatory provisions of § 4, imposes a penal tax of 19½% of the sale price of the coal, or of its fair market value when disposed of otherwise than by a sale, on all the coal sold or otherwise disposed of by a producer to whom the regulatory provisions as to price and unfair methods of competition included in § 4 are applicable. Only those who are producers of coal and would be subject to the provisions of the Code are liable to the penalty tax as an alternative to joining the Code and thus coming within the regulatory provisions applicable to such Code members. Such regulatory provisions are concerned only with those who sell or market coal.

Subdivision (l) of Part II of § 4 declares: "The provisions of this section shall not apply to coal consumed by the

producer or to coal transported by the producer to himself for consumption by him." The respondents insist that this subsection plainly exempts them from becoming members of the Code and that, in pursuance of the subsection, the Director should have granted their application for exemption.

Some stress is laid by the petitioners on § 17 (c) which declares that:

"As used in this Act,

. . . . . .

"(c) The term 'producer' includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal."

It seems plain enough that this provision was not intended to nullify subsection (1) of § 4, Part II. The evident purpose was to make it clear that, under whatever form the business was done, the operator should come under the applicable provisions of the statute. This subsection has no relevance to the question presented in this case.

The term "producer" is not a technical term or a term of art, but the statute has not left the Director or the courts without guides respecting the meaning of the word as used in the statute. It is the Director's duty to observe those guides in applying the statute and, if he fails so to do, it is the obligation of the courts to observe them in performing their statutory duty to review his determination. The context, the purpose of the Act, and the means adopted to carry them into effect, make clear the meaning of the word "producer" as used in the statute. This court obviously fails in performing its duty and abdicates its function as a court of review if it accepts, as the opinion seems to do, the Director's definition of "producer" and then proceeds to accommodate the meaning of related provisions to the predetermined definition. So to do is a

complete reversal of the normal and usual method of construing a statute.

The legislative history [3] demonstrates, and the opinion of the court concedes, that the purpose of § 4 (Pt. II (l)) was to exclude from the provisions of the Act regulating prices and other matters of competition in interstate marketing, coal produced from "captive mines"; that is, coal produced by the owner of a mine and consumed by him without placing it on the market. It is, as it must be, also conceded that subdivision (l) excludes from the operation of the Act one who mines coal by his own employes, upon land owned or leased by him, and consumes it in his business or industry. The only possible differentiation between the respondents' method of conducting the business and that of the usual captive mine lies in the fact that the respondents' coal is mined by an independent contractor instead of by employes. That circumstance, however, will not justify the statement that respondents do not produce the coal, any more than it would justify the statement that they would not transport coal to themselves, within the meaning of the Act, if they shipped it by a common carrier who was an independent contractor. The circumstance that the coal is mined by a contractor instead of an employe, or transported by a common carrier, cannot have any more, or any different, effect upon the subjects of regulation—prices and unfair methods of competition—in the one case than in the other. In both cases, the owner would consume coal which would otherwise come on the market. In neither case would the coal be brought into competition with marketed coal. In each case, the owner would remain free to buy coal on the market whenever the market price fell below the cost of production at his own mine.

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[3] Hearings before the Committee on Interstate Commerce of the Senate, 2d Sess., 74th Cong., on S. 4668, pp. 32, 33.

Subdivision (1) cannot appropriately be construed to deny respondents the right to be excluded from the operation of the Act upon their application as provided in § 4–A when there are plainly no affirmative provisions of the Act subjecting them to its regulation. It will hardly be denied that, by respondents' total operation, coal is produced. If they are not the producers, because they pay a contract price instead of wages for its production, they are not subject to the 19½% tax which applies only to producers; and they are thus exempt from the only sanction which would compel them to become Code members subject to the regulatory provisions of the Act. Since they market no coal, the provisions of § 4 relating to prices and methods of competition in the marketing of coal are not applicable to them. On the other hand, if the independent contractor whom respondents employ to mine the coal is deemed the producer of the coal, he likewise is exempt from the regulatory provisions and also exempt from the 19½% penal tax. For, even if he be called a producer, he neither markets nor sells the coal and he cannot be said to dispose of coal which he does not own. Disposal must mean something more than physical production, delivery, or transportation of the coal of another. If it were otherwise, the superintendent of a captive mine would be subject to the tax because he is engaged in mining coal and delivering it to the owner who consumes it. It is well known that, in many coal fields, coal is gotten out by employing a miner who in turn employs his own gang to assist him in the mine. If the Director's position is correct, this method of operation would subject the owner and operator of a captive mine to regulation under the Act. That view would be plainly untenable.

The vice in the construction which the court now adopts, apparently only because the Director has adopted it, lies in the fact that this construction is of practical significance

only as it is preliminary to regulation of features of the coal industry other than prices and methods of competition in the marketing of coal. Congress has not seen fit to prescribe such regulation. It is clear that the attempted subjection of respondents to the control of the Commission is without congressional authority.

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

UNITED STATES *v.* EMORY ET AL.

CERTIORARI TO THE SPRINGFIELD COURT OF APPEALS OF MISSOURI.

No. 33. Argued November 10, 1941.—Decided December 15, 1941.

1. The priority established by R. S. § 3466 for debts due to the United States in cases in which "an act of bankruptcy is committed," is applicable where, upon a creditor's petition, a receiver has been appointed to liquidate the assets of an insolvent corporation. P. 426.
2. The purpose of R. S. § 3466 is to secure adequate public revenues to sustain the public burden, and it is to be construed liberally in order to effectuate that purpose. P. 426.
3. In an equity receivership proceeding in a state court, a claim of the United States arising under the National Housing Act is entitled, under R. S. § 3466, to priority over claims for wages. P. 426.
4. The right of the United States to priority in such case is not affected by state law nor by § 64a of the Bankruptcy Act; nor is it inconsistent with the National Housing Act. Pp. 427, 429.

143 S. W. 2d 318, reversed.

CERTIORARI, 313 U. S. 552, to review a judgment denying a claim of the United States to priority. The judgment of the state court of first instance was affirmed by the Springfield Court of Appeals and the Supreme Court of Missouri denied a petition for certiorari.

Mr. Melvin H. Siegel, with whom *Assistant Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* were on the brief, for the United States.

No appearance for respondents.

MR. JUSTICE BYRNES delivered the opinion of the Court.

This case involves the application of § 3466 of the Revised Statutes to a claim of the United States under the National Housing Act in an equity receivership proceeding in a state court.

The St. James Distillery, a corporation, executed a note to the Industrial Bank and Trust Company of St. Louis on September 23, 1935. On July 14, 1936, the Bank endorsed the note and delivered it to the Federal Housing Administration, acting on behalf of the United States, under a contract of insurance and guaranty provided for in Title I of the National Housing Act. The United States, through the Federal Housing Administration, on that date reimbursed the Bank in the amount of $5988.88, the balance due on the note. Emory, claiming wages due him, filed a petition on August 27, 1936 in the Circuit Court of Phelps County, Missouri, alleging that the St. James Distillery was hopelessly insolvent and praying that a receiver be appointed. On September 9, the Circuit Court found all the issues in Emory's favor and appointed a receiver who took possession of the corporate assets.

After deductions for the costs of the receivership, the assets available for distribution totaled $678. Against this amount the wage claims of "about twelve individuals" were filed. The separate amounts of these claims were neither stipulated nor determined by the courts below; their aggregate was "about $900." The United States, on behalf of the Federal Housing Administration, filed a claim for the $5988.88 due on the note. The wage claim-

ants asserted priority under § 1168 of the Revised Statutes of Missouri;[1] the United States asserted priority under § 3466 of the Revised Statutes of the United States.[2]

The Circuit Court of Phelps County decided that the claim of the United States should be treated as an ordinary claim against the estate, and that the wage claims should be paid first. On appeal, the Springfield Court of Appeals held that the claim of the United States on behalf of the Federal Housing Administration was accorded preference over ordinary claims by § 3466 of the Revised Statutes of the United States. Consequently, it was of the opinion that the Circuit Court had erred in treating the claim of the United States as an ordinary claim. However, it held further that the error was of no consequence, since the Missouri statute granted priority to wage claims even over other preferred claims and no assets would remain after they had been satisfied. Rehearing was denied, and

[1] Mo. Rev. Stat. (1929) § 1168, so far as pertinent, provides: "Hereafter when the property of any company, corporation, firm or person shall be seized upon by any process of any court of this state, or when their business shall be . . . . put into the hands of a receiver or trustee, then in all such cases the debts owing to laborers or servants, which have accrued by reason of their labor or employment, to an amount not exceeding one hundred dollars to each employee, for work or labor performed within six months next preceding the seizure or transfer of such property, . . . shall be first paid in full; and if there be not sufficient to pay them in full, then the same shall be paid to them pro rata, after paying the costs."

[2] U. S. Rev. Stat. § 3466 (U. S. C., Title 31, § 191) provides: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

the Supreme Court of Missouri denied a petition for certiorari. We granted certiorari because of the importance of the question and because of an asserted conflict of decisions.

The applicability of § 3466 to this case is clear. The section applies in terms to cases "[1] in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or [2] in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, . . . [or] [3] in which an act of bankruptcy is committed." This case falls within the third category. It is agreed that the St. James Distillery was insolvent "on or before August 1936" and that in response to a creditor's petition a receiver was appointed to liquidate the corporate assets. The appointment of a receiver under such circumstances is among the most common examples of an "act of bankruptcy." *Cf.* § 3 (a) (4) of the Bankruptcy Act, U. S. C., Title 11, § 21 (a) (4).

Just such proceedings as this, therefore, are governed by the plain command of § 3466 that "debts due to the United States shall be first satisfied." The purpose of this section is "to secure adequate public revenues to sustain the public burden" (*United States* v. *State Bank of North Carolina,* 6 Pet. 29, 35), and it is to be construed liberally in order to effectuate that purpose (*Bramwell* v. *U. S. Fidelity & Guaranty Co.,* 269 U. S. 483, 487). In view of this language, purpose, and rule of construction, the priority asserted here by the United States appears to be securely established.

The court below, however, held otherwise. In granting priority to the wage claims over that of the United States, it relied upon Missouri law. It recognized, as the authorities obliged it to recognize,[3] that the state statute could

[3] *Field* v. *United States,* 9 Pet. 182, 200; *United States* v. *Oklahoma,* 261 U. S. 253; *Barnett* v. *American Surety Co.,* 77 F. 2d 225; *In re*

not prevail if it was in conflict with § 3466. But it decided that no such conflict arose, for the reason that § 3466 had been impliedly modified by § 64a of the Bankruptcy Act,[4] which, like the Missouri statute, requires that wage claims be satisfied before those of the United States.

The judgment below must have rested upon either of the following theories: that Congress intended by § 64a of the Bankruptcy Act to subordinate claims of the United States to wage claims in non-bankruptcy proceedings generally; or that Congress intended by § 64a to modify § 3466 only so far as to grant priority over the United States to wage claimants in state non-bankruptcy proceedings when they would be entitled to such priority by otherwise applicable state law.

There is a difficulty common to both theories which we regard as insurmountable. Neither the language of § 64a nor the Congressional history of the legislation here involved supports the proposition that § 64a was intended to eliminate, either partially or wholly, the priority of claims of the United States in non-bankruptcy proceedings.

Dickson's Estate, 197 Wash. 145, 154–155, 84 P. 2d 661. Cf. *United States* v. *Summerlin*, 310 U. S. 414.

[4] Section 64a of the Bankruptcy Act, so far as pertinent, provides: "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) . . . [costs of preserving the estate, etc.]; (2) wages, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; (3) . . . [certain expenses of creditors connected with the liquidation of the estate]; (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof . . .; and (5) debts owing to any person, including the United States, who by the laws of the United States is entitled to priority . . ."

The provisions of § 3466 have been in force since 1797, without significant modifications. 1 Stat. 515. The first three federal bankruptcy acts [5] specifically preserved the priority of the United States over all other claimants in bankruptcy proceedings in the federal courts. Section 64 of the Bankruptcy Act of 1898,[6] however, disturbed this state of affairs. It provided an order of distribution of the assets of bankrupt estates in which certain wage claims preceded non-tax claims of the United States. While § 64 has been altered since 1898 in several particulars, the priority of wage claims over non-tax claims of the United States has continued. Consequently, we must look to the Act of 1898 for evidence that the priority accorded to wage claims by § 64 was intended to apply to more than bankruptcy proceedings in the federal courts.

We find no such evidence. The entire Act of 1898, as § 2 in particular plainly reveals, was designed to create federal courts of bankruptcy and to define their functions. Indeed, § 64 itself, in subdivision (a), refers to the "court"; § 1 provides that, as used in the Act, "court" means "the

[5] Act of 1800, c. 19, § 62, 2 Stat. 19; Act of 1841, c. 9, § 5, 5 Stat. 441; Act of 1867, c. 176, § 28, 14 Stat. 517.

[6] Section 64 of the Bankruptcy Act of 1898 (30 Stat. 544) provided:

"(a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof . . .

"(b) The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) . . . [the costs of administration]; (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority."

court of bankruptcy in which the proceedings are pending"; and § 1 also provides that "courts of bankruptcy," as used in the Act, mean the federal district courts and a few other federal courts. There is no internal sign that any part of § 64 was intended to apply to state courts or to non-bankruptcy proceedings in the federal courts. We have looked in vain in the committee reports and the debate upon the bill for any external hint of such an intention.

It is not strange, therefore, that both courts and commentators have assumed that the application of § 64 of the Act of 1898 was limited to federal bankruptcy proceedings, and that the priority of claims of the United States in non-bankruptcy proceedings remained unaffected. *Bramwell* v. *U. S. Fidelity & Guaranty Co.*, 269 U. S. 483; *Price* v. *United States*, 269 U. S. 492; *Stripe* v. *United States*, 269 U. S. 503; *United States* v. *Butterworth-Judson*, 269 U. S. 504; *Mellon* v. *Michigan Trust Co.*, 271 U. S. 236, 238–239; *Spokane County* v. *United States*, 279 U. S. 80; *New York* v. *Maclay*, 288 U. S. 290. See Rogge, *The Differences in Priority of the United States in Bankruptcy and in Equity Receiverships*, 43 Harv. L. Rev. 251; Blair, *The Priority of the United States in Equity Receiverships*, 39 Harv. L. Rev. 1. We are aware of but a single case in which an appellate court has specifically passed upon the contention that the priority granted to the United States in non-bankruptcy proceedings by § 3466 has been modified by § 64 of the Bankruptcy Act. And in that case, the contention was rejected. *Matter of Kupshire Coats, Inc.*, 272 N. Y. 221, 5 N. E. 2d 715.[7]

While the point was not discussed in the courts below, it is now urged that the objectives and provisions of the National Housing Act require us to hold that claims of the

[7] A similar contention with respect to § 57j of the Bankruptcy Act was rejected in *Matter of Simpson, Inc.*, 258 App. Div. 148, 15 N. Y. S. 2d 1021.

United States arising under it are not entitled to the priority awarded by § 3466. We are aware of no canon of statutory construction compelling us to hold that the word "first" in a 150 year old statute means "second" or "third," unless Congress later has said so or implied it unmistakably.

Certainly, there is no provision in the National Housing Act expressly relinquishing the priority of the United States with respect to claims arising under it. At best, therefore, such an intention on the part of Congress must be found in some patent inconsistency between the purposes of the Housing Act and § 3466. The plain objective of the Housing Act was to stimulate the building trades and to increase employment. In order to induce banks and other lending institutions to get the program under way, Congress promised that the United States would make good up to 20% on the losses they might incur on such loans.[8] As between the Government and the lending institutions, it was clearly intended that the United States should bear the losses resulting from defaults. But beyond this we may not go. There is nothing to show a further intention that the United States should relinquish its priority as to claims against defaulting and insolvent borrowers whose notes it takes up from the lending institution pursuant to the insurance contract. That is, the ultimate collection of bad loans was consigned to the United States rather than to the lending institutions, but the collecting power of the United States was neither abridged nor qualified.[9]

We are told, however, that the broad purposes of the Act would be thwarted if we failed to assume that Con-

[8] 48 Stat. 1246, c. 847, § 2.

[9] The priority granted by § 3466 is, of course, no guaranty that the United States will be saved from loss. In the instant case, for example, the assets available for distribution are so small that the United States will lose heavily even if its claim is first satisfied.

gress intended to surrender this priority. The reason advanced is that suppliers of goods and services would refuse to extend credit to those desiring to make property improvements if they knew that in the event of insolvency their claims would be subordinated to those of the United States. The fatal weakness of this contention is that the Federal Housing Administration imposes an ironclad requirement that the proceeds of insured loans be used for no purpose other than the improvements described in the application for the loan.[10] Indeed, lending institutions frequently pay the proceeds of the loan directly to the suppliers of goods and services rather than to the property owner, and the practice has met with the enthusiastic approval of the Administration.[11]

Consequently, the argument against the application of § 3466 is reduced to this: Private persons in general are reluctant to extend credit when they know that in the event of the borrower's insolvency the claims of the United States will receive priority, and this circumstance is particularly undesirable in times of economic stress. In the first place, whatever may be the merits of the contention, it should be addressed to Congress and not to this Court. In the second place, the argument proves too much. If it is sound as applied to this kind of a claim of the United States, it is equally sound as applied to all claims as to which the United States asserts priority under § 3466.

Neither *Cook County National Bank* v. *United States*, 107 U. S. 445, nor *United States* v. *Guaranty Trust Co.*,

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[10] "Modernization Credit Plan," Bulletin No. 1 (Aug. 10, 1934) pp. 15, 16–17; *id.* (Sept. 12, 1934 revision) p. 22; *id.* (July 15, 1935, revision) p. 19; *id.* (July 20, 1936 revision) pp. 6–7; "Property Improvement Loans Under Title I" (Feb. 4, 1938) pp. 4, 23; *id.* (July 1, 1939 revision) p. 15; *id.* (March 15, 1940 revision) p. 10.

[11] "Modernization Credit Plan," Bulletin No. 1 (Sept. 12, 1934 revision) p. 29; *id.* (July 15, 1935 revision) p. 15; "Property Improvement Loans Under Title I" (Feb. 4, 1938) p. 33; *id.* (July 1, 1939 revision) p. 30; *id.* (March 15, 1940 revision) regulation No. VIII.

280 U. S. 478, requires a different conclusion. In the former case, the United States was denied its § 3466 priority in connection with a claim against a national bank for the amount of certain funds of the United States deposited with it. The decision was based on two grounds. First, the National Banking Act undertook to provide a complete system for the establishment and government of banks, and it included specific provisions concerning the distribution of the assets of insolvent banks which were plainly inconsistent with the granting of priority to general claims of the United States. Second, the National Banking Act expressly authorized the Secretary of the Treasury to require national banks accepting deposits of federal funds to give satisfactory security; it was held to be fairly inferable that Congress intended the United States to look to this provision rather than to § 3466 for protection.

The claims which were denied priority in the *Guaranty Trust* case arose under Title II of the Transportation Act of 1920. That Act provided for the funding of debts to the United States which the railroads had contracted during the period of wartime control, and also provided for new loans to the railroads. In holding § 3466 inapplicable to the collection of these loans the Court emphasized that the basic purpose of the Act was to promote the general credit status of the railroads, that the railroads were required to furnish adequate security for the payment of both the old and new loans, and that the interest rate of 6% on one class of loans was "much greater than that which ordinarily accompanies even a business loan carrying such assurance of repayment as would have resulted from an application of the priority rule." 280 U. S. at 486. These factors persuaded the Court that Congress had intended to exclude these loans from the scope of § 3466.

In the instant case, none of these circumstances is present. The National Housing Act contains no refer-

ence to the liquidation of estates of insolvent borrowers, and consequently no direct inconsistency with § 3466 is possible. The purpose of Title I was not the strengthening of the *general* credit of property owners, but the stimulation of the building trades by affording assurances to lending institutions in order to induce them to make loans for property improvements. No security was required of the borrowers, and the interest charge was low.[12] Only the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of § 3466. We think such inconsistency is wholly wanting here.

Section 3466 is applicable to this proceeding, and it requires that the claim of the United States be first satisfied.

Reversed.

MR. JUSTICE REED, dissenting:

The purpose and provisions of the National Housing Act [1] lead me to the conclusion that § 3466 of the Revised

[12] Not until 1939, four years after the note in this case was executed, did the Federal Housing Administration even require the lending institutions to pay premiums for the insurance of Title I loans. 53 Stat. 805, c. 175, § 2. The income from these premiums was to be used primarily to meet operating expenses under Title I and secondarily to meet losses resulting from defaults. In his report dated April 1, 1941, the Administrator estimated that for the fiscal year ending June 30, 1941, this income from premiums would prove sufficient to reimburse the United States for less than half its losses under Title I, and that $4,000,000 of public funds would be required to meet the balance. Report of the Federal Housing Administration for the year ending Dec. 31, 1940, p. 11.

[1] Act of June 27, 1934, c. 847, Tit. I, § 2, 48 Stat. 1246, as amended 49 Stat. 299, 49 Stat. 722, 49 Stat. 1187, 49 Stat. 1234. The statute as thereafter amended subsequently to the events of this case may be found as 12 U. S. C. § 1703 (1940).

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Statutes is inapplicable to the claim of the Administrator in this case.[2]

A statute is not to be interpreted by its text alone, as though it were a specimen under laboratory control. It takes meaning from other enactments forming the whole body of law bearing upon its subject.[3] If, like § 3466, it has been upon the books for years, the precedents interpreting its meaning must be considered in connection with it, particularly when, as here, new legislation is passed which may be inconsistent with its application.[4]

From past interpretation we learn that the traditional function of § 3466 is the assurance of the public revenue,[5] whatever may be the expense to the competing creditors. Their interests are subordinated to the general advantage.[6]

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[2] Previous decisions in other courts concededly are to the contrary. *In re Long Island Sash & Door Corp.*, 259 App. Div. 688, 20 N. Y. S. 2d 573, aff'd mem. 284 N. Y. 713, 31 N. E. 2d 48, cert. den. 312 U. S. 696; *In re Dickson's Estate*, 197 Wash. 145, 84 P. 2d 661. Accord, *Korman* v. *Federal Housing Administrator*, 113 F. 2d 743 (App. D. C.); *Wagner* v. *McDonald*, 96 F. 2d 273 (C. C. A. 8th); *In re Weil*, 39 F. Supp. 618 (M. D. Pa.); *In re Wilson*, 23 F. Supp. 236 (N. D. Tex.); cf. *Federal Reserve Bank of Dallas* v. *Smylie*, 134 S. W. 2d 838 (Tex. Civ. App.) (Farm Credit Administration); see 52 Harv. L. Rev. 320. *United States* v. *Summerlin*, 310 U. S. 414, held only that the claim assigned to the administrator became a claim of the United States not subject to a state statute of "non-claim." It did not pass upon the right to priority under § 3466 in the decedent's estate. Compare *Dupont de Nemours & Co.* v. *Davis*, 264 U. S. 456, where the Director General of the railroads was held free from limitation, with *Mellon* v. *Michigan Trust Co.*, 271 U. S. 236, where the Director General was denied priority under § 3466. *United States* v. *Marxen*, 307 U. S. 200, 203, expressly did not decide the point.

[3] *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 389.

[4] *United States* v. *Marxen*, 307 U. S. 200, 206; *United States* v. *Knott*, 298 U. S. 544, 547–48; *Mellon* v. *Michigan Trust Co.*, 271 U. S. 236, 240.

[5] *Spokane County* v. *United States*, 279 U. S. 80, 92; *Price* v. *United States*, 269 U. S. 492, 500; *Bramwell* v. *U. S. Fidelity Co.*, 269 U. S. 483, 487.

[6] *United States* v. *Fisher*, 2 Cranch 358, 389.

Title I of the National Housing Act, however, is not a revenue measure—it was intended to stimulate recovery and employment in the construction industries and to enable property-owners to obtain funds for sorely needed repairs by insuring financial institutions against loss on loans for such work.[7] This was accomplished by what is, in effect, a guarantee that all losses on rehabilitation loans, up to a predetermined percentage (20% here) of the total made by the financial institution, would be borne by the United States, either by taking over loans in default or paying the deficit.[8] That loss Congress intended the Government to bear.[9] In estimating the loss, it relied upon the experience of private companies which were unaided by any such priority as § 3466.[10] Loans could

[7] Message of the President, May 14, 1934, 78 Cong. Rec. 8739–40 (Senate), *id.* at 8773–74 (House). Concerning the doldrums of the construction industry, see 78 Cong. Rec. 11194, 11198, 11210, 11211; Hearings on Sen. 3603, Committee on Banking and Currency, 73d Cong., 2d Sess., May 16–24, 1934, pp. 166 ff. Concerning the need for repairs, see 78 Cong. Rec. 11194, 11214; Hearings on Sen. 3603, *supra*, at pp. 36, 48, 288, 290.

[8] Regulation No. 18—Modernization Credit Plan—Title I, National Housing Act, provided: "The Federal Housing Administration will reimburse any insured institution on losses up to a total aggregate amount equal to 20% of the total face amount of all qualified notes taken or current face value of notes purchased by the financial institution, during the time the insurance contract is in force, and held by it or on which it continues liable. . . ." Modernization Credit Plan, Bulletin No. 1, p. 30 (revised reissue, Dec. 10, 1934).

[9] Senator Bulkley, chairman of the subcommittee (78 Cong. Rec. 11974) stated to the Senate: "It is contemplated that there will be a loss to the Government under this title, but that probably the loss will not be very great. . . . The reason we justify this provision is that it will make possible a considerable expenditure of money on needed repairs and renovation and thereby stimulate business in trades which very much need stimulation at this time." 78 Cong. Rec. 11981, 73d Cong., 2d Sess.

[10] 78 Cong. Rec. 11195–11196, 11981, 11982, 73d Cong., 2d Sess. See Hearings on Sen. 3603, *supra*, at pp. 293–94.

not be made for a longer term than five years, and many would be for less. Stable economic improvement was hardly to be expected within that time, and yet, many of those who borrowed would die, or default, and undergo some sort of financial liquidation. The enforcement of § 3466 under those circumstances would shift the loss from the Government to competing creditors, thus hampering the efforts of private business and capital to achieve that economic recovery which was the aim of the legislation.[11]

Nothing in the hearings, the debates or the Act show definitively that Congress considered the application of § 3466 to government claims under the National Housing Act. If the two acts alone were to be appraised, it might well be concluded that, as they are not necessarily inconsistent, both should be enforced. But the determination of Congressional purpose is not so simple as that. Upon the assumption that the applicability of § 3466 never came to the attention of Congress, we must find legislative purpose not from the language of the two Acts alone but from generalizations as to the object of the new statute and from judicial interpretations of the meaning of the old. To reach a sound conclusion as to the applicability of the priority statute and the purpose of Congress deduced merely from the state of the law at the time of the enactment of the Housing Act, we need to weigh the precedents under § 3466 quite as carefully as the Acts themselves, in order to develop the legal situation

[11] These loans were to be so-called "character" loans, in reliance on the character and stable earnings of the borrower. 78 Cong. Rec. 11194, 11195, 11981. It was expected that while many persons at the time had no stable income, the Act would temporarily promote new employment which once under way was hoped would continue long enough of its own force to culminate in permanent business recovery and repayment of the borrowed money. Hearings on Sen. 3603, *supra*, at pp. 46, 173.

into which the Housing Act was injected. When this is done, it is apparent that, each time this Court has considered legislative purpose as to § 3466 in relation to government claims under public financial legislation affecting creditors competing with the Government, it has determined § 3466 did not apply.[12]

The National Housing Act was "one of the latest of a series of enactments, extending over more than a century, through which the Federal Government has recognized and fulfilled its obligation to provide a national system of financial institutions. . . ." [13] Section 3466 is inconsistent with this purpose.[14] It is not significant that in the case of *Cook County National Bank* the debtor bank against which priority was denied was in the federal financial system, while here the debtor is a private corporation which has participated in a federal financing plan. The intrusion of a novel priority, uncertain in amount because unrecorded, into the intricate credit system of the Nation at a time of strain, would be a drag on recovery, rather than a stimulus. Suppliers of goods or services in all fields of credit activity would be moved to constrict their advances to a borrower known to have created a secret but valid lien upon his assets superior to all general creditors. The full reach of the implication of credit dislocation may be readily gauged by the fact that, at the end of 1936, 1,326,102 separate rehabilitation loans had been made under Title I for an aggregate amount of $500,220,642.[15]

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[12] *Cook County Nat. Bank* v. *United States*, 107 U. S. 445; *United States* v. *Guaranty Trust Co.*, 280 U. S. 478; cf. *Sloan Shipyards* v. *U. S. Fleet Corp.*, 258 U. S. 549; *Mellon* v. *Michigan Trust Co.*, 271 U. S. 236.

[13] Validity of Certain Provisions of the National Housing Act, 38 Ops. Atty. Gen. 258, 262.

[14] *Cook County Nat. Bank* v. *United States*, 107 U. S. 445.

[15] Third Annual Report of the Federal Housing Administration, House Doc. No. 48, 75th Cong., 1st Sess., p. 7.

Possible priorities will now exist for every outstanding dollar.

The facts of this case show how government aid to a debtor may be a snare for his other creditors if the priority statute operates in this class of claims. About a dozen claimants became creditors in the aggregate amount of some nine hundred dollars for labor. Such labor claims were entitled to the preference under Missouri law common to labor claims. But for the priority of the Government's claim, they would receive all of the realization from the assets—about two-thirds of their claims. But a month before the appointment of the receiver, the Federal Housing Administration took over from a bank a note of about $6000. From a deferred position in the hands of the bank, this debt is said to have stepped into a preferred position by transfer to the government agency. As such, it absorbs all of the assets, and the laborers who trusted their employer's credit get nothing. Such a preference of creditors, brought about by the debtor, would be an act of bankruptcy.

In 1920, when the railroads needed funds but lacked credit for private borrowing, government loans were authorized by Congress, based upon such prospective earning power and security as would furnish reasonable assurance of repayment.[16] In *United States* v. *Guaranty Trust Co.*, 280 U. S. 478, we held that the rehabilitating functions and the security provisions of the Transportation Act of 1920 were so inconsistent with § 3466 as to preclude its application in the receivership of a debtor railroad. Even more inconsistent considerations exist in this case. Congress was confronted with widespread need of repairs on property owned by persons without the cash or credit to secure them.[17] Moreover, not only homeowners

[16] Transportation Act of 1920, § 210, 41 Stat. 468.

[17] 78 Cong. Rec. 11199, 11388, 11981, 73d Cong., 2d Sess.; Hearings on Sen. 3603, *supra*, at pp. 30, 172, 174, 179.

but, like the railroads, hard pressed business establishments, such as the distillery in this case, were to be assisted in securing modernization loans.[18] Instead of lending these people federal funds, Congress lent them federal credit on which to borrow private funds, with the evident purpose of keeping the program as much as possible a matter of private enterprise handled in the course of private affairs. Assurance of repayment was rested not on a combination of security and earning power but deliberately upon earning power alone.[19] Whereas, with the railroads, interest corresponding to the risk was charged, no premium was charged for the insurance of loans under Title I,—with the expectation that the Government would pay the loss as its contribution to recovery.[20] The declared purpose of the United States to absorb the losses of the lenders is clearly inconsistent with the priority over other creditors given by § 3466. It seems beyond doubt, to me, that Congress did not expect a priority under Title I which the *Guaranty Trust* case certainly denied it under Title II relating to insured mortgages.[21]

Even in the mechanics of its operation, Title I repudiated the benefits of § 3466. Collection was left to the financial institution after default, so long as there was

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[18] The loan limit of Title I was soon increased to meet business needs. Amendment of May 28, 1935, 49 Stat. 299.

[19] 78 Cong. Rec. 11194, 11195, 11981, 11982, 73d Cong., 2d Sess.; Hearings on Sen. 3603, *supra*, at pp. 37, 39, 293.

[20] Senator Bulkley stated: "The lender receives 20-percent insurance automatically as an inducement to make loans of this particular character. Frankly it is contemplated that the Government will lose some money." 78 Cong. Rec. 11982, 73d Cong., 2d Sess. See also 78 Cong. Rec. 11195; Hearings on Sen. 3603, *supra*, at pp. 34–35.

[21] Moreover, since July 1, 1939, there is a .75% insurance charge under Title I, so that in the future, whatever the decision here, even Title I would seem to be governed by the *Guaranty Trust* case. 24 C. F. R. § 501.18 (Supp. 1939.)

hope of partial liquidation.[22] The lender, of course, had no priority.

The judgment should be affirmed on the ground that no priority exists by virtue of § 3466.

MR. JUSTICE ROBERTS, MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON concur in this dissent.

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[22] Modernization Credit Plan, Bulletin No. 1, *supra*, at p. 8 states: "It is to the interest of the financial institution to carry the collection process on a defaulted note as far as there is reasonable prospect of ultimate payment inasmuch as complete reimbursement for any expenses incurred is provided as specified hereinafter. This policy will tend to conserve the insurance reserve of 20% for possible later losses and also will maintain the understanding of the local community that these notes require the same prompt handling by makers as any other credit obligation. . . . it is the policy of the Federal Housing Administration to permit financial institutions every possible latitude in making collections on delinquent items. It is only after it clearly appears that further collection efforts will be fruitless that the Federal Housing Administration will insist that claim be made. Financial institutions are, therefore, given a full year after default on the note to effect collection. . . . If 10% of the amount due on the note is collected within the first year after default on the note and so long thereafter as 5% at least is collected in each six-month period, the Federal Housing Administration will not require that claim be made, but will permit the financial institution to proceed with its collection efforts. Claims may include: (1) Net unpaid principal; (2) uncollected earned interest (after maturity interest is not to be claimed at a rate exceeding 6% per annum); (3) uncollected 'late charges'; (4) uncollected court costs, including fees paid for issuing, serving and filing summons; (5) attorney's fees not exceeding 15% of the amount collected on the defaulted note; (6) handling fee of $5 for each note, if judgment is secured, plus 5% of amount collected subsequent to return of unsatisfied property execution."

Syllabus.

DISTRICT OF COLUMBIA *v.* MURPHY.*

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

No. 58. Argued November 17, 1941.—Decided December 15, 1941.

1. One does not acquire a domicile in the District of Columbia, within the meaning of the District of Columbia Income Tax Act, merely by coming to the District to live for an indefinite period while in the Government service. P. 453.
2. The Act does not intend that one living in the District of Columbia indefinitely, while in the Government service, shall be held domiciled there simply because he does not maintain a domestic establishment at the place from which he came. P. 454.
3. Persons are domiciled in the District of Columbia, within the meaning of the Act, who live there and have no fixed and definite intent to return to their former domiciles and make their homes there. P. 454.
4. The place where a man lives is, *prima facie,* his domicile. P. 455.
5. The taxing authority is warranted in treating as *prima facie* taxable any person quartered in the District of Columbia on tax day whose status it deems doubtful. P. 455.
6. In applying this Act, the taxing authority need not find the exact time when the attitude and relationship of person to place which constitute domicile were formed. It is enough that they were formed before the tax day. P. 455.
7. If one has at any time become domiciled in the District of Columbia, it is his burden to establish any change of status upon which he relies to escape the tax. P. 456.
8. In order to retain his former domicile, one who comes to the District to perform Government service must always have a fixed and definite intent to return and to take up his home there when separated from the service. A mere sentimental attachment will not hold the old domicile. P. 456.
9. Whether or not one votes where he claims domicile is highly relevant but not controlling. P. 456.

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* Together with No. 59, *District of Columbia* v. *DeHart,* also on writ of certiorari, 313 U. S. 556, to the Court of Appeals for the District of Columbia.

10. Of great significance to the question of domicile in the District of Columbia is the nature of the position which brings one to or keeps him in the service of the Government. P. 457.
11. Manner of living in the District and many other considerations touching relationships, social connections and activities of the person concerned, are suggested in the opinion as among the considerations which are relevant to a determination of the question of domicile. P. 457.

73 App. D. C. 345, 347, 119 F. 2d 449, 451, reversed.

CERTIORARI, 313 U. S. 556, to review judgments sustaining, on petitions for review, decisions of the Board of Tax Appeals for the District of Columbia holding that collections of income taxes from two individuals by the District of Columbia were erroneous.

Mr. Glenn Simmon, with whom *Messrs. Richmond B. Keech* and *Vernon E. West* were on the brief, for petitioner.

Respondents came to reside in the District in 1914 and 1935. Since that time they have had no other homes or dwelling places. When a person has only one home, that is his domicile. Restatement, Conflict of Laws, c. 2, § 12, p. 24; Beale, Conflict of Laws, § 19.2; 9 R. C. L. 538; *Texas* v. *Florida,* 306 U. S. 398; Jacobs, Law of Domicile, § 70, p. 113, § 72, p. 120; Kennan on Residence and Domicile, § 16, p. 37; Goodrich on Conflict of Laws, § 25.

Where one lives is *prima facie* his domicile, and the burden of disproving this is on him who denies it. *Anderson* v. *Watt,* 138 U. S. 694; *Ennis* v. *Smith,* 14 How. 400, 423; *Newman* v. *U. S. ex rel. Frizzell,* 43 App. D. C. 53; *Bradstreet* v. *Bradstreet,* 18 D. C. Rep. (7 Mackey) 229; *Gallagher* v. *Gallagher,* 214 S. W. 516; *Dodd* v. *Dodd,* 15 S. W. 2d 686; *Harrison* v. *Harrison,* 117 Md. 607; 9 R. C. L. 541, 557; Restatement, Conflict of Laws, c. 2, § 12, p. 24; Story, Conflict of Laws, 8th ed., § 46; Kennan, § 172, p. 327; Dicey, Law of Domicile, p. 9.

The Board of Tax Appeals found as a fact that respondents intended to remain and make their homes in the District for an indefinite period. The findings were accepted by the Court of Appeals and domicile in the District follows as a matter of law. Story, § 46; *Gilbert* v. *David,* 235 U. S. 561; *Mitchell* v. *United States,* 21 Wall. 350; *Rosenberg* v. *Commissioner,* 59 App. D. C. 178; *Newman* v. *U. S. ex rel. Frizzell, supra; Ringgold* v. *Barley,* 5 Md. 186; *Klutts* v. *Jones,* 21 N. M. 720; *Felker* v. *Henderson,* 102 A. 623; Beale, § 19.1; Kennan, § 127, p. 257.

The intention to return to the domicile of nativity, or one acquired, must be fixed, absolute, and unconditional. A mere floating intention to return at some future period or upon the happening of some uncertain event is not sufficient. The intent to return must not depend upon inclination or be controlled by future events. *Sparks* v. *Sparks,* 114 Tenn. 666; Story, Conflict of Laws, 8th Ed., § 46; cf., Beale, Conflict of Laws, § 18.1.

The intention required for the acquisition of a domicile of choice is an intention to make a home in fact, and not an intention to acquire a domicile. Restatement, Conflict of Laws, c. 2, § 19, p. 38. See, also, *Mitchell* v. *United States,* 21 Wall. 350; *Texas* v. *Florida,* 306 U. S. 398; *Feehan* v. *Trefry,* 237 Mass. 169; Beale, Conflict of Laws, § 19.2; *Dickinson* v. *Inhabitants of Brookline,* 181 Mass. 195. See Jacobs, § 148, pp. 213–215.

The exercise of the elective franchise may be outweighed by other circumstances. 19 C. J. 436, 437; *Gaddie* v. *Mann,* 147 F. 955; *Bradstreet* v. *Bradstreet, supra*; *In re Sedgwick,* 223 F. 655; *In re Trowbridge's Estate,* 266 N. Y. 283; *Feehan* v. *Trefry, supra; Dickinson* v. *Inhabitants of Brookline, supra; Wagner* v. *Scurlock,* 166 Md. 284; Kennan, § 78, pp. 158–161; Wharton, Conflict of Laws, § 63.

Exercise of the right of suffrage is of much greater weight in the case of removal from State to State than in the case of removal from a State to the District.

The domicile of an employee of the Federal Government for purposes of taxation should be determined by the rules applicable to persons in private employment. Cf., *Sweeney* v. *District of Columbia,* 72 App. D. C. 30, 310 U. S. 631.

Individuals are under no compulsion to accept federal employment or reside in the District of Columbia. Government employees residing in the District are not taxable in their respective States of former residence upon income earned in the District. Domicile in the District is not inconsistent with political status in one of the States. Most Government employees remain in the District after retirement.

The legislative history of the Act reveals Congressional intent consistent with these views.

Mr. Harry Raymond Turkel for respondents.

The Act was not intended to apply to federal employees in the District unless they had abandoned their domiciles in the States.

The domicile of a federal employee in the District is not to be determined by the rules applicable to persons in private employment. *Sweeney* v. *District of Columbia,* 72 App. D. C. 30, cert. denied, 310 U. S. 631.

An individual may have but one domicile. *Williamson* v. *Osenton,* 232 U. S. 619, 625.

The rule that the federal employee is entitled to retain his State domicile (*Sweeney* case, *supra*) is supported by the clear weight of judicial authority, by many instances of Congressional recognition in principle, and by the long-established custom and practice of other officials and departments. See citations and footnotes in *Sweeney* v. *District of Columbia,* 72 App. D. C. 30, 37. The rule is of ancient origin. *Bruce* v. *Bruce,* 2 Bosanquet & Puller 229, and *Atherton* v. *Thornton,* 8 N. H. 178.

Practically all States have provisions, in their constitutions or laws, requiring domicile as a condition to exercise of the franchise, and providing that absence in the Government service does not prevent loss of "residence."

If this Court confirms the common-law doctrine that domicile is indivisible, and at the same time rules that federal employees are domiciled in the District, it will deprive federal employees of their franchise in the States.

The decision of the court below was equitable because it avoided double taxation. A reversal of it would deprive at least 24 States of the right to tax federal employees in the District domiciled in those States, and would subject federal employees from the States to double taxation.

MR. JUSTICE JACKSON delivered the opinion of the Court.

These cases, which have been argued together, differ somewhat in facts, but each involves a controversy as to whether respondent was domiciled within the District of Columbia on December 31, 1939, within the meaning of § 2 (a) of the District of Columbia Income Tax Act,[1] which lays a tax on "the taxable income of every individual domiciled in the District of Columbia on the last day of the taxable year." The following facts appear from proceedings before the Board of Tax Appeals for the District of Columbia:

The respondent in No. 58, a single man, first came to the District of Columbia in 1935 to work as an economist in the Treasury Department, and was blanketed into Civil Service in that position in July, 1938. He came here from Detroit, Michigan, and has ever since continued to

[1] 53 Stat. 1087; 20 D. C. Code (Supp. V, 1939) § 980 (a).

be a registered voter and has voted in the elections and primaries in Wayne County, Michigan. He was born in New London, Connecticut, in 1905, and when five years old moved with his parents to Los Angeles, California, where he resided until 1926, when he removed to Berkeley, California. His parents live in California. In 1929 he completed his studies at Brown University and immediately thereafter accepted employment in a trust company in Detroit, Michigan, of which one of his former professors at Brown was vice president. While in Detroit, respondent lived first in a rooming house and later in an apartment. He owns no property there. In the District of Columbia he lives in an apartment, which he has furnished himself. His present employment pays him $6,500 a year, while that which he left in Detroit paid but $6,000. He testified before the Board of Tax Appeals that he does not think he would improve his condition by returning to Detroit, but that "It is the place to which I will return if I ever become disemployed by the Government, which I hope will not happen . . ." Although he has no present connection with the trust company, he believes that he could go back with it if he should return to Detroit. If a better position than he now has should be offered in a city other than Detroit, he "very likely would" accept it, despite a "preference for Detroit" based on a belief that he "would fit in more easily" there.

Respondent claimed that Detroit was his "legal residence" and that he was not domiciled in the District of Columbia. The Board of Tax Appeals for the District of Columbia found "as a fact" that when he came to Washington in 1935 he "had an intention to remain and make his home in the District of Columbia for an indefinite period of time; and that such intention has ever since, and still does remain with him; and that if he has any intention to return and make his home in Detroit, it is a floating intention." The Board held, however, "as

matter of law," that on December 31, 1939, the last day of the taxable year, petitioner was not domiciled in the District of Columbia, believing that it was compelled to do so by the decision of the United States Court of Appeals for the District of Columbia in *Sweeney* v. *District of Columbia,* 72 App. D. C. 30, 113 F. 2d 25, certiorari denied, 310 U. S. 631.

The respondent in No. 59 lived in the District of Columbia for twenty-six years after coming here from Pennsylvania in 1914 to accept a clerical position of indefinite tenure under Civil Service in the Patent Office. He was then on a year's leave of absence from a railroad by which he was employed, but continued in the Civil Service to the time of hearing, becoming Chief Clerk of the Personnel and Organization Division of the National Guard Bureau, War Department, with offices in Washington. Single when he came, in 1917 he married a native of Washington, who died in 1935 without children. Shortly after their marriage the couple purchased as a home, premises at 1426 Massachusetts Avenue, S. E., in the District of Columbia, in which respondent still lives. In about 1925, he purchased a lot at "Selby on the Bay" in nearby Maryland, and before his wife's death he bought a building lot in the District of Columbia, acting on his wife's pleas for a summer place and a better residence. He agreed with his wife that, on his retirement, six months would be spent at Selby. He testified that he never desired to purchase the lot in the District of Columbia, but did so at the insistence of his wife. He put a "For Sale" sign on it when she died, and both lots, which he still owns, are up for sale. He has deposits in three Washington financial institutions and owns first trust notes on property located in Maryland and Virginia.

In 1915, respondent became a member of a Lutheran church in Washington, and has ever since been an active member, at one time serving as president of its Christian

Endeavor Society. He is a contributor to Washington charities, a member of the Motor Club of Washington, and of the Washington units of "Tall Cedars of Lebanon" and the "Mystic Shrine," both identified with freemasonry. He has filed his federal income-tax returns with the Collector of Internal Revenue at Baltimore, and always paid to the District of Columbia an intangible property tax while that tax was in effect.

Respondent had resided in Pennsylvania from birth until he left for Washington. He claimed as his "legal residence" the residence of his parents in Harrisburg, where they still keep intact his room in which are kept some of his clothes and childhood toys. Though paying nothing as rent or for lodging, he has from time to time made presents of money to his parents. He has visited his parents' home in Harrisburg over week ends at least eight times a year, and has been there annually between Christmas and the New Year. A registered voter in Pennsylvania, he has voted in all its general elections since he became of age. He paid the Pennsylvania poll tax until it was superseded by an occupational tax, which he has also paid. Payment of such taxes was a prerequisite to voting.

In 1912, respondent became a life member of the Robert Burns Lodge No. 464, Free and Accepted Masons, and of the Harrisburg Consistory, Scottish Rite, both Masonic bodies. While he resided in Harrisburg he was a member of the Bible Class of the Pine Street Presbyterian Church, which he still attends on visits there, and to which he made substantial contributions in 1939. He owns jointly with his father a note secured by a mortgage on Pennsylvania real estate. Respondent testified that he expected to retire from Civil Service in four years and intended then to sell his house and "leave Washington."

The Board found "as a fact" that, at the end of one year after he came to the District in 1914, respondent "had an

intention to remain and make his home in the District of Columbia for an indefinite period of time and that intention remained with him, at least until the death of his wife." As in No. 58, it considered itself bound by the *Sweeney* case, *supra,* and accordingly held "as a matter of law" that the petitioner was not domiciled in the District on December 31, 1939, and never had been.

The decisions in both cases were affirmed on review by the United States Court of Appeals for the District of Columbia. 73 App. D. C. 345, 347, 119 F. 2d 449, 451. The cases were brought here on writs of certiorari because of the importance of the questions involved. 313 U. S. 556.

Although the District of Columbia Income Tax Act made "domicile" the fulcrum of the income tax, the first ever imposed in the District, it set forth no definition of that word. To ascertain its meaning we therefore consider the Congressional history of the Act, the situation with reference to which it was enacted, and the existing judicial precedents, with which Congress may be taken to have been familiar in at least a general way. *United States* v. *Dickerson,* 310 U. S. 554, 562.

As introduced into and passed by the House of Representatives, the bill which, with amendments, became the Act, laid a tax upon income of residents from whatever source derived, and upon income of nonresidents from sources within the District, with a provision for credit for the payment of income taxes elsewhere. H. R. 6577, 76th Cong., 1st Sess., §§ 2 (a), 4 (a), 9 (a), (b). The bill was amended on the floor of the House to except "Senators, Representatives, Delegates, Resident Commissioners, officers and employees of the Senate and House of Representatives of the United States." 84 Cong. Rec. 7036. It was unacceptable to the Senate in this form, and it was agreed in conference that the tax should be levied upon "every individual domiciled in the District of Columbia

on the last day of the taxable year," with no provision for credit for income taxes paid elsewhere. H. R. Rep. Nos. 1093, 1206, 76th Cong., 1st Sess., p. 3; Sen. Doc. No. 92, 76th Cong., 1st Sess., p. 3. This was agreed to by the Senate and by the House of Representatives, and became part of the Act under consideration.

The conference agreement was presented to the Senate by Senator Overton, chairman of the Senate conferees, with the following explanation: "Mr. President, I now call attention to the fact that the individual income tax is imposed only on those domiciled in the District of Columbia. It, therefore, necessarily excludes from its imposition all Senators and Members of the House of Representatives, the President of the United States, all Cabinet officers, and Federal employees who have been brought into the District from the various States of the Union to serve their country in the National Capital, provided such employees have not of their volition surrendered their domiciles in the States and have voluntarily acquired domiciles within the District of Columbia." 84 Cong. Rec. 8824. Senator Overton also stated: "I took the position before the District of Columbia Committee and in conference that I would not support any legislation which would exempt Senators and Members of the House of Representatives and their official force from an income tax in the District of Columbia but would impose it on all others. I then took the position in conference that if we imposed an income tax only on those domiciled within the District, then we would be imposing it only on those who of their own volition had abandoned their domiciles in the States of their origin and had elected to make their permanent home or domicile here in the District of Columbia. Such persons, it may be justly contended, have no cause to complain against an income tax that is imposed upon them only because they have

chosen to establish within the District of Columbia their permanent [2] places of abode and to abandon their domiciles within the States." 84 Cong. Rec. 8825.

In the House, Representative Nichols, chairman of the House conferees, and also chairman of the House District Committee in charge of fiscal affairs, submitted the conference report and stated: "Since the question of the effect of the word 'domicile' in this act has been raised, I think the House would probably like to have the legal definition read: 'Domicile is the place where one has his true, fixed, permanent home and principal establishment and to which, whenever he is absent, he has the intention of returning, and where he exercises his political rights.[3] . . . There must exist in combination the fact of residence and animus manendi—' which means residence and his intention to return [*sic*]; so that under this definition he could certainly live in the District of Columbia and have his legal domicile in any other State in the United States." 84 Cong. Rec. 8974.

Representative Bates, another of the House conferees, stated in response to a question regarding the possibility of triple taxation, "We raised that particular point [in conference] because we are much concerned about how those who come from our States would be affected by the income-tax provisions of the new law, and it was distinctly

[2] We do not understand "permanent" to have been used in a literal sense. Of course it cannot be known without the gift of prophecy whether a given abode is "permanent" in the strictest sense. But beyond this, it is frequently used in the authorities on domicile to describe that which is not merely "temporary," or to describe a dwelling for the time being which there is no presently existing intent to give up. And further, compare a statement by Representative Dirksen on the floor of the House, 84 Cong. Rec. 8973.

[3] Exercise of political rights elsewhere cannot be considered as meant to be conclusive on the issue of taxability in the District. See statement by Representative Dirksen on the floor of the House. *Ibid.*

understood that in this bill there should be no triple taxation . . ." 84 Cong. Rec. 8973.

The unusual character of the National Capital, making the income tax a "very explosive and controversial item," [4] was vividly before the Congress, and must also be considered in construing the statute imposing the tax.

The District of Columbia is an exceptional community. It is not a local municipal authority, but was established under the Constitution as the seat of the National Government. Those in Government service here are not engaged in local enterprise, although their service may be localized. Their work is that of the Nation, and their pay comes not from local sources but from the whole country. Because of its character as a Federal City, there is no local political constituency with whose activities those living in it may identify themselves as a symbol of their acceptance of a local domicile.

Not all who flock here are birds of a feather. Some enter the Civil Service, finding tenure and pay there more secure than in private enterprise. Political ties are of no consequence in obtaining or maintaining their positions. At the other extreme are those who hold appointive office at the pleasure of the appointing officer. These latter, as well as appointive officers with definite but unprotected tenure, and all elective officers, usually owe their presence here to the intimate and influential part they have played in community life in one of the States.

Relatively few persons here in any branch of the Government service can truthfully and accurately lay claim to an intention to sever themselves from the service on any exact date. Persons in all branches usually desire, quite naturally and properly, to continue family life and to have the comforts of a domestic establishment for whatever may be the term of their stay here. This is true of

[4] 84 Cong. Rec. 8972.

many Senators and Congressmen, cited by Senator Overton as typical of those whom the limitation of the statute to persons "domiciled" here "necessarily excludes."

Turning to the judicial precedents for further guidance in construing "domicile" as used in the statute, we find it generally recognized that one who comes to Washington to enter the Government service and to live here for its duration does not thereby acquire a new domicile. More than a century ago, Justice Parker of New Hampshire observed that "It has generally been considered that persons appointed to public office under the authority of the United States, and taking up their residence in Washington for the purpose of executing the duties of such office, do not thereby, while engaged in the service of the government, lose their domicile in the place where they before resided, unless they intend on removing there to make Washington their permanent [5] residence." See *Atherton* v. *Thornton,* 8 N. H. 178, 180. By and large, subsequent cases have taken a like view.[6] It should also be observed

[5] See note 2, *supra.*

[6] *Walden* v. *Canfield,* 2 Rob. (La.) 466; *Lesh* v. *Lesh,* 13 Pa. Dist. Ct. 537; see *Woodworth* v. *St. Paul, M. & M. Ry. Co.,* 18 F. 282, 284; *Commonwealth* v. *Jones,* 12 Pa. St. 365, 371; cf. *Newman* v. *United States,* 43 App. D. C. 53, 70; reversed on another ground, 238 U. S. 537; *Deming* v. *United States,* 59 App. D. C. 188, 37 F. 2d 818; *Campbell* v. *Ramsey,* 150 Kan. 368, 388, 92 P. 2d 819; *Hannon* v. *Grizzard,* 89 N. C. 129. But cf. *Bradstreet* v. *Bradstreet,* 18 D. C. 229, 7 Mackey 229; *Sparks* v. *Sparks,* 114 Tenn. 666, 88 S. W. 173.

Professor Beale has summarized the cases as follows: "Presence for the purpose of performing the duties of a civil office will not of itself effect a change of domicil; there is no inference of *animus manendi* from the fact of the new residence, since it is explained by the fact of office holding. It makes no difference whether the office is elective or appointive; nor is it material whether the appointment is in its nature merely temporary or has a degree of permanence, though the permanence of the appointment is an element to be considered in determining the domicil." 1 Beale, Conflict of Laws § 22.6. See also, Restatement, Conflict of Laws, pp. 42–43.

that a policy against loss of domicile by sojourn in Washington is expressed in the constitutions and statutes of many States.[7] Of course, no individual case, constitution, or statute is controlling, but the general trend of these authorities is a significant recognition that the distinctive character of Washington habitation for federal service is meaningful to those who are served as well as to those in the service.

From these various data on Congressional intent, it is apparent that the present cases are not governed by the tests usually employed in cases where the element of Federal service in the Federal City is not present.[8] We hold that a man does not acquire a domicile in the District simply by coming here to live for an indefinite period of time while in the Government service. A contrary decision would disregard the statements made on the floor of Congress as to the meaning of the statute, fail to give proper weight to the trend of judicial decisions, with which Congress should be taken to have been cognizant, and result in a wholesale finding of domicile on the part of Government servants quite obviously at variance with Congressional policy. Further, Congress did not intend that one living here indefinitely while in the Government service be held domiciled here simply because he does not maintain a domestic establishment at the place he hails from. Such a rule would result in taxing those unable to maintain two establishments, and exempting those able to meet such a burden—thus reversing the usual philosophy of income tax as one based on ability to pay.

On the other hand, we hold that persons are domiciled here who live here and have no fixed and definite intent to return and make their homes where they were formerly

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[7] 1 Beale, Conflict of Laws, p. 172, note 2.

[8] Cf. *Williamson* v. *Osenton,* 232 U. S. 619, 624; *Gilbert* v. *David,* 235 U. S. 561.

domiciled.[9] A decision that the statute lays a tax only on those with an affirmative intent to remain here the rest of their days would be at odds with the prevailing concept of domicile, and would give the statute scope far narrower than Congress must have intended.

Cases falling clearly within such broad rules aside, the question of domicile is a difficult one of fact to be settled only by a realistic and conscientious review of the many relevant (and frequently conflicting) *indicia* of where a man's home [10] is and according to the established modes of proof.

The place where a man lives is properly taken to be his domicile until facts adduced establish the contrary. *Ennis* v. *Smith,* 14 How. 400, 423; *Anderson* v. *Watt,* 138 U. S. 694, 706. The taxing authority is warranted in treating as *prima facie* taxable any person quartered in the District on tax day whose status it deems doubtful. It is not an unreasonable burden upon the individual, who knows best whence he came, what he left behind, and his own attitudes, to require him to establish domicile elsewhere if he is to escape the tax.

To hold taxable one who contends that he is not domiciled here, the Board need not find the exact time when the "attitude and relationship of person to place" which constitute domicile, *Texas* v. *Florida,* 306 U. S. 398, 411, were

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[9] This is not inconsistent with our holding that domicile here does not follow from mere indefiniteness of the period of one's stay. While the intention to return must be fixed, the date need not be; while the intention to return must be unconditional, the time may be, and in most cases of necessity is, contingent. The intention must not waver before the uncertainties of time, but one may not be visited with unwelcome domicile for lacking the gift of prophecy.

[10] Of course, this term does not have the magic qualities of a divining rod in locating domicile. In fact, the search for the domicile of any person capable of acquiring a domicile of choice is but a search for his "home." See Beale, Social Justice and Business Costs, 49 Harv. L. Rev. 593, 596; 1 Beale, Conflict of Laws, § 19.1.

formed, so long as it finds they were formed before the tax day. What was at first a firm intent to return may have withered gradually in consequence of dissolving associations elsewhere and growing interests in the District. It is common experience that this process usually is unmarked by any dramatic or even sharply defined episode. The taxing authority need not find just when the intent was finally dissipated; it is enough that it finds that this has happened before the tax day.

If one has at any time become domiciled here, it is his burden to establish any change of status upon which he relies to escape the tax. *Anderson* v. *Watt, supra,* at p. 706.

In order to retain his former domicile, one who comes to the District to enter Government service must always have a fixed and definite intent to return and take up his home there when separated from the service. A mere sentimental attachment will not hold the old domicile. And residence in the District with a nearly equal readiness to go back where one came from, or to any other community offering advantages upon the termination of service, is not enough.

One's testimony with regard to his intention is, of course, to be given full and fair consideration, but is subject to the infirmity of any self-serving declaration, and may frequently lack persuasiveness or even be contradicted or negatived by other declarations and inconsistent acts.

Whether or not one votes where he claims domicile is highly relevant but by no means controlling.[11] Each State prescribes for itself the qualifications of its voters, and each has its own machinery for determining compliance with such qualifications. A vote cast without challenge and adjudication may indicate only laxity of the

[11] See statements of Representative Dirksen, 84 Cong. Rec. 8973.

state officials, and even an adjudication of the right to vote cannot preclude the levy of a tax by an arm of the Federal Government. On the other hand, failure to vote elsewhere is, of course, not conclusive that domicile is here.

Also of great significance is the nature of the position which brings one to or keeps him in the service of the Government: whether continuous or emergency, special or war-time in character; whether requiring fixed residence in the District or only intermittent stays; whether entailing monetary sacrifices or betterment; and whether political or non-political. Those dependent upon the action of a local constituency on the first Tuesday after the first Monday in November are, of course, loath to leave their local identifications behind when taking up Government duties in Washington.

Of course, the manner of living here, taken in connection with one's station in life, is relevant. Did he hire a furnished room or establish himself by the purchase of a house? Or did he rent a house or apartment? Has he brought his family and dependents here? Has he brought his goods? What relations has he to churches, clubs, lodges, and investments that identify him with the District?

All facts which go to show the relations retained to one's former place of abode are relevant in determining domicile. What bridges have been kept and what have been burned? Does he retain a place of abode there, or is there a family home with which he retains identity? Does he have investments in local property or enterprise which attach him to the community? What are his affiliations with the professional, religious, and fraternal life of the community, and what other associations does he cling to? How permanent was his domicile in the community from which he came? Had it long been a family seat, or was he there a bird of passage? Would a return to

the old community pick up threads of close association? Or has he so severed his relations that his old community is as strange as another? Did he pay taxes in the old community because of his retention of domicile which he could have avoided by giving it up? Were they nominal or substantial? In view of the legislative history showing that Congress was concerned lest there be "triple taxation"—Federal, State and District—the Board should consider whether taxes similar in character to those laid by this Act have been paid elsewhere. See statement of Representative Bates, quoted *supra,* p. 451.

Our mention of these considerations as being relevant must not be taken as an indication of the relative weights to be attached to them, as an implied negation of the relevance of others, or as an effort to suggest a formula to handle all cases that may arise, or the possibility of devising one.

In view of what we have said, it is clear that the present cases did not call for rulings of non-taxability "as a matter of law." On the other hand, we do not consider whether taxability follows as a matter of law, as petitioner contends it does, for the factual inquiries and findings of the Board, made under a view of the law not our own, are quite likely not in all respects those which the Board would have made had it proceeded with knowledge of our opinion, and are in some respects ambiguous for the purpose of decision in accordance with it. Accordingly, we reverse the decisions by the United States Court of Appeals for the District of Columbia and remand these cases to that Court with directions to remand to the Board for further proceedings in conformity with this opinion.

Reversed.

The CHIEF JUSTICE, MR. JUSTICE ROBERTS, and MR. JUSTICE REED took no part in the consideration or decision of these cases.

SCAIFE COMPANY *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 57. Argued December 11, 1941.—Decided December 22, 1941.

1. By the terms of the capital stock tax provisions of the Revenue Act of 1935, an erroneous valuation of its capital stock made by a corporation in its "first return" can not be corrected by an amended return filed more than 30 days after the statutory due date and within the 60 days period for which an extension might have been had under the statute and the Treasury Regulations, but where no such extension was applied for or granted. P. 461.
2. In view of the express command of the statute, relief against such a mistake can not be granted by a court of equity. P. 462.

117 F. 2d 572, affirmed.

CERTIORARI, 313 U. S. 557, to review a judgment sustaining a decision of the Board of Tax Appeals, 41 B. T. A. 278, declining to redetermine an excess profits tax.

Mr. Samuel Kaufman, with whom *Messrs. S. Leo Ruslander* and *James M. Magee* were on the brief, for petitioner.

Mr. Richard H. Demuth, with whom *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *William L. Cary* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

On July 29, 1936, petitioner filed its capital stock tax [1] return for the period ended June 30, 1936. This return

[1] Sec. 105 (a) of the Revenue Act of 1935, 49 Stat. 1014, 1017, as amended by § 401 of the Revenue Act of 1936, 49 Stat. 1648, 1733, provides:

"For each year ending June 30, beginning with the year ending June 30, 1936, there is hereby imposed upon every domestic corpora-

was prepared by petitioner's treasurer and signed by petitioner's president. The treasurer had been instructed by petitioner's vice-president to place upon the capital stock a value of $1,000,000. By mistake the value was declared at $600,000. This error was not noted by petitioner's president when he signed the return. When the error was later discovered, a new return was prepared declaring the value of the stock to be $1,000,000. This return was lodged with the Collector on September 3, 1936, and a remittance of $400.00 to cover the additional capital stock tax computed on the higher valuation was tendered. The Collector refused to accept the amended return [2] and the remittance of the additional $400.00. Petitioner then filed a petition with the Board of Tax Appeals for a redetermination of its excess profits tax [3] for 1936, claiming

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tion with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock."

[2] Petitioner sought to enjoin the Collector from refusing to accept the amended return. The bill was dismissed by the District Court. *Wm. B. Scaife & Sons Co.* v. *Driscoll,* 18 F. Supp. 748. The Circuit Court of Appeals affirmed. 94 F. 2d 664. This Court denied certiorari. 305 U. S. 603.

[3] Sec. 106 (a) of the Revenue Act of 1935, 49 Stat. 1014, 1019, provides:

"There is hereby imposed upon the net income of every corporation for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 105, an excess-profits tax equal to the sum of the following:

"6 per centum of such portion of its net income for such income-tax taxable year as is in excess of 10 per centum and not in excess of 15 per centum of the adjusted declared value;

"12 per centum of such portion of its net income for such income-tax taxable year as is in excess of 15 per centum of the adjusted declared value."

Sec. 106 (b) provides that the "adjusted declared value shall be determined as provided in section 105 as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year)."

that that tax should be computed on the basis of a declared value for its capital stock of $1,000,000. The Board sustained the action of the Commissioner. 41 B. T. A. 278. The Circuit Court of Appeals affirmed. 117 F. 2d 572. We granted the petition for certiorari because of a conflict between that holding and the decision of the Circuit Court of Appeals for the Second Circuit in *Lerner Stores Corp.* v. *Commissioner,* 118 F. 2d 455.

Sec. 105 (f) of the Revenue Act of 1935 (49 Stat. 1014, 1018) provides that the adjusted declared value of the taxpayer's capital stock shall be the value as declared in the "first return." The value so declared "cannot be amended." § 105 (f). The return must be made within one month after the close of the year with respect to which the tax is imposed. § 105 (d). While the Commissioner by rules and regulations "may extend the time for making" the return, no extension shall be for more than sixty days. § 105 (d). Under Art. 37 (b) of Treasury Regulations 64 (1936 ed.) an extension of time for filing the return and paying the tax shall be granted only upon written application under oath filed on or before the statutory due date and on a showing of reasonable cause for an extension. Petitioner sought no such extension. It did, however, file the amended return within the sixty day period.

We agree with the court below that the amended return was properly disallowed. A "first return" means a return "for the first year in which the taxpayer exercises the privilege of fixing its capital stock value for tax purposes, and includes a timely amended return for that year." *Haggar Co.* v. *Helvering,* 308 U. S. 389, 395. The return filed on September 3, 1936 was not timely. The statute is not ambiguous. Once the period for filing the "first return" has expired, the value declared "cannot be amended." Unless an extension had previously been obtained, the period for filing ended one month after the close of the taxable year, which in this case was June 30,

1936. Unlike the situation in *Haggar Co.* v. *Helvering, supra,* the due date of the return had not been extended. Nor did the statute make mandatory or automatic an extension for sixty days. It merely gave the Commissioner the power to extend the due date under appropriate rules and regulations. And the latter made no provision for an extension after the expiration of the statutory period. It is immaterial that different rules and regulations might have been promulgated under which an extension might have been obtained in the circumstances of this case. The important consideration is that this amended return was filed after the unextended or statutory due date had expired. In absence of an extension a later due date would have no statutory sanction. See *J. E. Riley Investment Co.* v. *Commissioner,* 311 U. S. 55. Furthermore, the mandate of the statute that the declaration of value contained in the first return cannot be amended must be taken to preclude an amendment after the due date, if that prohibition is to have real vitality.

But petitioner argues that a court of equity has power to relieve against such mistakes. Cf. *Moffett, Hodgkins & Clarke Co.* v. *Rochester,* 178 U. S. 373. Its contention is that the amended return reflects its original intent rather than a shift in position. But we cannot treat this case like a case for reformation of a contract. We are dealing here with an Act of Congress which not only prescribes the formula for determining the time within which a return may be filed but which also explicitly states that a declaration of value contained in the original return may not be amended. Hence, no extension of the due date may be had except pursuant to the procedure which has clear statutory sanction. If we were to grant petitioner the extension which it asks, we would be performing a legislative or administrative,[4] not a judicial, function.

[4] There are to be distinguished those cases adverted to in *J. E. Riley Investment Co.* v. *Commissioner, supra,* p. 58, where the Treasury has

The result in individual cases may be harsh. But that may be true in case of any statute of limitations. As we indicated in *J. E. Riley Investment Co.* v. *Commissioner, supra,* such considerations, though a basis for an appeal to Congress for relief in individual cases,[5] are not appropriate grounds for relief by the courts from the strictness of the statutory demand.

Affirmed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE *v.* LERNER STORES CORP. (MD.)

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

No. 248. Argued December 11, 1941.—Decided December 22, 1941.

1. An amended capital stock tax return, to correct an undervaluation of the taxpayer's capital stock declared by mistake in its "first return," can not be filed after the lapse of 30 days from the statutory due date and after the expiration of the period for which an extension might have been allowed by the Commissioner if application for it had been made. *Scaife Company* v. *Commissioner, ante,* p. 459. P. 466.

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provided for correction of certain errors or miscalculations in the original returns. Such an example is Art. 43–2 of Treasury Regulations 86 providing for the filing of amended returns for the purpose of deducting losses which were sustained during a prior taxable year.

[5] Thus Private Act No. 199, c. 440, 50 Stat. 1014, provides that the original declared value of the Jackson Casket & Manufacturing Co., notwithstanding the declaration in its return for the year ending June 30, 1936, should be a value computed on the basis of $125 per share of its capital stock. From the Committee Reports it appears that, due to a mistake by Western Union Telegraph Co. in transmitting a message from the president of the company to its cashier, the latter filed a return in which the value of the capital stock was declared to be $175 per share, rather than $125 per share as the president had directed. H. Rep. No. 777, 75th Cong., 1st Sess.; S. Rep. No. 730, 75th Cong., 1st Sess.

2. In allowing the taxpayer to fix its own valuation of its capital stock, thereby affecting its tax liability under the closely related capital stock and excess profits tax provisions, the Revenue Act of 1935 does not unconstitutionally delegate legislative power. P. 468.
3. A claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment, which contains no equal protection clause. P. 468.
4. The propriety or wisdom of a tax on profits, computed with reference to a specified criterion of value of capital stock, is not open to challenge in the courts. P. 468.
5. There is no constitutional reason why Congress may not avoid litigious valuation problems by relying on the self-interest of taxpayers to place a fair valuation on their capital stock. P. 468.

118 F. 2d 455, reversed.

CERTIORARI, *post*, p. 598, to review a judgment which reversed a decision of the Board of Tax Appeals sustaining an excess profits tax.

Mr. Richard H. Demuth, with whom *Assistant Solicitor General Fahy*, *Assistant Attorney General Clark*, and *Messrs. J. Louis Monarch* and *William L. Cary* were on the brief, for petitioner.

Mr. Andrew B. Trudgian for respondent.

The taxpayer is not bound by the clerical error resulting in the statement of an erroneous value.

The taxpayer may elect to declare any value it sees fit in a timely amended return; and a return before the end of its first income tax year ending after the declaration year is timely.

The capital stock tax under § 105 was an excise tax. The excess profits tax under § 106 was an income tax. Since, under these sections, there were two distinct types of taxes, taxpayers were given the option of imposing on themselves a direct tax or an indirect tax as they desired. A taxpayer might declare no value for capital stock and thus elect the excess profits tax; or it might declare a large capital stock value and avoid imposition of excess

profits tax; or it might by a medium declaration elect to pay both capital stock and excess profits taxes. Congress may not thus delegate its legislative authority. See Black, American Const. Law, 3d Ed. pp. 373 *et seq.; Field* v. *Clark,* 143 U. S. 649, 692; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *United States* v. *Grimaud,* 220 U. S. 506.

Sections 105 and 106 of the Revenue Act of 1935 are arbitrary and capricious in violation of the Fifth Amendment. The excess profits tax, considered together with its related capital stock tax, places a premium on the good luck or ability of the taxpayer to predict the amount of net income it will earn in the future. The taxpayer with less ability as a guesser, or in some instances, with less business acumen or opportunity, is heavily penalized and must bear a heavier burden than its more fortunate or able rival. *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1, 24–25; *Tyler* v. *United States,* 281 U. S. 497, 504.

The statute likewise produces gross inequality in its effect on those businesses which involve more risks, and wider fluctuation in the amount of income.

Moreover, the tax operates unfairly against many taxpayers because of the ending dates of their fiscal years. Solely because the taxpayer herein has a fiscal year ended January 31st, it must bear a greater tax burden than one on the calendar year basis.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a companion case to *Scaife Co.* v. *Commissioner, ante,* p. 459. The tax in dispute is respondent's excess profits tax for the fiscal year 1937. Respondent filed a timely capital stock tax return for the first year, ended June 30, 1936, in which the declared value of its capital stock was stated to be $25,000. This return was filed September 27, 1936, an extension of time until September 29, 1936 having been obtained. The figure of $25,000 was

erroneous due to a mistake made by an employee of respondent. When the error was discovered, an amended return was tendered in which the declared value of the capital stock was given as $2,500,000. This was on January 27, 1937, more than sixty days after the statutory due date. The amount of the tax, penalty and interest on the higher amount was tendered. The amended return was not accepted and the amount of the remittance was refunded. Petitioner, in determining respondent's net income subject to the excess profits tax for the fiscal year ended January 31, 1937, used the declared value of $25,000 appearing in the original return. The order of the Board of Tax Appeals sustaining the Commissioner was reversed by the Circuit Court of Appeals. 118 F. 2d 455.

On the issue of timeliness of the amended return the decision in the *Scaife* case is determinative. The case for disallowance of the amendment is even stronger here, for the amended return was filed beyond the period for which any extension could have been granted by the Commissioner. The hardship resulting from the misplaced decimal point is plain. But Congress, not the courts, is the source of relief.

Respondent in its brief tenders another issue. It contends here, as it did before the Board and the Circuit Court of Appeals, that §§ 105 and 106 of the Revenue Act of 1935 constitute an unlawful delegation of legislative authority, contrary to Art. 1, § 8 of the Constitution; that they violate the Fifth Amendment; and that the capital stock and excess profits taxes, being "based on guesses and wagers," are beyond the delegated powers of Congress. The Board and the Circuit Court of Appeals ruled adversely to respondent on these constitutional issues. Respondent filed no cross-petition for certiorari. Yet a respondent, without filing a cross-petition, may urge in support of the judgment under review grounds rejected

by the court below. *Langnes* v. *Green,* 282 U. S. 531, 538–539; *Public Service Commission* v. *Havemeyer,* 296 U. S. 506, 509; *McGoldrick* v. *Compagnie Generale Transatlantique,* 309 U. S. 430, 434.

The constitutional issues, however, are without substance. As we noted in *Haggar Co.* v. *Helvering,* 308 U. S. 389, 391–392, 394, the capital stock tax and the excess profits tax are closely interrelated. The declared value of the capital stock is the basis of computation of both taxes. The declared value for the first year is the value declared by the corporation in its first return; the declared value for subsequent years [1] is the original declared value as changed by certain specified capital adjustments. Sec. 105 (f), Revenue Act of 1935, 49 Stat. 1014, 1018. The taxpayer is free to declare any value of the capital stock for the first year which it may choose. While a low declaration of value decreases the amount of the capital stock tax, it increases the risk of a high excess profits tax. On the other hand, a high declaration of value, while decreasing the tax on excess profits, increases the capital stock tax. By allowing the taxpayer "to fix for itself the amount of the taxable base" for purposes of computation of these taxes, Congress "avoided the necessity of prescribing a formula for arriving at the actual value of capital"—a problem "which had been found productive of much litigation under earlier taxing acts." *Haggar Co.* v. *Helvering, supra,* p. 394. See 1 Bonbright, Valuation of Property, pp. 577–594. "At the same time it guarded against loss of revenue to the Government through understatements of capital" by providing a formula which would in such circumstances result in an increase in the excess profits tax. *Haggar Co.* v. *Helvering, supra,* p. 394.

[1] There is no limitation of time on the use of the original declared value under the 1935 Act. It should be noted, however, that § 1202 of the Internal Revenue Code (see § 601 (f) of the Revenue Act of 1938, 52 Stat. 447, 566) provides that the "adjusted declared value

There is present no unlawful delegation of power. Congress has prescribed the method by which the taxes are to be computed. The taxpayer here is given a choice as to value. While the decision which it makes has a pronounced effect upon its tax liability, that is not uncommon in the tax field. Congress has fixed the criteria in light of which the choice is to be made. The election which the taxpayer makes cannot affect anyone but itself.

The contention that these provisions of the Act run afoul of the Fifth Amendment is likewise without merit. A claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment, which contains no equal protection clause. *LaBelle Iron Works* v. *United States*, 256 U. S. 377; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 401. The propriety or wisdom of a tax on profits, computed in reference to a specified criterion of value of capital stock, is not open to challenge in the courts. *LaBelle Iron Works* v. *United States, supra*, p. 393. That being true, there is no constitutional reason why Congress may not, because of administrative convenience alone (*Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 511 and cases cited), avoid litigious valuation problems and rely on the self-interest of taxpayers to place a fair valuation on their capital stock. As was stated in *Rochester Gas & Electric Corp.* v. *McGowan*, 115 F. 2d 953, 955, "To say that Congress could not choose a scheme implemented by such mild sanctions, as an alternative to actually computing an 'excess profits tax' with all the uncertainty and litigation which that had involved, would be most unreason-

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shall be determined with respect to three-year periods beginning with the year ending June 30, 1938, and each third year thereafter." That adjusted declared value enters into the computation of the excess profits tax under §§ 600 and 601 of the Internal Revenue Code.

ably to circumscribe its powers to establish a convenient and flexible fiscal system."

Nor do we have here any lack of that territorial uniformity which is required by Art. I, § 8 of the Constitution. *LaBelle Iron Works* v. *United States, supra,* p. 392.

Reversed.

NATIONAL LABOR RELATIONS BOARD *v.* VIRGINIA ELECTRIC & POWER CO.*

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

No. 25. Argued November 13, 1941.—Decided December 22, 1941.

1. The National Labor Relations Act does not forbid or penalize expression by an employer to his employees of his views on labor policies. P. 476.
2. Conduct, though evidenced in part by speech, may amount in connection with other circumstances to coercion within the meaning of the Act. In determining whether an employer actually interfered with, restrained, and coerced its employees, the Board may look at what it said as well as what it did. P. 477.
3. Where the Board specifically found that certain spoken and posted utterances by the employer were unfair labor practices, the adequacy of which finding was doubtful if the utterances were separated from their background, and it was not certain from the Board's decision that its conclusion was based on the whole course of conduct during the period in question, of which the utterances were a part, *held,* that the case must be returned to the Board for a redetermination. P. 479.

115 F. 2d 414, reversed.

CERTIORARI, 312 U. S. 677, to review a judgment setting aside an order of the National Labor Relations Board, 20 N. L. R. B. 911, requiring the above-named power com-

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* Together with No. 26, *National Labor Relations Board* v. *Independent Organization of Employees of the Virginia Electric & Power Co.,* also on writ of certiorari, 312 U. S. 677, to the Circuit Court of Appeals for the Fourth Circuit.

pany, among other things, to withdraw recognition of, and disestablish, a union with which it had contracted. The company and the independent union filed separate petitions in the court below to review and set aside the order. The Board answered and prayed enforcement of the order.

Mr. Robert B. Watts, with whom *Assistant Solicitor General Fahy* and *Messrs. Richard S. Salant, Laurence A. Knapp, Morris P. Glushien,* and *Owsley Vose* were on the brief, for petitioner.

Messrs. T. Justin Moore and *George D. Gibson* for respondent in No. 25. *Mr. William Earle White,* with whom *Mr. Paul E. Hadlick* was on the brief, for respondent in No. 26.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Upon the usual proceedings [1] had pursuant to § 10 of the National Labor Relations Act,[2] the Board made substantially the following findings of fact:

For years prior to the events in this case the Virginia Electric and Power Company (hereinafter called the Com-

[1] These proceedings were instituted on charges and amended charges filed in 1937 and 1938 by the Transport Workers Union of America, affiliated with the Congress of Industrial Organizations, by the Amalgamated Association of Street, Electrical Railway, and Motor Coach Employees of America, and by the International Brotherhood of Electrical Workers, the latter two being affiliated with the American Federation of Labor. The complaint, as amended, charged that the employer, respondent in No. 25, had engaged in unfair labor practices within the meaning of § 8 (1), (2), and (3) of the Act; 29 U. S. C. § 158 (1), (2), and (3). The Independent Organization of Employees of the Virginia Electric and Power Company, respondent in No. 26, was allowed to intervene with respect to the 8 (2) charge, was represented by counsel and participated throughout the proceedings.

[2] 49 Stat. 449; 29 U. S. C. § 151 *et seq.*

pany) was hostile to labor organizations. From 1922, when a strike was unsuccessful by a nationally affiliated union,[3] until the formation of the Independent Organization of Employees (hereinafter called the Independent) in 1937, there was no labor organization among its employees. Shortly after the enactment of the National Industrial Recovery Act in 1933, Holtzclaw, the president of the Company, spoke to the employees and stated that any organization among them was "entirely unnecessary." Until his death, in May 1937, the Company utilized the services of one Walters, an employee of the Railway Audit and Inspection Company, who, prior to the effective date of the Act, admittedly furnished a report on the labor activity of the employees to the Company. In 1936, Bishop, Superintendent of Transportation in Norfolk, interrogated employees concerning union activities. On April 26, 1937, shortly after the Act was upheld,[4] and an A. F. of L. organizer had appeared, the Company posted a bulletin[5] throughout its operations, appealing to the

[3] Amalgamated Association of Street, Electrical Railway, and Motor Coach Employees of America.

[4] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and companion cases.

[5] The bulletin read as follows:

"April 26, 1937.

To the Employees of the Company:

As a result of recent national labor organization activities and the interpretation of the Wagner Labor Act by the Supreme Court, employees of companies such as ours may be approached in the near future by representatives of one or more such labor organizations to solicit their membership. Such campaigns are now being pressed in various industries and in different parts of the country and strikes and unrest have developed in many localities. For the last fifteen years this Company and its employees have enjoyed a happy relationship of mutual confidence and understanding with each other, and during this period there has not been any labor organization among our employees in any department, so far as the management is aware. Under these circumstances, we feel that our employees are entitled to

employees to bargain with the Company directly, without the intervention of an "outside" union, and thereby coerced its employees. In response to this bulletin several requests for increased wages and better working conditions were received.[6] The Company decided to withhold action on those requests, and directed its employees to select representatives to attend meetings at which Company officials would speak on the Wagner Act. These representa-

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know certain facts and have a statement as to the Company's attitude with reference to this matter.

The Company recognizes the right of every employee to join any union that he may wish to join, and such membership will not affect his position with the company. On the other hand, we feel that it should be made equally clear to each employee that it is not at all necessary for him to join any labor organization, despite anything he may be told to the contrary. Certainly, there is no law which requires or is intended to compel you to pay dues to, or to join any organization.

This Company has always dealt with its employees in full recognition of the right of every individual employee, or group of employees, to deal directly with the Company with respect to matters affecting their interests. If any of you, individually or as a group, at any time, have any matter which you wish to discuss with us, any officer or department head will be glad, as they always have been, to meet with you and discuss them frankly and fully. It is our earnest desire to straighten out in a friendly manner, as we have done in the past, whatever questions you may have in mind. It is reasonable to believe that our interests are mutual and can best be promoted through confidence and cooperation.

(signed) J. G. Holtzclaw,
President."

[6] Included in those requests was a petition from a majority of the Norfolk transportation employees which was the result of two meetings on Company property during working hours on May 11, 1937, in response to unsigned notices placed in the dispatcher's office by A. R. Ruett, a car operator. Both Ruett, and R. E. Elliott, who assumed the leadership in those meetings, testified that Superintendent Bishop had urged them to form an inside organization after warning them against the C. I. O. Bishop denied this, and the Board made no finding.

tives met in Norfolk and Richmond on May 24, and were addressed by high Company officials, who read identical speeches [7] stressing the desirability of forming a bargain-

[7] "A substantial number of its employees representing various departments and various occupations have approached the Company with the request that the Company consider with them the matter of their working conditions and wages. In other words, they have requested collective bargaining. The Company's position with respect to this was recently stated in a posted bulletin.

"In a company such as ours, if an individual operator, for example, should ask for himself better working conditions or wages, this Company could not comply with his request without also making the same concessions to other similar operators. In such a case the operator who appealed individually would, as a practical matter, be bargaining collectively for all of his group, which is not the logical procedure.

"This Company is willing to consider the requests mentioned above but feels that, in fairness to all of its employees and to itself, it should at the same time consider other groups who have not yet come to it. If the approaching negotiations are to be intelligent and fair to all properly concerned, they should be conducted in an orderly way, and all interested groups should be represented in these discussions by representatives of their own choosing, as provided in the Wagner National Labor Relations Act, which provides as follows:

" 'SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.'

"The Wagner Act applies only to employees whose work is in or directly affects interstate commerce and to companies engaged in interstate commerce. Counsel for this Company advise us that in their opinion the provisions of the Act do not apply to local transportation employees, to gas employees in Norfolk, or to certain strictly local employees of the light and power department. In spite of this, the Company wants to make it perfectly clear that its policy is one of willingness to bargain with its employees in any manner satisfactory to the majority of its employees and that no employee will be discriminated against because of any labor affiliations he desires to make.

"The petitions and representations already received indicate a desire on the part of these employees at least to do their own bargaining,

ing agency. At the Richmond meeting it was announced that any wage increase granted would be retroactive to June 1. By the substance of the speeches and the mechanics of the meetings, the Company gave impetus to, and assured the creation of, an "inside" organization, and coerced its employees in the exercise of their rights guaranteed by § 7 of the Act. Meetings, arranged with the coöperation of Company supervisors, on Company property, and, in some instances, on Company time, followed, at which the May 24 speeches were reported to the men who voted to form an "inside" organization and selected committees for that purpose. These committees met on Company property until June 15, when the constitution of the Independent was adopted.

While the Independent was in the process of organization, Edwards, a supervisor, kept meetings of a rival C. I. O. union under surveillance and warned employees that they would be discharged for "messing with the C. I. O." On June 1, Mann, a member of the C. I. O. who had openly protested against an "inside" union at one of the May 11 meetings (see note 6 *ante*) attended by Superintendent Bishop's son, Warren, was discharged for union activities.

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and we are taking this means of letting you know our willingness to proceed with such bargaining in an orderly manner. In order to progress, it would seem that the first step necessary to be taken by you is the formation of a bargaining agency and the selection of authorized representatives to conduct this bargaining in such an orderly manner.

"The Wagner Labor Act prohibits a company from 'dominating or interfering with the formation or administration of any labor organization or contributing financial or other support to it.'

"In view of your request to bargain directly with the Company and, in view of your right to self-organization as provided in the law, it will facilitate negotiations if you will proceed to set up your organization, select your own officers and advisers, adopt your own by-laws and rules, and select your representatives to meet with the Company officials whenever you desire."

On June 17, application cards for the Independent were distributed throughout the entire system of the Company, and many were signed on Company property and time. Within three weeks after the adoption of the constitution of the Independent, a majority of the employees filled out application cards. By July 13, the organization was complete, and permanent committeemen had been elected. A majority of those committeemen had been present at the May 24 meetings. On July 19, the Independent notified the Company that it represented a majority of the employees, and submitted a proposed contract. Negotiations were begun on July 30, and agreement was reached by midnight of the following day. The contract was formally executed on August 5, and provided, *inter alia*, for a closed shop, a check-off, and a wage increase. On August 20, the Company paid $3,784.50 to the Independent, although it had not yet deducted that entire amount from the employees' wages. On November 4, the date upon which the closed shop provision became effective, the Company discharged two employees, Staunton and Elliott, because they refused to join the Independent. In March, 1938, it discharged another employee, Harrell, for his membership and activity in an outside union.

Upon the basis of these findings and the entire record in the case, the Board concluded that the Company had committed unfair labor practices within the meaning of § 8 (1), (2) and (3) of the Act. Its order directed the Company to cease and desist from its unfair labor practices and from giving effect to its contract with the Independent, to withdraw recognition from and disestablish that organization, to reinstate with back pay the four wrongfully discharged employees, to reimburse each of its employees who was a member of the Independent in the amount of the dues and assessments checked off his wages by the Company on behalf of the Independent, and to post appropriate notices.

The Company and the Independent filed separate petitions in the court below to review and set aside the Board's order. The Board answered and requested enforcement of its order against the Company. The court below denied enforcement to any part of the Board's order, completely setting it aside.[8] We granted the petition for writs of certiorari because the case was thought to present important questions in the administration of the Act. 312 U. S. 677.

The Company is engaged in the business of generating and distributing electrical energy in eastern Virginia and north-eastern North Carolina. It also furnishes illuminating gas to customers in the vicinity of Norfolk, Virginia, and operates transportation services in Richmond, Norfolk, Portsmouth and Petersburg. It does not here renew the contention, correctly decided against it by the court below,[9] that the jurisdiction of the Board does not extend to its employees in the gas and transportation departments.

Domination of the Independent

The command of § 10 (e) of the Act that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive," precludes an independent consideration of the facts. Bearing this in mind, we must ever guard against allowing our views to be substituted for those of the agency which Congress has created to administer the Act. But here the Board's conclusion that the Independent was a company-dominated union seems based heavily upon findings which are not free from ambiguity and doubt. We believe that the Board, and not this Court, should undertake the task of clarification.

The Board specifically found that the bulletin of April 26 and the speeches of May 24 "interfered with, re-

[8] *Virginia Electric & Power Co.* v. *National Labor Relations Board,* 115 F. 2d 414.

[9] *Ibid.,* 415–416.

strained and coerced" the Company's employees in the exercise of their rights guaranteed by § 7 of the Act. The Company strongly urges that such a finding is repugnant to the First Amendment. Neither the Act nor the Board's order here enjoins the employer from expressing its view on labor policies or problems, nor is a penalty imposed upon it because of any utterances which it has made. The sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees. The employer in this case is as free now as ever to take any side it may choose on this controversial issue. But, certainly, conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act. If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways. For "Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure." *International Association of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 78.

If the Board's order here may fairly be said to be based on the totality of the Company's activities during the period in question, we may not consider the findings of the Board as to the coercive effect of the bulletin and the speeches in isolation from the findings as respects the other conduct of the Company. If the Board's ultimate conclusion is based upon a complex of activities, such as the anti-union background of the Company, the activities of Bishop, Edwards' warning to the employees that they would be discharged for "messing with the

C. I. O.," the discharge of Mann, the quick formation of the Independent, and the part which the management may have played in that formation, that conclusion would not be vitiated by the fact that the Board considered what the Company said in conjunction with what it did. The mere fact that language merges into a course of conduct does not put that whole course without the range of otherwise applicable administrative power. In determining whether the Company actually interfered with, restrained, and coerced its employees, the Board has a right to look at what the Company has said, as well as what it has done.

But, from the Board's decision, we are far from clear that the Board here considered the whole complex of activities, of which the bulletin and the speeches are but parts, in reaching its ultimate conclusion with regard to the Independent. The Board regarded the bulletin, on its face, as showing a marked bias against national unions by implying that strikes and unrest are caused by the organizational campaigns of such bodies, by stressing the "happy relationship of mutual confidence and understanding" prevailing in the absence of organization since the defeat of the Amalgamated in 1922, and by emphasizing the negative "right" of the employees to refrain from exercising their rights guaranteed under the Act, after paying "lip service" to those rights. Summing up its conclusions, the Board said: "We interpret the bulletin as an appeal to the employees to bargain with the respondent directly, without the intervention of any 'outside' union. We find that by posting the bulletin the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

The Board was of the view that the speeches delivered in the meetings of May 24 provided the impetus for the formation of a system-wide organization, that they re-

emphasized the Company's distaste for "outside" organizations by referring to the bulletin, and that, after quoting the provision of the Act forbidding employer domination of labor organizations, they suggested that the employees select their "own" officers, and adopt their "own" by-laws and rules. The Board's finding was: "We find that at the May 24 meetings the respondent urged its employees to organize and to do so independently of 'outside' assistance, and that it thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

It is clear that the Board specifically found that those utterances were unfair labor practices, and it does not appear that the Board raised them to the stature of coercion by reliance on the surrounding circumstances. If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone. The bulletin and the speeches set forth the right of the employees to do as they please without fear of retaliation by the Company. Perhaps the purport of these utterances may be altered by imponderable subtleties at work, which it is not our function to appraise. Whether there are sufficient findings and evidence of interference, restraint, coercion, and domination, without reference to the bulletin and the speeches, or whether the whole course of conduct, evidenced in part by the utterances, was aimed at achieving objectives forbidden by the Act, are questions for the Board to decide upon the evidence.

Here, we are not sufficiently certain from the findings that the Board based its conclusion with regard to the Independent upon the whole course of conduct revealed by this record. Rather, it appears that the Board rested heavily upon findings with regard to the bulletin and the speeches, the adequacy of which we regard as doubtful. We therefore remand the cause to the Circuit Court of Appeals with directions to remand it to the Board for a

redetermination of the issues in the light of this opinion. We do not mean to intimate any views of our own as to whether the Independent was dominated, or suggest to the Board what its conclusion should be when it reconsiders the case. Since the Board rested the remainder of its order in large part on its findings with respect to the domination of the Independent, we do not at this time reach the other parts of the Board's order, including the command that the checked-off dues and assessments should be refunded.

Reversed and remanded.

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

UNITED STATES *v.* TEXAS ET AL.

CERTIORARI TO THE COURT OF CIVIL APPEALS, SECOND JUDICIAL DISTRICT, OF TEXAS.

No. 44. Argued November 19, 21, 1941.—Decided December 22, 1941.

1. Under R. S. § 3466, in the distribution of assets of an insolvent debtor through a general receivership, an unsecured tax claim of the United States takes priority over the like claim of a State. P. 483.
2. The priority of unsecured claims of the United States under R. S. § 3466 attaches upon the taking over of the insolvent debtor's property by a general receivership and can not be divested by subsequent proceedings for the perfection of liens claimed by a State. P. 486.
3. Article 7065a–7 of the Texas Civil Statutes declares that all gasoline taxes due by any distributor to the State "shall be a preferred lien, first and prior to any and all other existing liens, upon all the property of any distributor, devoted to or used in his business as a distributor . . ." *Held*, that the lien thus created is not a specific and perfect lien entitled to priority, despite R. S. § 3466, over a claim of the United States, but is an inchoate and general lien requiring further procedure to define and enforce it. P. 484.

138 S. W. 2d 924, reversed.

CERTIORARI, 313 U. S. 554, to review a judgment entered in accordance with answers made by the Supreme Court of Texas to questions certified to it by the court below. The judgment, reversing a decision of the court of first instance, upheld the claim of the State to priority over a claim of the United States in the liquidation of the assets of an insolvent debtor.

Mr. Arnold Raum, with whom *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Clarence E. Dawson* were on the brief, for the United States.

Mr. Pat M. Neff, Jr., Assistant Attorney General of Texas, with whom *Messrs. Gerald C. Mann,* Attorney General, and *George W. Barcus,* Assistant Attorney General, were on the brief, for respondents.

MR. JUSTICE BYRNES delivered the opinion of the Court.

W. L. Nix was a manufacturer and distributor of motor fuel, doing business in Texas under the name of Texas Refinery. On November 20, 1933, M. R. Ingraham, who held a demand note secured by a chattel mortgage on certain tanks belonging to Nix, brought an action in the District Court of Gregg County, Texas. He alleged that demand had been made on the note, that it had not been paid, that Nix owned no property in Texas other than that of Texas Refinery, that the value of the mortgaged tanks was insufficient to discharge the note, that the tanks were not used "for a separate purpose" but in the "operation of the said refinery as a unit," and that Nix was insolvent. He asked that judgment be entered in his favor for the amount of the note, that the mortgage be foreclosed, and that in the meantime a receiver be placed in charge of "the whole of the property" of Texas Refinery. On the

same day a receiver was appointed, and he was subsequently authorized to sell all of the refinery property.

On November 21, R. P. Ash intervened in the proceedings as the holder of an overdue note secured by a mortgage on the physical plant of the refinery not subject to the Ingraham mortgage. Both the State of Texas and the United States then intervened with the claims for state and federal gasoline taxes, which are the subject of the present dispute. Later, both the Ingraham and Ash mortgage notes were assigned to Howard Dailey.

The District Court found that Nix was insolvent on November 20, 1933, and continued to be insolvent thereafter. The sum available for distribution after sale of the refinery property by the receiver was $7466.92. The court found that, of these proceeds, $1294.80 was allocable to those assets which were subject to the mortgages held by Dailey, and it ordered that his claim to that amount be first satisfied. It determined that Nix was liable to the United States for $19,343.91 in federal gasoline taxes, and to Texas for $40,312.51 in state gasoline taxes. As between the state and federal claims, it decided that the United States was entitled to priority, and concluded that nothing would be left to apply to the Texas claim.

From this order Texas appealed to the Court of Civil Appeals for the Second District. That court certified the controlling questions to the Supreme Court of Texas. The Supreme Court, on the authority of *State* v. *Wynne*, 134 Tex. 455, 133 S. W. 2d 951, a companion case decided the same day, answered the questions in such a way as to require that the claim of Texas be first satisfied, that of Dailey second, and that of the United States third. The Court of Civil Appeals thereupon so ruled, noting that the assets available would not completely satisfy even the claim of Texas and that Dailey and the United States would receive nothing. A motion by the United States for a rehearing was denied, and the Supreme Court of

Texas refused to review the decision of the Court of Civil Appeals. We granted the petition of the United States for certiorari because of the important question of the fiscal relationship between state and federal governments which is involved.

No question as to the rights of Dailey, the mortgagee, is raised by this appeal. We confine ourselves, therefore, to the only question presently open to decision: the relative priority of the claims of the United States and Texas.

The United States rests its assertion of priority upon § 3466 of the Revised Statutes.[1] Despite the contention of Texas to the contrary, that section clearly applies to this proceeding. As we recently remarked in *United States* v. *Emory*,[2] § 3466 covers in terms the case of an insolvent debtor who has committed an act of bankruptcy, and there are few more familiar examples of an act of bankruptcy than the appointment of a receiver because of the debtor's insolvency. *Cf.* § 3 (a) (4) of the Bankruptcy Act, U. S. C., Title 11, § 21 (a) (4). Here the district court expressly found that Nix was insolvent, and it appointed a receiver. It is true that the original petition was filed by a mortgagee rather than by a general creditor. But, if any limitations upon the operation of § 3466 might otherwise have flowed from this circumstance, they were removed by the subsequent character of the proceeding.

[1] U. S. Rev. Stat. § 3466 (U. S. C., Title 31, § 191) provides: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

[2] *Ante*, p. 423.

The receiver was placed in control of all of Nix's assets, rather than only those subject to the mortgage, and all of the assets were eventually liquidated. Parties other than the mortgagee, including Texas itself, intervened and were heard. We think that realities require us to treat the proceeding as a general equity receivership within the scope of § 3466.

We are thus brought to the important issue in the case. Article 7065a–7 of the Texas Civil Statutes declared that all gasoline taxes due by any distributor to the State "shall be a preferred lien, first and prior to any and all other existing liens, upon all of the property of any distributor, devoted to or used in his business as a distributor . . ."[3] It is the State's position that under this section it held a specific and perfected lien upon the refinery property which entitled it to priority despite § 3466 of the Revised Statutes.

Section 3466 mentions no exception to its requirement that "the debts due to the United States shall be first satisfied." It is nevertheless true that in several early decisions this Court read an exception into the section in the case of previously executed mortgages. *Thelusson* v. *Smith,* 2 Wheat. 396, 426; *Conard* v. *Atlantic Insurance Co.,* 1 Pet. 386; *Brent* v. *Bank of Washington,* 10 Pet. 596, 611, 612. This doctrine seems to have been based on the

[3] The full text of the paragraph, as of Nov. 20, 1933, when the receiver was appointed read: "All taxes, fines, penalties and interest due by any distributor to the State shall be a preferred lien, first and prior to any and all other existing liens, upon all of the property of any distributor, devoted to or used in his business as a distributor, which property shall include refinery, blending plants, storage tanks, warehouses, office buildings and equipment, tank trucks or other motor vehicles, or any other property devoted to such use, and each tract of land on which such refinery, blending plant, tanks or other property is located, or which is used in carrying on such business." This section was repealed on May 1, 1941 by Article XVII, § 28 of the Acts of the 47th Legislature, and simultaneously replaced without significant change by a new Article 7065b–8.

theory that mortgaged property passes to the mortgagee and is no longer a part of the estate of the mortgagor. See *Conard* v. *Atlantic Insurance Co., supra,* at 441–442. The question of whether the priority of the United States under § 3466 would also be defeated by a specific and perfected lien upon property, whose title remained in the debtor was reserved in those cases. *Ibid.; Brent* v. *Bank of Washington, supra,* at 611–612. However, it was determined that a general judgment lien upon the lands of an insolvent debtor does not take precedence over claims of the United States unless execution of the judgment has proceeded far enough to take the land out of the possession of the debtor. *Thelusson* v. *Smith, supra,* at 425–426.

In more recent years the Court has had occasion to consider the argument that liens created in favor of States or counties by state statutes entitled them to priority over the United States under § 3466. In *Spokane County* v. *United States,* 279 U. S. 80, the priority of the United States was upheld. The state statutes involved provided that if a certain personal property tax was not paid, and if the personal property against which it had been assessed was no longer in the hands of the delinquent taxpayer, the amount of the unpaid tax should become a lien upon all the real and personal property of the taxpayer. They went on to prescribe the procedure by which the lien was to be enforced. The Court determined that the statutory lien did not become specific until this procedure had been followed. Since these procedural conditions had not been satisfied in the case before it, the Court refused priority to the tax claims of the county. It specifically declined to consider what "the effect of more completed procedure in the perfecting of the liens under the law of the State" would have been. 279 U. S. at 95.

The New York statute in *New York* v. *Maclay,* 288 U. S. 290, declared that the corporate franchise tax there involved should "be a lien and binding upon the real

and personal property of the corporation . . . until the same is paid in full." 288 U. S. at 292. Although the franchise taxes in question were overdue, the State had taken no steps to perfect and liquidate its lien at the time the receiver was appointed for the insolvent corporation. Under such circumstances, the Court was of the opinion that the tax claim of the State did not deprive the claim of the United States of its priority under § 3466. It was at pains to make clear, however, that it intended by its decision to lend no support to the assumption that the doctrine of the mortgage cases, whatever its current vitality, would require the subordination of unsecured claims of the United States to a specific and perfected lien. 288 U. S. at 293–294.[4]

We think that it is equally unnecessary to test that assumption here. Prior to the appointment of the receiver on November 20, 1933, the State of Texas had made no move to assert the lien proclaimed in Article 7065a–7. And the priority which attached to the claim of the United States on that day (*United States* v. *Oklahoma,* 261 U. S. 253, 260) could not be divested by any subsequent proceedings in connection with the State's lien. *New York* v. *Maclay, supra,* at 293.

It is urged, however, that Article 7065a–7 by its own force creates a specific and perfected lien. Support for this contention is said to lie in the fact that the statutory lien purports to affect only the property of the

[4] In *United States* v. *Oklahoma,* 261 U. S. 253, the question was not reached because it was found that the "insolvency" upon which the operation of § 3466 is conditioned was absent. The Court sustained the priority of the United States under § 3466 in *United States* v. *Knott,* 298 U. S. 544. The Florida statutes there involved required foreign surety corporations to deposit certain bonds with the State Treasurer for the protection of Florida residents. This arrangement was held to create no more than "an inchoate general lien" for the benefit of unknown persons who might become entitled to the fund, and not to limit the effect of § 3466.

distributor which is "devoted to or used in his business as a distributor," rather than his property in general. This is thought to make the lien sufficiently specific. Moreover, the State argues, and the Supreme Court of Texas has declared,[5] that the provisions of the Texas Civil Statutes which govern the levy, seizure and sale of the property of delinquent taxpayers generally[6] are inapplicable to the gasoline tax. We are of course bound by this authoritative construction of the statute.

With respect to this contention it may first be said that the "property devoted to or used in his business as a distributor" is neither specific nor constant. But a more important consideration is that the amount of the claim secured by the lien is unliquidated and uncertain. As we said in *New York* v. *Maclay*: "If the state were to . . . omit to ascertain the debt, it would never be able to sell anything, for it would not know how much to sell." 288 U. S. at 293. That the legislature of Texas recognized this is revealed by another section of the statute. Article 7065a–8 (d) declared that, in the event of default, when it might become necessary for the State "to bring suit or to intervene . . . for the establishment or collection" of its claims in judicial proceedings, the tax reports required of the distributor by other provisions of the statute[7] should be "prima facie evidence of the contents thereof," but "the incorrectness of said report or audit may be shown." Thus, it was clearly envisaged that the amount of the taxes due, for which the lien was security, should be left to determination by the courts.

As to the nature of the proper procedure for levy, seizure, and sale, it is enough to say that some procedure is essential. As we have indicated, the statutory scheme reveals that the legislature contemplated resort to the

[5] *State* v. *Wynne*, 134 Tex. 455, at 473.

[6] See, esp., Articles 7266, 7272, and 7275 of the Texas Civil Statutes.

[7] Article 7065a, §§ 2 (b), 2 (d), 8 (a), and 8 (b).

courts. In addition to the statutory provisions referred to above, Article 7065a–8 (e) regulates the pleadings in suits by the Attorney General to collect the tax, and Article 7065a–9 determines the venue of such suits. Consequently, while it was clearly intended by Article 7065a–7 to create a lien in favor of the State, we must conclude that of necessity it was nothing more than an inchoate and general lien. Certainly it did not of its own force divest the taxpayer of either title or possession. It could not become specific until the exact amount of the taxes due had been determined, and it could not be enforced without the assistance of the courts. Like the tax lien in *New York* v. *Maclay, supra,* it served "merely as a *caveat* of a more perfect lien to come." 288 U. S. at 294.

We are not now called upon to decide whether the chattel mortgages held by Dailey are entitled to priority over the claim of the United States.[8] We hold only that the tax claim of the United States is entitled to priority over the tax claim of Texas. The case is remanded to the Court of Civil Appeals for proceedings not inconsistent with this opinion.

Reversed.

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

MORTON SALT CO. *v.* G. S. SUPPIGER CO.

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

No. 49. Argued December 10, 1941.—Decided January 5, 1942.

1. A corporation, engaged through a wholly-owned subsidiary in the business of selling salt tablets to the canning trade, and which also

[8] The texts of the mortgages are not contained in the record: and Dailey did not appear in this Court.

owned a patent on a machine for depositing such tablets in the process of canning, made a practice of licensing canners to use its machines, but only upon condition that the tablets used with them be bought from the subsidiary. *Held:*

(1) That this use of the patent monopoly to restrain competition in the marketing of the unpatented tablets for use with the patented machines, and to aid in the creation of a limited monopoly in the tablets not within that granted by the patent, is contrary to the public policy of the United States evinced by the Constitution and the patent law. P. 491.

(2) The patentee while engaged in such practice can not have an injunction to restrain the making and leasing of infringing machines. P. 492.

2. It is a principle of general application that courts, and especially courts of equity, may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest. P. 492.

117 F. 2d 968, reversed.

CERTIORARI, 313 U. S. 555, to review the reversal of a decree, 31 F. Supp. 876, dismissing a bill to enjoin alleged infringements of a patent, and for an accounting.

Mr. Clarence E. Mehlhope, with whom *Mr. Walter A. Scott* was on the brief, for petitioner.

Messrs. Estill E. Ezell and *Lawrence C. Kingsland,* with whom *Messrs. Edmund C. Rogers* and *Robert H. Wendt* were on the brief, for respondent.

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

Respondent brought this suit in the district court for an injunction and an accounting for infringement of its Patent No. 2,060,645, of November 10, 1936, on a machine for depositing salt tablets, a device said to be useful in the canning industry for adding predetermined amounts of salt in tablet form to the contents of the cans.

Upon petitioner's motion, pursuant to Rule 56 of the Rules of Civil Procedure, the trial court, without passing

on the issues of validity and infringement, granted summary judgment dismissing the complaint. It took the ground that respondent was making use of the patent to restrain the sale of salt tablets in competition with its own sale of unpatented tablets, by requiring licensees to use with the patented machines only tablets sold by respondent. The Court of Appeals for the Seventh Circuit reversed, 117 F. 2d 968, because it thought that respondent's use of the patent was not shown to violate § 3 of the Clayton Act, 15 U. S. C. § 14, as it did not appear that the use of its patent substantially lessened competition or tended to create a monopoly in salt tablets. We granted certiorari, 313 U. S. 555, because of the public importance of the question presented and of an alleged conflict of the decision below with *B. B. Chemical Co.* v. *Ellis,* 117 F. 2d 829, and with the principles underlying the decisions in *Carbice Corp.* v. *American Patents Corp.,* 283 U. S. 27, and *Leitch Mfg. Co.* v. *Barber Co.,* 302 U. S. 458.

The Clayton Act authorizes those injured by violations tending to monopoly to maintain suit for treble damages and for an injunction in appropriate cases. 15 U. S. C. §§ 1, 2, 14, 15, 26. But the present suit is for infringement of a patent. The question we must decide is not necessarily whether respondent has violated the Clayton Act, but whether a court of equity will lend its aid to protect the patent monopoly when respondent is using it as the effective means of restraining competition with its sale of an unpatented article.

Both respondent's wholly owned subsidiary and the petitioner manufacture and sell salt tablets used and useful in the canning trade. The tablets have a particular configuration rendering them capable of convenient use in respondent's patented machines. Petitioner makes and leases to canners unpatented salt depositing machines,

charged to infringe respondent's patent. For reasons we indicate later, nothing turns on the fact that petitioner also competes with respondent in the sale of the tablets, and we may assume for purposes of this case that petitioner is doing no more than making and leasing the alleged infringing machines. The principal business of respondent's subsidiary, from which its profits are derived, is the sale of salt tablets. In connection with this business, and as an adjunct to it, respondent leases its patented machines to commercial canners, some two hundred in all, under licenses to use the machines upon condition and with the agreement of the licensees that only the subsidiary's salt tablets be used with the leased machines.

It thus appears that respondent is making use of its patent monopoly to restrain competition in the marketing of unpatented articles, salt tablets, for use with the patented machines, and is aiding in the creation of a limited monopoly in the tablets not within that granted by the patent. A patent operates to create and grant to the patentee an exclusive right to make, use and vend the particular device described and claimed in the patent. But a patent affords no immunity for a monopoly not within the grant, *Interstate Circuit* v. *United States,* 306 U. S. 208, 228, 230; *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 456, and the use of it to suppress competition in the sale of an unpatented article may deprive the patentee of the aid of a court of equity to restrain an alleged infringement by one who is a competitor. It is the established rule that a patentee who has granted a license on condition that the patented invention be used by the licensee only with unpatented materials furnished by the licensor, may not restrain as a contributory infringer one who sells to the licensee like materials for like use. *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.,* 243 U. S. 502, 510; *Carbice Corp.* v. *American Patents*

Corp., supra; Leitch Mfg. Co. v. *Barber Co., supra;* cf. *United Shoe Machinery Co.* v. *United States,* 258 U. S. 451, 462; *International Business Machines Corp.* v. *United States,* 298 U. S. 131, 140.

The grant to the inventor of the special privilege of a patent monopoly carries out a public policy adopted by the Constitution and laws of the United States, "to promote the Progress of Science and useful Arts, by securing for limited Times to . . . Inventors the exclusive Right . . ." to their "new and useful" inventions. United States Constitution, Art. I, § 8, cl. 8; 35 U. S. C. § 31. But the public policy which includes inventions within the granted monopoly excludes from it all that is not embraced in the invention. It equally forbids the use of the patent to secure an exclusive right or limited monopoly not granted by the Patent Office and which it is contrary to public policy to grant.

It is a principle of general application that courts, and especially courts of equity, may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest. *Virginian Ry. Co.* v. *Federation,* 300 U. S. 515, 552; *Central Kentucky Co.* v. *Railroad Commission,* 290 U. S. 264, 270–73; *Harrisonville* v. *Dickey Clay Co.,* 289 U. S. 334, 337–38; *Beasley* v. *Texas & Pacific Ry. Co.,* 191 U. S. 492, 497; *Securities & Exchange Comm'n* v. *U. S. Realty Co.,* 310 U. S. 434, 455; *United States* v. *Morgan,* 307 U. S. 183, 194. Respondent argues that this doctrine is limited in its application to those cases where the patentee seeks to restrain contributory infringement by the sale to licensees of a competing unpatented article, while here respondent seeks to restrain petitioner from a direct infringement, the manufacture and sale of the salt tablet depositor. It is said that the equitable maxim that a party seeking the aid of a court of equity must come into court with clean hands applies only to the plaintiff's wrongful conduct in the particular act or transaction which raises the

equity, enforcement of which is sought; that where, as here, the patentee seeks to restrain the manufacture or use of the patented device, his conduct in using the patent to restrict competition in the sale of salt tablets does not foreclose him from seeking relief limited to an injunction against the manufacture and sale of the infringing machine alone.

Undoubtedly "equity does not demand that its suitors shall have led blameless lives," *Loughran* v. *Loughran,* 292 U. S. 216, 229; cf. *Keystone Driller Co.* v. *Excavator Co.,* 290 U. S. 240, 241–45, but additional considerations must be taken into account where maintenance of the suit concerns the public interest as well as the private interests of suitors. Where the patent is used as a means of restraining competition with the patentee's sale of an unpatented product, the successful prosecution of an infringement suit even against one who is not a competitor in such sale is a powerful aid to the maintenance of the attempted monopoly of the unpatented article, and is thus a contributing factor in thwarting the public policy underlying the grant of the patent. Maintenance and enlargement of the attempted monopoly of the unpatented article are dependent to some extent upon persuading the public of the validity of the patent, which the infringement suit is intended to establish. Equity may rightly withhold its assistance from such a use of the patent by declining to entertain a suit for infringement, and should do so at least until it is made to appear that the improper practice has been abandoned and that the consequences of the misuse of the patent have been dissipated. Cf. *B. B. Chemical Co.* v. *Ellis, post,* p. 495.

The reasons for barring the prosecution of such a suit against one who is not a competitor with the patentee in the sale of the unpatented product are fundamentally the same as those which preclude an infringement suit against a licensee who has violated a condition of the license by using with the licensed machine a competing

unpatented article, *Motion Picture Patents Co.* v. *Universal Film Mfg. Co., supra,* or against a vendee of a patented or copyrighted article for violation of a condition for the maintenance of resale prices, *Adams* v. *Burke,* 17 Wall. 453; *Bobbs-Merrill Co.* v. *Straus,* 210 U. S. 339; *Bauer & Cie* v. *O'Donnell,* 229 U. S. 1; *Straus* v. *Victor Talking Machine Co.,* 243 U. S. 490; *Boston Store* v. *American Graphophone Co.,* 246 U. S. 8; cf. *United States* v. *General Electric Co.,* 272 U. S. 476, 485. It is the adverse effect upon the public interest of a successful infringement suit, in conjunction with the patentee's course of conduct, which disqualifies him to maintain the suit, regardless of whether the particular defendant has suffered from the misuse of the patent. Similarly equity will deny relief for infringement of a trademark where the plaintiff is misrepresenting to the public the nature of his product either by the trademark itself or by his label. *Manhattan Medicine Co.* v. *Wood,* 108 U. S. 218; *Worden* v. *California Fig Syrup Co.,* 187 U. S. 516; *Leather Cloth Co.* v. *American Leather Cloth Co.,* 11 H. L. 522, 541–45; see also, for application of the like doctrine in the case of copyright, *Edward Thompson Co.* v. *American Law Book Co.,* 122 F. 922, 926; *Stone & M'Carrick* v. *Dugan Piano Co.,* 220 F. 837, 841–43. The patentee, like these other holders of an exclusive privilege granted in the furtherance of a public policy, may not claim protection of his grant by the courts where it is being used to subvert that policy.

It is unnecessary to decide whether respondent has violated the Clayton Act, for we conclude that in any event the maintenance of the present suit to restrain petitioner's manufacture or sale of the alleged infringing machines is contrary to public policy and that the district court rightly dismissed the complaint for want of equity.

Reversed.

MR. JUSTICE ROBERTS took no part in the decision of this case.

B. B. CHEMICAL CO. *v.* ELLIS ET AL.

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

No. 75. Argued December 10, 1941.—Decided January 5, 1942.

The owner of a method patent who authorizes manufacturers to use it only with materials furnished by him may not enjoin infringement by one who supplies the manufacturer with materials for use by the patented method and aids in such use. *Morton Salt Co.* v. *G. S. Suppiger Co., ante,* p. 488. P. 497.

117 F. 2d 829, affirmed.

CERTIORARI, 313 U. S. 558, to review the affirmance of a decree of the District Court, 32 F. Supp. 690, which dismissed the bill in a suit to enjoin infringement of a patent, and for an accounting.

Mr. Harrison F. Lyman, with whom *Messrs. C. E. Hammett, Jr.,* and *Arnold C. Rood* were on the brief, for petitioner.

Mr. William Gates, Jr., with whom *Messrs. Robert Cushman* and *James R. Hodder* were on the brief, for respondents.

Solicitor General Fahy, Assistant Attorney General Arnold, and *Messrs. Richard H. Demuth* and *James C. Wilson* filed a brief on behalf of the United States, as *amicus curiae,* urging affirmance.

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

This is a companion case to *Morton Salt Co.* v. *G. S. Suppiger Co., ante,* p. 488, and involves the question whether the owner of a method patent who authorizes manufacturers to use it only with materials furnished by him may enjoin infringement by one who supplies

the manufacturer with materials for use by the patented method and aids in such use.

Petitioner brought the present suit for an injunction and an accounting for infringement of the Ellis Patent, No. 1,830,428, of November 3, 1931, for a method of reinforcing insoles in shoe manufacture. Respondents denied infringement and set up as a further defense petitioner's misuse of the patent by permitting its use only with the unpatented materials sold by petitioner. The district court sustained this defense, 32 F. Supp. 690, and the Court of Appeals for the First Circuit affirmed. 117 F. 2d 829. We granted certiorari, 313 U. S. 558, because of the importance of the question presented and because we wished to consider this with the *Morton Salt Company* case.

Claim 4 of the patent is for a method "of reinforcing insoles which comprises applying, at room temperature, to a strip of reinforcing material provided with a dry coating of a cement having a substantial rubber content, a coating of adhesive containing a relatively large amount of rubber and of such a character that it will be effective even when freshly applied to cause quick adhesion of the reinforcing material and the material of the insole, and applying to each other, still at room temperature, a portion of the coated strip and the insole to be reinforced." Both courts below sustained the validity of claim 4 and held it was infringed by respondents' selling to purchasers of petitioner's materials like material for use with the patented process. But both held that petitioner was debarred from enjoining the infringement because of the manner of conducting its business, which is to supply shoe manufacturers, for use in reinforcing insoles, pre-coated fabric which it has slit into strips of suitable width for use by the patented method. If the manufacturer desires, he provides the fabric and petitioner pre-coats and slits it. Petitioner

supplies adhesive of high rubber content to be applied to the pre-coated fabric at the factory, just before the application of the reinforcing material to the insole. It also furnishes patented machines suitable for applying the adhesive to the strips, the machines remaining petitioner's property.

As compensation, petitioner makes a single charge to the shoe manufacturer at a rate per web yard of fabric used, and if the manufacturer does not furnish the fabric the price of that is added to the charge. Petitioner has not granted to shoe manufacturers, or asked them to take, written licenses. The courts below held that petitioner's sale to manufacturers of the unpatented materials for use by the patented method operated as a license to use the patent with that material alone and thus restrained competition with petitioner in the sale of the unpatented material, as in *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27, and *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458.

Petitioner insists that the respondents' acts of infringement, as found by the district court, were not limited to the sale of material for use by the patented method, as in the *Carbice* and *Leitch* cases, but amounted to active inducement of infringement by the shoe manufacturers and to coöperation with their infringing acts. Petitioner argues that, even though under the *Carbice* and *Leitch* cases it has "no right to be free from competition in the sale" of the materials, it has the right under the patent law to restrain infringement in any manner other than by the competitive sale of the unpatented materials.

We may assume, for purposes of decision, that respondents' infringement did extend beyond the mere sale of the materials to the manufacturers. But in view of petitioner's use of the patent as the means of establishing a limited monopoly in its unpatented materials, and for the reasons given in our opinion in the *Morton Salt Company* case,

we hold that the maintenance of this suit to restrain any form of infringement is contrary to public policy, and that the district court rightly dismissed it.

It is without significance that, as petitioner contends, it is not practicable to exploit the patent rights by granting licenses because of the preferences of manufacturers and of the methods by which petitioner has found it convenient to conduct its business. The patent monopoly is not enlarged by reason of the fact that it would be more convenient to the patentee to have it so, or because he cannot avail himself of its benefits within the limits of the grant.

Despite this contention, petitioner suggests that it is entitled to relief because it is now willing to give unconditional licenses to manufacturers on a royalty basis, which it offers to do. It will be appropriate to consider petitioner's right to relief when it is able to show that it has fully abandoned its present method of restraining competition in the sale of unpatented articles and that the consequences of that practice have been fully dissipated.

Affirmed.

MR. JUSTICE ROBERTS took no part in the decision of this case.

ILLINOIS NATURAL GAS CO. *v.* CENTRAL ILLINOIS PUBLIC SERVICE CO. ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 100. Argued December 19, 1941.—Decided January 5, 1942.

1. A corporation, engaged within a State in the business of piping natural gas and selling it wholesale to distributors, whose supply of gas comes from sources outside of the State and moves in continuous streams from the pipeline of an affiliate at the state border to points where the corporation delivers it to its customers, is subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act of June 21, 1938, and can not be required by state

authority to extend its facilities and make sales in an area already served by another natural gas company similarly engaged and subject to the Act, when no certificate of public convenience and necessity for such proposed extensions and sales has been granted by the Federal Power Commission under § 7 (c) of the statute. P. 508.

2. It is unnecessary to determine whether the interstate commerce comes to an end when the company reduces the gas pressure before delivery into the service pipes of distributors so that the sales to distributors are intrastate in character, since the extension of the company's facilities as proposed in this case is so related to interstate commerce as to come within the Congressional power to regulate not only interstate commerce itself, but also those matters which materially affect such commerce. P. 509.

375 Ill. 634, 32 N. E. 2d 157, reversed.

APPEAL from a judgment affirming a judgment of the Illinois Circuit Court which had sustained on appeal an order of the Illinois Commerce Commission. The order required the appellant to supply another company with natural gas and to make pipeline connections for that purpose.

Mr. Glenn W. Clark, with whom *Messrs. Russell Voertman* and *R. Allan Stephens* were on the brief, for appellant.

Mr. Albert E. Hallett, Jr., Assistant Attorney General of Illinois, with whom *Messrs. George F. Barrett,* Attorney General, *Albert J. Meserow,* Assistant Attorney General, *A. D. Stevens,* and *Gray Herndon* were on the brief, for appellees.

The series of transactions by which natural gas is produced in one State, transported to a local company in another, and by it there resold is not to be treated as indivisible but must be broken down into its component parts and the character of such parts separately determined.

The interstate character of such transmission terminates upon delivery of the gas to the appellant in Illinois.

Appellant's resale and delivery to its customers within the State are purely local activities.

Previous decisions of this Court, and the background and express language of the Natural Gas Act, sustain these views.

The cases relied upon by appellant are each distinguishable upon their facts. Although some of the *dicta* give color to appellant's position, the actual holdings and general tenor of the cases sustain the appellees.

The Illinois Commerce Commission, under the Illinois statute, has jurisdiction over appellant's activities.

The order is not repugnant to or in conflict with the Commerce Clause, and is consistent with the Natural Gas Act.

Appellant's argument is based on the erroneous assumption that its activities, after receiving the gas, are interstate in character.

The Natural Gas Act vests in the Federal Power Commission control over only such companies as transport natural gas across state lines. It provides that the several States shall continue to regulate the local resale and distribution of gas within their respective borders, and sets up extensive provisions looking forward to continued activity on the part of both State and Federal Commissions in this field, each voluntarily coöperating with the others.

The interests of the Nation will best be served by federal control of such interstate activities as are here carried on by Panhandle, and state control of such local activities as those of the appellant.

Cases cited and discussed: *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298; *East Ohio Gas Co.* v. *Commission*, 283 U. S. 465; *Southern Natural Gas Corp.* v. *Alabama*, 301 U. S. 148, 155; *Natural Gas Pipe Line Co.* v. *Slattery*, 302 U. S. 300; *Bacon & Sons* v. *Martin*, 305 U. S. 380; *Atlantic Coast Line R. Co.* v. *Standard Oil Co.*, 274 U. S.

257; *Schechter Corp.* v. *United States,* 295 U. S. 495; *Public Utilities Commission* v. *Landon,* 249 U. S. 236; *Chicago, M. & St. P. R. Co.* v. *Iowa,* 233 U. S. 334; *Peoples Natural Gas Co.* v. *Public Service Comm'n,* 270 U. S. 552; *National Labor Relations Board* v. *Central Missouri Telephone Co.,* 115 F. 2d 563; *United States* v. *Erie R. Co.,* 280 U. S. 98; *United States* v. *Rock Royal Co-operative,* 307 U. S. 533; *Carson Petroleum Co.* v. *Vial,* 279 U. S. 95; *State Tax Comm'n* v. *Interstate Gas Co.,* 284 U. S. 41; *Public Utilities Comm'n* v. *Attleboro Steam & Elec. Co.,* 273 U. S. 83; *Western Union Telegraph Co.* v. *Foster,* 247 U. S. 105; In re Billings Gas Co., 35 P. U. R. (N. S.) 321; *Hines* v. *Davidowitz,* 312 U. S. 52; *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co.,* 271 U. S. 246; *O'Brien* v. *Western Union Telegraph Co.,* 113 F. 2d 539; *Kentucky Natural Gas Corp.* v. *Public Service Comm'n,* 28 F. Supp. 509, aff'd 119 F. 2d 417; *People ex rel. N. Y. C. R. Co.* v. *Public Service Comm'n,* 233 N. Y. 113; *Erie R. Co.* v. *New York,* 233 U. S. 671; *Chicago, R. I. & P. R. Co.* v. *Hardwicke Farmers Elev. Co.,* 226 U. S. 426; *Missouri Pacific R. Co.* v. *Stroud,* 267 U. S. 404.

Solicitor General Fahy, and *Messrs. Richard S. Salant, William S. Youngman, Richard J. Connor,* and *Gregory Hankin* filed a brief on behalf of the Federal Power Commission, as *amicus curiae,* urging reversal.

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

On complaint of appellee, Central Illinois Public Service Company, which is engaged in the distribution of natural gas to consumers in various cities and towns in Illinois, appellee, Illinois Commerce Commission, made its order requiring appellant, Illinois Natural Gas Company, to supply the Central Company with natural gas and to establish the pipe line connection necessary for

that purpose. In the proceedings before the Commission, appellant contended that its entire operations and business in Illinois constitute interstate commerce and challenged the Commission's exercise of its jurisdiction and its order, as in conflict with the commerce clause and the provisions of the Natural Gas Act, 52 Stat. 821–833, 15 U.S.C. §§ 717–717w. Section 7 (c), 15 U.S.C. § 717f (c), it was contended, prohibits such extension of facilities and sale of gas to distributors without a certificate of public convenience and necessity from the Federal Power Commission.

On review, the Illinois Circuit Court sustained the order and the Illinois Supreme Court affirmed, 375 Ill. 634, 32 N. E. 2d 157, holding that the activities of appellant affected by the Commission's order constitute intrastate commerce, to which the provisions of the Natural Gas Act do not apply, and that those activities are, therefore, subject to state regulation. The case comes here on appeal under § 237 of the Judicial Code as amended, 28 U. S. C. § 344 (a).

Appellant, an Illinois corporation, is a wholly owned subsidiary of Panhandle Eastern Pipe Line Company, which owns and operates a natural gas pipe line system extending from gas fields in Texas, Kansas and Oklahoma across Illinois and into Indiana. Appellant owns a pipe line system wholly in Illinois, whose transmission pipe lines connect at various points in Illinois with the main line of Panhandle Eastern. Appellant, by long term contract, purchases its supply of gas from Panhandle Eastern and transports it through its own lines to local gas distributing utilities in Illinois, to which it sells the gas for distribution to consumers in Illinois cities and towns. It also sells and delivers gas to several industrial consumers in the state. The gas moves continuously, under pressure applied by Panhandle, from the gas fields until it enters appellant's transmission lines, where appellant reduces

the pressure according to the needs of its service. After the reduction of pressure, the gas continues to move in appellant's lines until it passes into the service pipes of the local distributors, or industrial users, where the pressure is again substantially reduced. The Central Illinois Public Service Company is distributing natural gas to consumers in several Illinois towns and cities, which it purchases for resale from Universal Gas Company, and takes from the pipe line of the latter at the Illinois state line. Universal, in turn, acquires the gas in Indiana from Panhandle Eastern, and from Kentucky Natural Gas Company.

The Illinois Commission found that appellant's operations in the sale of the gas to distributors in the state are wholly intrastate commerce; that the supply of gas capable of passing through Central's pipe line is inadequate to supply the Illinois communities served by it. The Commission then ordered appellant to extend its pipe line so as to connect with Central's pipe line system and to supply gas in sufficient quantities to enable it to satisfy the needs of its customers.

That appellant and Panhandle Eastern are engaged in interstate commerce in the purchase and sale of the natural gas which moves in a continuous stream from points without the state into appellant's pipes within the state seems not to be open to question. *Missouri* v. *Kansas Gas Co.,* 265 U. S. 298; *Ozark Pipe Line Corp.* v. *Monier,* 266 U. S. 555; *Peoples Gas Co.* v. *Public Service Commission,* 270 U. S. 550; *State Tax Commission* v. *Interstate Gas Co.,* 284 U. S. 41. Pursuant to the mutual agreement of the two companies, the gas is transported in continuous movement through the pipe line into the state and through appellant's pipes to the service lines of the distributors, where appellant delivers it to them. In such a transaction the particular point at which the title and custody of the gas pass to

the purchaser, without arresting its movement to the intended destination, does not affect the essential interstate nature of the business. See *Peoples Gas Co.* v. *Public Service Commission, supra,* 554; *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 587; *United Fuel Gas Co.* v. *Hallanan,* 257 U. S. 277, 280–281.

But appellee argues, as the State Supreme Court held, that although the sale of the gas and its movement into the state is interstate commerce, that commerce comes to an end when appellant reduces the gas pressure before its delivery into the service pipes of the distributors. In consequence, it is asserted, the sale of the gas to the distributors is intrastate commerce subject to state regulation by the Commission's order, and is therefore not within the purview of the Natural Gas Act, which is said to be applicable only to interstate commerce.

This Court has held that the retail sale of gas at the burner tips by one who pipes the gas into the state, or by one who is a local distributor acquiring the gas from another who has similarly brought it into the state, is a sale in intrastate commerce, since the interstate commerce was said to end upon the introduction of the gas into the service pipes of the distributor. *Public Utilities Commission* v. *Landon,* 249 U. S. 236; *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465. In applying this mechanical test for determining when interstate commerce ends and intrastate commerce begins, this Court has held that the interstate transportation and the sale of gas at wholesale to local distributing companies is not subject to state control of rates, *Missouri* v. *Kansas Gas Co., supra;* see *Public Utilities Commission* v. *Landon, supra,* 245; cf. *Public Utilities Commission* v. *Attleboro Co.,* 273 U. S. 83, 89, or to a state privilege tax, *State Tax Commission* v. *Interstate Gas Co., supra.* Yet, state regulation of local retail rates to ultimate consumers has been sustained where the gas so dis-

tributed was purchased at wholesale from one who had piped the gas into the state, *Public Utilities Commission* v. *Landon, supra,* as has a state tax measured by receipts from local retail sales of gas by one who has similarly brought the gas into the state. *East Ohio Gas Co.* v. *Tax Commission, supra.*

In other cases, the Court, in determining the validity of state regulations, has been less concerned to find a point in time and space where the interstate commerce in gas ends and intrastate commerce begins, and has looked to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce. Cf. *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 185, 187, *et seq.; California* v. *Thompson,* 313 U. S. 109, 113, 114; *Duckworth* v. *Arkansas, ante,* p. 390. Thus, in *Pennsylvania Gas Co.* v. *Public Service Commission,* 252 U. S. 23, where natural gas was transported by pipe line from one state into another and there sold directly to ultimate local consumers, it was held that, although the sale was a part of interstate commerce, a state public service commission could regulate the rates for service to such consumers. While the Court recognized that this local regulation would to some extent affect interstate commerce in gas, it was thought that the control of rates was a matter so peculiarly of local concern that the regulation should be deemed within state power. Cf. *Arkansas Louisiana Gas Co.* v. *Dept. of Public Utilities,* 304 U. S. 61. And, similarly, this Court has sustained a non-discriminatory tax on the sale to a buyer within the taxing state of a commodity shipped interstate in performance of the sales contract, not upon the ground that the delivery was not a part of interstate commerce, see *East Ohio Gas Co.* v. *Tax Commission, supra,* but because the tax was not a prohibited regulation of, or burden on, that commerce. *Wil-*

oil Corporation v. *Pennsylvania,* 294 U. S. 169; *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, 50. In *Southern Gas Corp.* v. *Alabama,* 301 U. S. 148, 156–57, on which the Illinois Supreme Court relied, we held only that the sale of gas to a local industrial consumer by one who was piping the gas into the state was a local business sufficient to sustain a franchise tax on the privilege of doing business within the state, measured by all the taxpayer's property located there, including that used for wholesale distribution of gas to local public service companies.

In the absence of any controlling act of Congress, we should now be faced with the question whether the interest of the state in the present regulation of the sale and distribution of gas transported into the state, balanced against the effect of such control on the commerce in its national aspect, is a more reliable touchstone for ascertaining state power than the mechanical distinctions on which appellee relies. But we are under no necessity of making that choice here, for Congress, by the Natural Gas Act, has brought under national control the very matters which the state has undertaken to regulate by the order.

An avowed purpose of the Natural Gas Act of June 21, 1938, was to afford, through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation. H. Rep. No. 709, Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., April 28, 1937.[1] By its enactment, Congress under-

[1] The Committee said of the proposed bill:

"It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use.

took to regulate a defined class of natural gas distribution, without the necessity, where Congress has not acted, of drawing the precise line between state and federal power by the litigation of particular cases. By § 1 (b), 15 U. S. C. § 717 (b), the Act is restricted in its application "to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale . . ." And by § 2 (6), 15 U. S. C. § 717a (6) "natural-gas company" means a person (including a corporation) engaged in the transportation of natural gas in interstate commerce or the sale in interstate commerce of such gas for resale. Sections 4, 5, 6, 15 U. S. C. § 717 c, d, e, give the Federal Power Commission extensive control over the rates at which the gas is sold for resale. Under § 7 (a), 15 U. S. C. § 717f (a) the Commission has authority to order natural-gas companies to extend their systems to establish physical connections of their transportation facilities with those of

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The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U. S. 23.) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri* v. *Kansas Gas Co.* (1924), 265 U. S. 298, and *Public Utilities Commission* v. *Attleboro Steam & Electric Co.* (1927), 273 U. S. 83.) The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act."

distributors, and to sell gas to them. Section 7 (b) prohibits the abandonment of the facilities of natural-gas companies without approval of the Commission. Section 7 (c), here involved, provides that "No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in any transportation by means of any new or additional facilities, or sell natural gas in any such market," without the Federal Commission's certificate of public convenience and necessity.

We think it plain that these provisions, read in the light of the legislative history, were intended to bring under federal regulation wholesale distribution, like that of appellant, of gas moving interstate. Appellant engages in interstate commerce in gas and in its interstate transportation, as those terms had been defined by this Court, before the adoption of the Act. After the gas is brought into the state, appellant makes the first sale to distributors for resale, to which the Act in terms applies, and which the cases last mentioned defined as a part of the commerce subject in some respects to the exclusive regulation of Congress. Cf. *Parker* v. *Motor Boat Sales, Inc., ante,* p. 244. Section 7 of the Act commits to the Federal Commission the control of extensions and abandonment of the transportation facilities of natural-gas companies, their physical connection with those of distributors and sales to distributors, and prohibits extensions, such as the state commission has now ordered, into an area already served by another natural-gas company, unless the Commission has first granted a certificate of public convenience and necessity. Since the communities here are supplied by the Universal and Central companies, which transport the gas interstate, they constitute a market already served by a natural-gas company within § 7 (c) and § 2 (6) of the Act.

The Federal Commission has ruled that it has jurisdiction under the Act over companies which, like appellant, sell at wholesale to local distributors gas moving interstate. Re Billings Gas Company, 35 P. U. R. (N. S.) 321; Re East Ohio Gas Company, 28 P. U. R. (N. S.) 129. The proceedings of the Commission under § 7 (c) indicate the many important matters which it takes into consideration in determining whether an extension of facilities in a case such as this should be permitted.[2]

In determining the scope of the federal power over the proposed extension of facilities and sale of gas, it is unnecessary to scrutinize with meticulous care the physical characteristics of appellant's business, in order to ascertain whether, as the court below held, the interstate commerce involved in bringing the gas into the state ends before delivery to distributors. In any case, the proposed extension of appellant's facilities is so intimately associated with the commerce, and would so affect its volume moving into the state and distribution among the states, as to be within the Congressional power to regulate those matters which materially affect interstate commerce, as well as the commerce itself. *Southern Ry. Co.* v. *United*

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[2] In In re Kansas Pipe Line & Gas Co., No. G–106 and In re North Dakota Consumers Gas Co., No. G–119, October 24, 1939, it inquired:

(1) whether the applicant possessed a supply of natural gas adequate to meet those demands which it was reasonable to assume would be made upon it; (2) whether there existed in the territory proposed to be served customers who could reasonably be expected to use such gas service; (3) whether the facilities proposed to be constructed would be adequate to meet the estimated demands for gas in the area; (4) whether applicant possessed adequate financial resources with which to construct the facilities proposed; (5) whether the cost of construction of the facilities proposed was adequate and reasonable; (6) whether anticipated fixed charges were reasonable; (7) whether the rates proposed to be charged were reasonable, comparing in that connection the proposed rates with those of other natural-gas companies already serving the territory.

States, 222 U. S. 20; *Houston, E. & W. T. Ry. Co.* v. *United States*, 234 U. S. 342; *Railroad Comm'n of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563; see *United States* v. *Darby*, 312 U. S. 100, 119–120.

As Congress, by § 7 (a) (c) of the Act, has given plenary authority to the Federal Commission to regulate extensions of gas transportation facilities and their physical connection with those of distributors, as well as the sale of gas to them, and since no certificate of public convenience and necessity, required by § 7 (c), has been granted to appellant by the Federal Commission for the proposed extensions and sale, the state commission was without power to order them.

Reversed.

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

EX PARTE DON ASCANIO COLONNA.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF PROHIBITION AND MANDAMUS.

No. —, original. Decided January 5, 1942.

In view of § 7 (b) of the Trading with the Enemy Act and of the state of war existing between this country and Italy, an application to this Court by the Italian Ambassador, praying for process looking to the release of a vessel and cargo owned by Italy from a libel proceeding in a District Court, will not be entertained. P. 511.

Motion for leave to file denied.

Mr. Homer L. Loomis for petitioner.

PER CURIAM:

Petitioner, the Royal Italian Ambassador, seeks leave to file in this Court a petition for writs of prohibition and mandamus, directed to the United States District Court

for the District of New Jersey. The basis of this application is petitioner's allegation that a vessel and its cargo of oil, the subject of litigation in the District Court and now in its possession, are the property of the Italian Government and are entitled to the benefit of Italy's sovereign immunity from suit.

After the motion was filed, there occurred on December 11, 1941, the declaration that the United States is at war with Italy. Section 2 (b) of the Trading with the Enemy Act, 40 Stat. 411, defines "enemy" to include the government of any nation with which the United States is at war. Section 7 (b) contains the following provision, 40 Stat. at 417:

"Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof" [which relates to patent, trademark and copyright suits] ". . . *And provided further,* That an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him."

This provision was inserted in the Act in the light of the principle, recognized by Congress and by this Court, that war suspends the right of enemy plaintiffs to prosecute actions in our courts. See S. Repts. Nos. 111 and 113, pp. 21, 24, 65th Cong., 1st Sess.; *Caperton* v. *Bowyer,* 14 Wall. 216, 236; *Hanger* v. *Abbott,* 6 Wall. 532, 536–37, 539; *Masterson* v. *Howard,* 18 Wall. 99, 105; *Porter* v. *Freudenberg,* [1915] 1 K. B. 857, 866–80. In view of the statute and the opinions in the cases cited, the application will not be entertained. Cf. *Rothbarth* v. *Herzfeld,* 179 App. Div. 865, 867–69, 167 N. Y. S. 199, affirmed 223 N. Y. 578, 119 N. E. 1075.

Motion for leave to file denied.

MR. JUSTICE ROBERTS took no part in the decision of this application.

NATIONAL LABOR RELATIONS BOARD *v.* P. LORILLARD CO.

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

No. 71. Argued December 18, 19, 1941.—Decided January 5, 1942.

Whether an employer should be required to bargain with a union previously selected as employees' bargaining representative or, in view of lapse of time and changed conditions, a new election should be held is a question for decision by the Board and not by the Circuit Court of Appeals. P. 513.

117 F. 2d 921, reversed.

CERTIORARI, 313 U. S. 557, to review a judgment entered on a petition of the National Labor Relations Board for enforcement of an order, 16 N. L. R. B. 684. The judgment sustained the order as made but introduced a modification requiring the Board to conduct an election as prayed by the respondent-employer in a petition for rehearing.

Mr. Richard H. Demuth, with whom *Solicitor General Fahy* and *Messrs. Archibald Cox, Robert B. Watts, Laurence A. Knapp,* and *Morris P. Glushien* were on the brief, for petitioner.

Mr. Homer Cummings, with whom *Messrs. William Stanley, Carl McFarland,* and *Wm. R. Perkins* were on the brief, for respondent.

PER CURIAM:

The Board found that the respondent, P. Lorillard Company, had committed an unfair labor practice within the meaning of § 8 (5) of the National Labor Relations Act, 49 Stat. 449, 453, by refusing to bargain collectively with Pioneer Tobacco Workers' Local Industrial Union No. 55, which was at the time the duly selected bargaining representative of a majority of Lorillard's employees. The Board affirmatively ordered Lorillard to bargain collec-

tively with Local No. 55. On the Board's petition for enforcement the court below sustained the Board's finding, but, expressing the belief that because of lapse of time and changed conditions the Local might no longer represent the majority of employees, modified the Board's order so as to require it to conduct an election to determine whether the Local had lost its majority due to a shift of employees to a rival independent association. The Board had considered the effect of a possible shift in membership, alleged to have occurred subsequent to Lorillard's unfair labor practice. But it had reached the conclusion that, in order to effectuate the policies of the Act, Lorillard must remedy the effect of its prior unlawful refusal to bargain by bargaining with the union shown to have had a majority on the date of Lorillard's refusal to bargain. This was for the Board to determine, and the court below was in error in modifying the Board's order in this respect. *Labor Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 339–340; *I. A. of M.* v. *Labor Board*, 311 U. S. 72, 82. See also *Labor Board* v. *Falk Corp.*, 308 U. S. 453, 458–459. The judgment of the court below is reversed with directions to enforce the order of the Board.

Reversed.

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

UNITED STATES *v.* RAGEN.*

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

No. 54. Argued December 11, 1941.—Decided January 5, 1942.

1. The crime of willfully attempting to evade or defeat income taxes (Rev. Acts 1932, 1934, 1936, § 145), is committed where the members of a corporation, scheming to reduce or evade its income taxes, cause

*Together with No. 55, *United States* v. *Arnold W. Kruse*, and No. 56, *United States* v. *Lester A. Kruse*, also on writs of certiorari, 313 U. S. 557, to the Circuit Court of Appeals for the Seventh Circuit.

distributions of its funds to be made to its shareholders in the guise of commissions and cause the amounts so distributed to be deducted in the corporation's income tax reports from its gross income as reasonable allowances for personal services, knowing that the amounts are in excess of reasonable compensation for any services rendered by the recipients to the corporation. P. 522.

2. The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness does not make it too vague to afford a practical guide to permissible conduct. *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, and other cases, distinguished. P. 523.
3. There was sufficient evidence in this case to support a finding by the jury that the respondents willfully attempted to make unreasonable allowances for personal services, in reporting the net income of the corporation. P. 524.
4. Where a count of the indictment alleged that moneys of a corporation, distributed to its shareholders as "commissions" and deducted in its income tax returns as reasonable expenses for services to the corporation, were dividends in their entirety, but the proof indicated that some services to the corporation were performed by the recipients, the variance was not fatal, since it related at most to the extent of the alleged tax evasion and involved no element of surprise prejudicial to the defense. P. 526.

118 F. 2d 128, reversed.

CERTIORARI, 313 U. S. 557, to review the reversal of judgments upon convictions for conspiracy to violate, and for violations of, a provision in several Revenue Acts making criminal a willful attempt to evade or defeat any tax.

Mr. Gordon B. Tweedy, with whom *Assistant Solicitor General Fahy*, *Assistant Attorney General Clark*, and *Mr. Arnold Raum* were on the brief, for the United States.

Mr. John L. McInerney, with whom *Messrs. Matthias Concannon* and *Sidney R. Zatz* were on the brief, for respondent in No. 54.

The evidence was insufficient to support a verdict of guilty.

Commissions or percentages of net profits of a corporation paid for services rendered are deductible in computing taxable income.

The fifth count charges that no services were rendered; but the evidence shows that services were rendered. The charge was not proved as alleged, and a verdict should have been directed.

There was no showing as to the total of all services rendered or as to their reasonable value. Even if the question of compensation were an issue in the case, a verdict should have been directed, because the evidence was insufficient to warrant the submission of that question to a jury.

To be a party to a conspiracy, guilty knowledge is essential. The doing of some act in furtherance of the object of the conspiracy is not enough.

In a prosecution for a wilful attempt to defeat and evade taxes, it is not sufficient to show merely that a lesser tax was paid than was due. It is essential to prove that the acts complained of were wilfully done in bad faith and with intent to evade and defeat the tax.

The question whether there is a sufficiently definite standard of guilt, if defendants rendered any services to the corporation, is raised here for the first time. In the courts below, the Government contended that this question was irrelevant. The Government should not be permitted to shift its position.

To permit a conviction to rest upon the determination by a jury of the reasonableness of the compensation paid for services rendered, without a definite standard for determination of that question, prescribed by statute or regulation, would be contrary to the due process clause of the Fifth Amendment, and to the provision of the Sixth Amendment that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation. *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 89; *Connally* v. *General Construction Co.*, 269 U. S. 385, 391; *Collins* v. *Kentucky*, 234 U. S. 634, 638; *International Harvester Co.* v. *Kentucky*, 234 U. S. 216,

221; *American Machine Co.* v. *Kentucky,* 236 U. S. 660, 661; *United States* v. *Pennsylvania R. Co.,* 242 U. S. 208, 237; *Smith* v. *Cahoon,* 283 U. S. 553, 564; *Small Co.* v. *American Refining Co.,* 267 U. S. 233, 238; *Champlin Refining Co.* v. *Commission,* 286 U. S. 210, 242; *Herndon* v. *Lowry,* 301 U. S. 242, 262–264; *Lanzetta* v. *New Jersey,* 306 U. S. 451, 453. Distinguishing *Gorin* v. *United States,* 312 U. S. 19. See, also, *Omaechevarria* v. *Idaho,* 246 U. S. 343, 348; *Hygrade Provisions Co.* v. *Sherman,* 266 U. S. 497, 501. Distinguishing *Tinkoff* v. *United States,* 86 F. 2d 868; *United States* v. *Kelley,* 105 F. 2d 912; *United States* v. *Zimmerman,* 108 F. 2d 370, and *Wagner* v. *United States,* 118 F. 2d 801.

Mr. Joseph A. Struett, with whom *Messrs. George K. Bowden* and *Warren Canaday* were on the brief, for respondents in Nos. 55 and 56.

The Government's evidence established that the commissions were paid for services rendered, and no evidence was offered to show that the payments were unreasonable.

The case was submitted to the jury on the theory that the issue was whether the deductions of the commissions were either proper or improper in their entirety. The trial court erroneously instructed the jury that they could convict the defendants if they found only that a substantial portion of the deductions was improper. There was no evidence in the record to support such a finding or instruction.

The factual and ultimate legal conclusions of the Circuit Court of Appeals are substantiated by the record.

Mr. Justice Black delivered the opinion of the Court.

Section 145 of the Revenue Act of 1932 provides that "any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the pay-

ment thereof, shall, in addition to other penalties provided by law, be guilty of a felony . . ." 47 Stat. 217. (There are identical provisions in the Revenue Acts of 1934 and 1936. 48 Stat. 725; 49 Stat. 1703.) Petitioners were indicted, tried, and convicted in the District Court for conspiracy to violate, and for violation of, this provision. The Circuit Court of Appeals, one judge dissenting, reversed. *United States* v. *Molasky,* 118 F. 2d 128. Because questions of importance in the enforcement of this criminal statute and the administration of the revenue laws were raised, we granted certiorari. 313 U. S. 557.

In computing net corporate income subject to tax, a deduction is permitted for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered . . ." § 23 (a), Revenue Acts of 1932, 1934, and 1936. 47 Stat. 179; 48 Stat. 688; 49 Stat. 1658. "Dividends" distributed from net corporate profits are not allowable deductions. But "commissions," if incurred as necessary business expenses and as a reasonable allowance for personal services actually rendered, are deductible from gross income. The larger the allowable deduction the smaller are the net taxable income and the tax imposed. The first four counts of the indictment set out attempts by the defendants to evade income taxes of the Consensus Publishing Company for the years 1933 to 1936, through a fraudulent scheme whereby, under the guise of paying commissions which were deducted from gross income, the corporation distributed dividends deduction of which the statute does not permit. The fifth count sets out a conspiracy to accomplish similar results for the years 1929 to 1936.

After an examination of the evidence in the record, including numerous exhibits, we are satisfied that the

jury could justifiably have found the following facts to be true:

The Consensus Publishing Company, an Illinois corporation, was organized in 1929 to carry on the business of preparing "run-down" sheets, daily bulletins containing information on horse racing, and selling them to bookmakers. The original stock ownership was distributed among Arnold Kruse (20 shares), James Ragen, Sr. (20 shares), William Molasky (30 shares), and Cecelia Investment Company (30 shares), a holding company controlled by Moses Annenberg, the dominant figure in several other corporations which were engaged in enterprises connected with betting on horse races. Kruse and Ragen were executives in other Annenberg companies. Molasky alone lived in St. Louis, where Consensus conducted its principal business operations, but he delegated to one Gordon Brooks, an employee of another corporation owned by Molasky, the job of collecting receipts, preparing records and reports, and supervising printing for Consensus,—work which took Brooks an hour-and-a-half a day on the average, except for the one day each week when the preparation of operating reports for the Chicago office required about three hours.

For several years Consensus made a weekly distribution of money to its shareholders in direct proportion to their holdings. In the period covered by the indictment, only the 30% of the distribution going to Cecelia Investment Company was treated as dividends in Consensus' tax returns. The remaining 70%, although referred to in some of the corporation's confidential weekly reports to stockholders during the period as "dividends," was nevertheless in its income tax return deducted from gross income as "commissions." The deductions thus claimed were $10,761 in 1929, $62,961 in 1930, $64,791 in 1931, $57,255 in 1932, $54,538 in 1933, $60,172 in 1934, $76,714 in 1935, and $119,756 in 1936. The book-

keeping system, under which 70% of the funds remaining after payment of expenses was charged as commissions, was set up in 1929 in accordance with instructions from Arnold Kruse.

In 1934, Kruse, having learned of a decision of the Board of Tax Appeals that distributions of profits as commissions would not be allowed as a deductible expense if made in accordance with stockholdings, set in motion a series of transactions retroactively modifying the relationship between Consensus and its stockholders. He directed an employee to destroy the original stock book of the company, issue new stock certificates bearing the date of incorporation (September 18, 1929), and then immediately to cancel the new certificates and issue a single certificate for one hundred shares to the Cecelia Investment Company. In 1935 or 1936, Kruse ordered the drawing up of written yearly contracts of employment for the several years from 1930 on between Consensus and the individuals to whom "commission" payments had since the inception of the company been made. In each contract, the compensation was to correspond identically with the amount that had already actually been paid.

Except for delays in destroying the original stock book and the original stock certificates, this plan was promptly carried out. Moreover, corporate minutes were drawn up, appropriately back dated, which set out the stock "issue" and the employment contracts as if they were actual events contemporaneous with the false dates of recording.

Among the back-dated contracts were several between Consensus and the respondent Lester Kruse, son of Arnold. These together with a back-dated assignment by Arnold to Lester of his "contract of employment" with Consensus were to afford ostensible documentation of a shift to Lester, after March, 1933, of the share that had formerly

gone to Arnold.[1] Similarly, after 1931, Consensus paid the share that had formerly gone to Ragen to Ragen's son. Here, too, a set of back-dated papers documenting the shift was fabricated. After their sons became the nominal recipients of commissions, Kruse and Ragen continued to be connected with the affairs of Consensus. Kruse, for example, directed the creation of the spurious papers and records already described, and Ragen from time to time, at least until 1935, signed "commission" checks of Consensus which were paid in regular course.[2]

If, from the foregoing and other supporting evidence in the record, the jury could have found that any one of the defendants had, with the intentional coöperation of the others, received "commissions" without rendering any services whatsoever, it would have been possible for the trial judge to have submitted the case to the jury without calling upon it to decide any questions of reasonableness of compensation for services actually rendered. If, however, each defendant had performed some service for the corporation, the jury would have had to consider whether or not the "commissions" had intentionally been made excessive so that a portion of payments made in the guise of meeting expenses actually constituted a distribution of dividends. There was evidence which, if believed, tended to establish that each defendant had performed some service, although of an irregular and undefined nature. Hence, it seems to us entirely proper for the trial judge to have submitted the case to the jury with a charge not necessarily calling for a determination of whether all or

[1] Or to his wife. From August, 1932, to March, 1933, Consensus distributed 20% of its earnings to Mrs. Arnold Kruse. No explanation is apparent in the record.

[2] Because of this and other circumstances showing Ragen's continued participation in the affairs of Consensus, we conclude that the argument, separately made on his behalf, that there was insufficient evidence to establish his connection with any scheme to evade taxes, is without merit.

none of the "commissions" paid to each defendant were dividends, but permitting a determination of whether the "commissions" were intentionally made to *include* substantial amounts which should have been treated as dividends. Upon such a charge,[3] the jury found Arnold Kruse and Ragen guilty on all five counts, and Lester Kruse guilty on counts four and five.[4]

[3] The crucial portions of the District Judge's charge to the jury are as follows:

"If these sums distributed were distributed as a part of the profits of the corporation, then they should have been accounted for in the income tax report of the Consensus Company as profits and upon that the corporation should have paid a tax, which it did not.

"If, on the other hand, they were intended to and represented actual bona fide compensation to employes of this corporation in the ordinary operation of its business; in other words, if they were ordinary and necessary expenses of the operation of the business, then they were properly deductible as they were deducted and no tax was due upon them.

. . . . . .

We are concerned only with the question of whether these men have entered into a conspiracy, into a scheme whereby as a result this corporation, the Consensus Company, under the guise of commissions, distributed to its shareholders sums that actually represented a division of profits.

"If these defendants had that kind of plan and carried it out, if they wilfully and intentionally entered into such an arrangement, there wouldn't be any question of their guilt.

. . . . . .

It is not necessary for the government under this indictment to prove that all of the sums so distributed to these defendants were profits. It is not necessary that the government prove all of the figures precisely as they are charged in the indictment. It is sufficient if you find beyond a reasonable doubt that the defendants intentionally diverted profits of this concern, in the amounts charged in the indictment or substantial parts thereof, diverted them from the form of profits and received them in the form of commissions."

[4] Molasky, James Ragen, Jr., and the Consensus Publishing Company were also found guilty. The government has not sought review of the Circuit Court of Appeals reversal of the conviction of Molasky

In the charge as given, the Circuit Court of Appeals found reversible error. The gist of the court's argument is contained in the following excerpt from the opinion:

"We have reached the conclusion that where a statute permits a reasonable deduction for services, a criminal prosecution can not be maintained by proof other than that such services were not rendered. It is not sufficient to allege or prove that a deduction claimed for services is unlawful because the amount charged is unreasonable. Such a charge would leave to the trier of the facts the responsibility for fixing the standard by which a defendant's guilt would be determined. The standard would vary according to the views of different courts and juries. Such a theory would be violative of the defendant's constitutional rights, and void. *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81 . . .; *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 221 . . .; *Collins* v. *Kentucky*, 234 U. S. 634, 638 . . ." [5]

Determination of allowable deductions by reference to a standard of "reasonableness" is not unusual under federal income tax laws. For example, the deductions allowed for depreciation and obsolescence, for bad debts, and for ordinary and necessary business expenses (other than compensation for services) are designated in the Internal Revenue Code as "reasonable." 53 Stat. 1, §§ 23 (l), 23 (k) (1), 23 (a) (1). If, as the opinion below suggests, the only question that can properly be submitted to the jury is whether the *entire* deduction is fabricated, an unconscionable taxpayer can immunize himself from the criminal sanctions for tax evasion by the simplest of expedients. He need only find a legitimate item of deduction and then pad it as much as his purpose

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and James Ragen, Jr., which involved additional issues of no relevance to the respondents here. The corporation did not take an appeal from the judgment of the District Court.

[5] *United States* v. *Molasky*, *supra*, 118 F. 2d at 139.

requires. By transforming the question "Should any deduction have been made?" into "Was the deduction made in excess of a reasonable allowance?" he can, if the theory accepted below be correct, largely destroy the deterrent effect of a penal statute passed by Congress.

We have concluded, however, that the ground of decision below is untenable. The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct. Cf. *Nash* v. *United States,* 229 U. S. 373. The cases cited by the Court of Appeals affirm no such proposition. In the *Cohen Grocery* case, this Court held a conviction under § 4 of the Lever Act, 41 Stat. 297, 298, unconstitutional because the statute left open "the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against," and because an "attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." *United States* v. *Cohen Grocery Co., supra,* 89. In the *International Harvester* case, this Court expressed the view that assurance that the state statute there in issue was complied with called for "gifts that mankind does not possess." *International Harvester Co.* v. *Kentucky, supra,* 224. And in the *Collins* case, the same statute was said to call for a determination of conduct "not according to the actualities of life, or by reference to knowable criteria, but by speculating upon imaginary conditions." *Collins* v. *Kentucky, supra,* 638.

No such unworkable standards are involved here. Section 145 of the Revenue Act of 1932, standing alone, is not vague nor does it delegate policy-making powers to

either court or jury. It declares that "any person who willfully attempts in any manner to evade or defeat any tax imposed" by the act "shall . . . be guilty of a felony" and specifies penalties in addition to those otherwise provided by law. That such acts of bad faith are not beyond the ready comprehension either of persons affected by the act or of juries called upon to determine violations need not be elaborated. Nor does the particular mode of evasion here alleged, intentional deduction of dividends in the guise of compensation for personal services, so transform the nature of the offense as to make the actors less aware that they are committing it or juries less competent to detect it. The statutory specification of permissible deduction here in question is of long standing. For years, thousands of corporations have filed income tax returns in accordance with the direction to deduct "a reasonable allowance for salaries or other compensation for personal service actually rendered," and there has not been any apparent general confusion bespeaking inadequate statutory guidance. A finding of unconstitutional uncertainty in this section of the act, as applied here, would be a negation of experience and common sense.

On no construction can the statutory provisions here involved become a trap for those who act in good faith. A mind intent upon willful evasion is inconsistent with surprised innocence. Cf. *Gorin* v. *United States,* 312 U. S. 19; *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497; *Omaechevarria* v. *Idaho,* 246 U. S. 343. And the charge given by the trial court amply instructed the jury that scienter is an essential element of the offense.

We conclude that it was not error to submit to the jury the question of whether or not the respondents attempted to make unreasonable allowances for personal services. The respondents, however, raise a further objection going not to the propriety of such a submission as a matter of law, but to the insufficiency of the evidence upon which

the jury could have found an answer to the question submitted. They contend that the record discloses that the recipients of commissions performed some services; that the record fails to show that the services disclosed were the only services rendered; that there was no direct testimony as to the total amount of services rendered or the reasonable value thereof; and that, therefore, the jury had no rational basis upon which to conclude that the sums deducted as "commissions" were more than a reasonable allowance for compensation for the services rendered. We must reject this contention.

The business conducted by Consensus, a business which, according to the testimony of a person who was in immediate charge of its major operations, normally required only an hour and a half daily of managerial supervision, would hardly seem to call for additional executive services worth what Consensus paid in "commissions." The same witness testified that he had never seen some of the recipients of "commissions," and that his only contact with one of them was two telephone conversations. This testimony, too, belies participation by the respondents in the business activities of Consensus to a degree justifying payment of the high "commissions"—equal on the average to about half of gross revenues and amounting each year to several times all other wages and salaries [6]—as a *quid pro quo* for their services. Moreover, there is the additional circumstance, damaging to the respondents' contention that, year in and year out, 30% of earnings after deduction of expenses was paid to the Cecelia Investment Company as dividends, and 70% to the respondents or other individuals as "commissions." This uniformity in the computation of "compensation" is difficult to reconcile with the variations in extent and kind of personal services which

[6] In 1936, for example, "commissions" amounted to $119,756 as compared with $8,816 paid out for other wages and salaries.

one would expect to find in accounts reflecting bona fide allowances for personal services. Further, there is the circumstance that the "commission" payments were always in proportion to original stock holdings. And darkening the whole picture is the atmosphere of purposeful concealment evinced by the destruction of some important corporate papers and the fabrication of others. We are convinced that all of this is sufficient to support a finding by the jury that the respondents willfully attempted to make unreasonable allowances for personal services.

The respondents also urge that there was a fatal variance between the indictment and the proof, in that the indictment alleges that the commission payments were actually dividends in their entirety, whereas the evidence indicates that some services were performed. The fifth count of the indictment does refer to "all of the moneys . . . paid . . . by virtue of the . . . so-called 'Employment Contracts' " as "in truth and in fact, distributions of profits and dividends." But the gravamen of the charge is distribution of dividends in the guise of commissions, and the respondents cannot fairly claim that they were not adequately apprised of the nature of the offense. Any variance which existed, at most a matter of the extent of the alleged tax evasion, involves no elements of surprise prejudicial to the respondents' efforts to prepare their defense. Cf. *Berger* v. *United States*, 295 U. S. 78; *Bennett* v. *United States*, 227 U. S. 333.

The respondents have made further contentions which we conclude, after consideration, are without merit.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court affirmed.

Reversed.

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

CONTINENTAL CASUALTY CO. ET AL. *v.* UNITED STATES.

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 39. Argued November 18, 19, 1941.—Decided January 5, 1942.

1. Revised Statutes, § 1020, 18 U. S. C. § 601, provides that when any recognizance in a criminal case returnable to any court of the United States is forfeited by a breach of the conditions thereof, such court may remit the whole or a part of the penalty whenever it appears that there has been no "willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced." *Held:*

   (1) That this statute is the exclusive source of the power of the District Court at any time to remit the forfeiture of a recognizance in a criminal cause. P. 533.

   (2) The word "party" appearing in the phrase "willful default of the party," means only the principal in the recognizance; it does not include the surety. P. 530.

2. Where the words of the Revised Statutes are clear, their meaning may not be changed by resort to the prior law. P. 530.

RESPONSE to questions certified by the Circuit Court of Appeals on a review by that court of a judgment of the District Court, 34 F. Supp. 1007, which dismissed a petition praying that forfeiture of a recognizance be remitted. The petitioners were the surety and its indemnitor.

Mr. Joseph V. McEnery, with whom *Mr. Thomas J. Clary* was on the brief, for the Continental Casualty Co. et al.

Mr. Richard H. Demuth, with whom *Assistant Solicitor General Fahy* was on the brief, for the United States.

MR. JUSTICE REED delivered the opinion of the Court.

This certificate brings to this Court from the Court of Appeals for the Third Circuit questions concerning

the power of a District Court of the United States to relieve an innocent surety from the penalty of a forfeited recognizance.

The principal in the recognizance, "Herbert R. Short, was convicted in the District Court for the District of New Jersey on June 20, 1940, upon two counts of an indictment charging conspiracy and was on that day directed to appear in the court on July 19, 1940, for sentence. On July 19, 1940, Short did not appear in the said court. The court thereupon ordered a bench warrant to issue and ordered the recognizance to be forfeited. Short was apprehended on August 29, 1940. On September 12, 1940, he was brought before the District Court and sentence was then imposed upon him."

The surety, Continental Casualty Company, and its indemnitor, Marie M. Short, the wife of the principal, the convicted defendant, filed a joint petition in the District Court within the term at which the order of forfeiture had been entered, praying for remission of the forfeiture. "The District Court found as a fact that the default of Herbert R. Short, the principal in the recognizance, was willful, and dismissed the petition for remission of the forfeiture upon the ground that it was without power under Section 1020 of the Revised Statutes, 18 U. S. C. § 601, to grant the petition in view of the willful default of the principal, and that it had no power independently of the statute to entertain the petition."

The Court of Appeals, being in doubt as to the power of the District Court, certified the following questions to this Court for instructions:

"1. Is Section 1020 of the Revised Statutes (18 U. S. C. § 601) the exclusive source of the power of the District Court of the United States at any time to remit the forfeiture of the penalty of a recognizance taken in a criminal cause?

"2. Is the word 'party' appearing in the phrase 'willful default of the party' in Section 1020 of the Revised Statutes (18 U. S. C. § 601) intended to describe

(a) the person who makes application to the court for the remission of the forfeiture of the penalty, whether that person is the principal or the surety in the recognizance, or

(b) only the principal in the recognizance?

"3. If the answer to Question 1 is 'No' does the District Court of the United States have common law power to remit the forfeiture of the penalty of a recognizance taken in a criminal cause, where the default of the principal in the recognizance was willful?

"4. If Question 3 is answered and the answer thereto is 'Yes' is the common law power to remit the forfeiture limited to exercise upon an application made within the term of court at which the order of forfeiture was entered?"

The answers depend upon the construction of § 601 of Title 18 of the United States Code, set out below.[1] This section assumed its present form in the Revised Statutes § 1020, approved June 22, 1874. R. S. Title LXXIV, § 5596, repealed all acts mentioned in the revision passed prior to December 1, 1873. The revision substituted the word "party" for the word "parties" which was in the earlier act, and by reënactment thus raised the question as to whether the willful default mentioned in both the revision and the former act may be that either of the principal or his bail, or whether it is restricted, on account of the revision, to the principal

[1] "When any recognizance in a criminal cause, taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced."

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only. The provision for remission of forfeitures was first enacted in 1839 as § 6 of an "Act in amendment of the acts respecting the Judicial System of the United States." [2] The act included various procedural provisions designed to fix practice in the federal courts. The change to the singular in the Revised Statutes was made without any explanation of its purpose and indeed without the brackets or italics used to indicate a repeal or amendment. See Preface, R. S. (2d ed., 1878), p. v. The revised form, however, is to be accepted as correct, notwithstanding a possible discrepancy. R. S. § 5596; *United States* v. *Bowen,* 100 U. S. 508, 513; *Bate Refrigerating Co.* v. *Sulzberger,* 157 U. S. 1, 45. Cf. U. S. C., (1940 ed.) p. LVII, § 2 (a).

It appears to us that there can be but one person who can willfully default within the meaning of the section. This is the principal in the recognizance. By its terms he agrees to "appear for judgment." When, without excuse, he fails to appear, there is a willful default. The surety only guarantees that the principal will not default. In a certain sense the surety may default by failure to pay its obligation, but this is plainly not the kind of default to which the statute refers. Nor will the possibility of collusion of the surety with the absconding principal permit an interpretation that misconduct on the part of the applicant for relief from forfeiture is the "default" meant by the statute. The condition of the bond is the appearance of the principal at the time set. Nothing less satisfies the condition.

The appellants urge against this conclusion that, since the object of "a recognizance is not to enrich the treasury" but to promote convenience of criminal administration, *United States* v. *Feely,* Fed. Cas. No. 15,082, and to remedy hardships caused by defaults, the word "party" should be liberally construed to cover not only principals but sure-

[2] 5 Stat. 322.

ties, without willful default, even though the principal may have deliberately violated the terms of the recognizance. They further point out that justice suffers no affront, since surrender of the fugitive in time for trial is another and an essential condition of the remission of the penalty.

But the considerations of policy are too confused to afford a clear test of Congressional purpose. Paid sureties are often, as here, indemnified. Remission of penalty would inure to the benefit of defendants, who had violated their undertakings of appearance with consequent disorganization of criminal administration. A bail charged with custody of a defendant, *Taylor* v. *Taintor,* 16 Wall. 366, 371, may exercise to the substantial benefit of criminal administration a high degree of care to prevent default, if he knows the later fortuitous apprehension of the principal will not relieve him of the forfeit. It is not for courts to say whether strict forfeiture on willful default or a generous attitude toward innocent bail will be most conducive to the public welfare. Hence, not for reasons of policy, but because of the language of the statute, we conclude that Congress has chosen the former.

After the change to "party," with exceptions in the District Courts,[3] all the Circuits except the First[4] and Tenth have reached our conclusion, to wit, that the statute requires as a condition to the remission of the penalty a determination that the principal in the recognizance is free of willful default.[5] No Circuit has decided to the contrary.

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[3] *United States* v. *Traynor,* 173 F. 114, 116; *United States* v. *O'Leary,* 275 F. 202; *United States* v. *Slaimen,* 6 F. 2d 464; *United States* v. *Barger,* 20 F. 500; *Griffin* v. *United States,* 270 F. 263; cf. *United States* v. *Jacobson,* 257 F. 760.

[4] Compare *United States* v. *Slaimen,* 6 F. 2d 464 (D. R. I.), with *United States* v. *Vincent,* 10 F. Supp. 489 (D. Mass.), and *dicta* in *United States* v. *Vendetti,* 33 F. Supp. 34.

[5] *United States* v. *Kelleher,* 57 F. 2d 684 (C. C. A. 2d); *Sun Indemnity Co. of New York* v. *United States,* 91 F. 2d 120 (C. C. A. 3d);

Since there is no doubt as to the willful default of the principal, under the interpretation of the statute just reached, relief, if any there is for the bail, must be in other sources of judicial power as suggested in Questions 1 and 3 of the certificate. That is to say, that in addition to the statutory power the courts have a common law power to remit forfeitures in their discretion. *United States* v. *Feely*, 1 Brock. 255, Fed. Cas. No. 15082 (1813 C. C.), is relied upon as authority. In that case, decided before the statute, Chief Justice Marshall exercised the power and stayed proceedings. Appellant urges that forfeiture is a judgment within the power of courts to modify on application made, as here, during the term, and that this power is not affected by the statute, which was intended to extend the power to remission after the term in which forfeiture was entered.

No authority, historical or judicial, is cited by appellant to support its view that the purpose of the Act of February 28, 1839, was to confer power upon the courts of the United States to act after the term in which the forfeiture was entered, in contradistinction to power already existing to relieve from forfeitures during the term. We see

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United States v. *Robinson*, 158 F. 410 (C. C. A. 4th); *United States* v. *Nordenholz*, 95 F. 2d 756 (C. C. A. 4th); *Isgrig* v. *United States*, 109 F. 2d 131, 134 (C. C. A. 4th); *Fidelity & Deposit Co.* v. *United States*, 293 F. 575 (C. C. A. 5th); *United States* v. *Reed*, 117 F. 2d 808 (C. C. A. 5th); *United States* v. *Costello*, 47 F. 2d 684 (C. C. A. 6th); *Henry* v. *United States*, 288 F. 843 (C. C. A. 7th); *Skolnik* v. *United States*, 4 F. 2d 797, 799 (C. C. A. 7th); *United States* v. *Capua*, 94 F. 2d 292 (C. C. A. 7th); cf. *United States* v. *Libichian*, 113 F. 2d 368, 371, 372 (C. C. A. 7th); *Weber* v. *United States*, 32 F. 2d 110 (C. C. A. 8th); *La Grotta* v. *United States*, 77 F. 2d 673, 675 (C. C. A. 8th); *United States* v. *Rosenfeld*, 109 F. 2d 908 (C. C. A. 8th); *United States* v. *American Bonding Co.*, 39 F. 2d 428 (C. C. A. 9th); *Fidelity & Deposit Co. of Maryland* v. *United States*, 47 F. 2d 222 (C. C. A. 9th); *United States* v. *Von Jenny*, 39 App. D. C. 377, 381; *United States* v. *Allen*, 39 App. D. C. 383; *United States* v. *Walter*, 43 App. D. C. 468.

nothing in the act itself to persuade us that the generality of the words "whenever it appears to the court" means after the term in which the forfeiture was entered. Such a desire on the part of Congress to extend the power of the courts would be manifested by the language of extension rather than differentiation. If the reason was as appellant contends, why qualify the discretion after the term by the conditions of the statute and leave the discretion during the term unqualified?

Whatever may have been the powers of the courts of the United States before the statute, those powers are now regulated by statute. Cf. *United States* v. *Mack,* 295 U. S. 480, 488. These statutory powers are exclusive. Before remission may be allowed there must be a determination of lack of willfulness in the default, that a trial can be had, and that public justice does not otherwise require the enforcement of the penalty. The statement of the conditions negatives action without the satisfaction of those requirements. Generally speaking, a "legislative affirmative description" implies denial of the non-described powers. *Durousseau* v. *United States,* 6 Cranch 307, 314. The circumstances of this inquiry carry us beyond the rule of *expressio unius est exclusio alterius,* cf. *Ford* v. *United States,* 273 U. S. 593, 611, and into the domain of inconsistency of purpose. Cf. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 436 *et seq.* There cannot logically be two series of tests to determine the power of a federal court to relieve of forfeiture under a recognizance. The conditions for action make action without meeting the conditions, we think, contrary to Congressional purpose, as expressed in the statute. Since the passage of the original statute on remission of forfeitures, the courts of the United States have, in general, held the same view that the statutory power was exclusive.[6]

[6] *United States* v. *Mack,* 295 U. S. 480, 488; *United States* v. *Walter,* 43 App. D. C. 468; *Sun Indemnity Co. of New York* v.

Our answer to Question 1 is "Yes." Our answer to Question 2 (a) is "No". Our answer to Question 2 (b) is "Yes." It is not necessary to answer Questions 3 and 4.

It is so ordered.

MR. JUSTICE ROBERTS took no part in the decision of this case.

BOARD OF TRADE OF KANSAS CITY ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 143. Argued November 18, 1941.—Decided January 5, 1942.

1. Upon a thorough investigation of the grain rate structure in the western district, the Interstate Commerce Commission prescribed rate-break combinations as the exclusive basis of transit privileges at primary markets. However, transit privileges at interior points on routes passing through a primary market were allowed on the basis of lower rates in effect over competing routes between the same points. *Held* that, considering the whole history of grain rate regulation, the differentiation between primary markets and interior points thus made by the Commission was not an undue or unreasonable discrimination forbidden by the Interstate Commerce Act. P. 544.
2. The contention that the orders of the Commission are invalid because they deprive the primary markets of natural competitive advantages is rejected. P. 548.
3. Whether a discrimination is unreasonable under the Act is a question of fact that has been confided by Congress to the judgment and discretion of the Commission, and upon which its decisions, made the basis of administrative orders operating *in futuro,* are not to be

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United States, 91 F. 2d 120; *United States* v. *Robinson,* 158 F. 410, 412; *United States* v. *Nordenholz,* 95 F. 2d 756; *United States* v. *Reed,* 117 F. 2d 808; *United States* v. *Costello,* 47 F. 2d 684; *Henry* v. *United States,* 288 F. 843; *United States* v. *Libichian,* 113 F. 2d 368; *United States* v. *Rosenfeld,* 109 F. 2d 908.

disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power. P. 546.

36 F. Supp. 865, affirmed.

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

Messrs. M. W. Borders and *Samuel J. Wettrick* for appellants.

Mr. J. Stanley Payne, with whom *Assistant Solicitor General Fahy, Assistant Attorney General Arnold,* and *Messrs. Smith R. Brittingham, Jr.* and *Daniel W. Knowlton* were on the brief, for the United States et al.; and *Mr. Frank A. Leffingwell* for the Texas Industrial Traffic League et al., appellees.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

We have before us on this appeal orders embodying a series of determinations made by the Interstate Commerce Commission after inquiries into the grain rate structure stretching over a period of twelve years. The plaintiffs are millers, elevator companies, boards of trade, grain exchanges, and other business interests in Kansas City, St. Louis, Omaha, St. Joseph, Atchison, Leavenworth, and Minneapolis, the great grain centers known in the trade as "primary markets." The Commission's orders, they complain, create an unlawful discrimination under the Interstate Commerce Act, §§ 1 (5), 2, 3 (1), by prohibiting the interruption of shipments of grain for the purpose of being stored, marketed, or processed—technically characterized as transit privileges—at these primary markets on the lower rates under which these privileges are available at competing interior points (*i. e.,*

grain centers other than primary markets). The District Court dismissed the complaint, 36 F. Supp. 865, and the case is here on appeal. Judicial Code § 210; 28 U. S. C. § 47 (a).

As one phase of the effort to relieve agricultural distress, Congress in 1925 by the Hoch-Smith Resolution directed the Interstate Commerce Commission to make a thorough investigation of the rate structure of common carriers "in order to determine to what extent and in what manner existing rates and charges may be unjust . . . or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make, in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist." 43 Stat. 801; 49 U. S. C. § 55.

Accordingly, on September 30, 1926, the Commission instituted a comprehensive investigation into the rates and practices affecting grain and grain products in the Western District.[1] The Commission called its proceeding "unusual," involving as it did "three score and more of major issues, affecting every part of a vast territorial domain, each of which would ordinarily present a case of more than average importance." 164 I. C. C. 619, 697. Extensive hearings were held, and on the basis of a huge record of some 53,000 pages of testimony, including 2,100 exhibits, 20,000 pages of memoranda, exceptions, and oral arguments, the Commission on July 1, 1930, issued a report and order prescribing maximum rates for grain and grain products. 164 I. C. C. 619. A supplemental report and order were issued on April

[1] The Western District is defined as the area "on and west of the Mississippi River, west of Lakes Superior and Michigan, and west of and including Illinois."

13, 1931. 173 I. C. C. 511. Because the Commission did not take evidence relating to the drastic changes in economic conditions due to the depression occurring between the close of its hearings and the date of its orders, this Court set aside the orders. *Atchison, T. & S. F. Ry. Co.* v. *United States,* 284 U. S. 248. New and extensive hearings were thereupon held, and on October 22, 1934, the Commission in an elaborate report affirmed some of its earlier findings and modified others. 205 I. C. C. 301. Upon further consideration of the record, the Commission issued a supplemental order to remove discriminations between interior points. 215 I. C. C. 83. Dealers at the primary markets thereupon filed formal complaints seeking modification of that part of the Commission's orders which differentiated between transit privileges at primary markets and those at interior points. Hearings upon these complaints produced more than 7,000 pages of new testimony and over 250 exhibits. On July 27, 1937, the Commission authorized, but did not require, the carriers to meet the requests of the primary markets. 223 I. C. C. 235. The carriers having declined to act on this authorization, the Commission was petitioned to enter a mandatory order. Proceedings were reopened, new arguments were heard, and on July 12, 1938, the Commission found that the prescribed rates did not subject the primary markets to any "undue prejudice and disadvantage." 229 I. C. C. 9, 16. Upon reconsideration this conclusion was affirmed on March 13, 1939. 231 I. C. C. 793. To upset these findings and to strike down the orders based upon them the present suit was filed.

Since the transit privilege is at the core of this litigation, a brief exposition of its mechanics and manipulations becomes necessary. The privilege of transit enables grain to be shipped from point A to point B, there to be stored, marketed, or processed, and later

reshipped to point C at a rate less than the combination of the separate rates from A to B and B to C. See Transit Case, 24 I. C. C. 340; *Atchison, T. & S. F. Ry. Co.* v. *United States,* 279 U. S. 768, 777–79; Locklin, Economics of Transportation (1935) 122–23, 629–31. The shipper pays the local rate on the inbound shipment to the transit point, B in our illustration. A receipted freight bill specifying the point of origin, the rate paid, and other pertinent data, is recorded with the transit bureau as evidence of intention of further transportation of the inbound grain or its equivalent. When the outbound shipment is tendered to the carrier, the freight bill is surrendered in order that the shipper may obtain an outbound rate lower than that which he would otherwise be compelled to pay. The privilege belongs, as it were, to both the grain and its shipper. "The benefit attaching to grain shipped into the primary market is commonly so broad that it is transferable not only to another owner of the same grain, but to like grain coming from the same country point." *Atchison, T. & S. F. Ry. Co.* v. *United States,* 279 U. S. 768, 778.

This privilege was available in the primary markets under two different rate schemes: (1) the "overhead through rate" and (2) the "rate-break combination."

(1) An overhead through rate is the rate from an originating point to the final destination, or to a gateway like Chicago, via a particular point. Thus, on a shipment of grain from Enid, Oklahoma, to Chicago via Kansas City, the overhead through rate was 38.5 cents per hundred pounds. Under this rate, grain reaching Kansas City could receive the various privileges of transit upon payment of 23.5 cents (the local rate from Enid to Kansas City) upon the inbound shipment, and the difference (known as the "transit balance") between the overhead through rate, 38.5 cents and the 23.5 cents inbound rate, upon the outbound shipment.

(2) On a "rate-break" basis, however, grain moved on a combination of the local or flat rate from the originating point to the primary market and the "proportional" rate from that market to a gateway or the final destination. The primary markets therefore came to be known as "rate-break" points. The "proportional" rate, representing an average of transit balances under overhead through rates, was designed to offset the competitive advantages of lines going through rate-break points as against lines starting there. The significance of the rate-break combination lay in the fact that for many points of origin there were no overhead through rates. In the above example, the proportional rate on outbound grain shipments from Kansas City to Chicago was 17.5 cents. The applicable rate on a shipment of grain from an originating point having no through rate to Chicago via Kansas City, with or without transit at Kansas City, was a combination of the local rate to Kansas City and the proportional rate from Kansas City to Chicago.

Thus, the difference between the two systems permitting transit at primary markets was the rate at which the outbound traffic moved. Under the rate-break combination the outbound shipment moved at the proportional rate; under the overhead through rate, it moved at the transit balance. The availability of these two rate bases, the Commission found, gave rise to serious discriminations: "Whether outbound shipments are at proportional rates or transit balances depends upon the selection of the inbound freight bill. If the inbound freight bill covers a shipment from an origin point from which there is no overhead route with transit to final destination, the outbound shipment is at the proportional rate. But grain from a point from which there is no overhead rate with transit can, under present practice, be substituted for grain from a point from which there is such an overhead rate with transit, and can be forwarded, upon pres-

entation of the inbound expense bill covering inbound transportation from the latter point, at the transit balance due that expense bill." 164 I. C. C. 619, 634.

"The uncertainty in advance as to the outbound basis of charge arises from the dependence of that charge upon a check of the individual shipper's range of inbound billing. The outbound charge will be a transit balance if the inbound freight bill surrendered covers a shipment from an origin from which there is a one-factor through rate less than the rate-break combination, and will be the higher proportional rate if the inbound freight bill surrendered covers a shipment from an origin from which there is no such one-factor through rate. Transit balances will vary with the measure both of the through rates and of the inbound rates to the transit point.

"The advantage to the user of the transit balance over the user of the higher proportional rate is evident, and increases in the ratio of the increase in the storage capacity of the respective cash-grain dealers at the rate-break markets. In other words, the greater the storage capacity the wider the selection of inbound billing and proportionately more transit balances." 205 I. C. C. 301, 335.

In the judgment of the Commission these practices "tended to disrupt the rate-break combinations, disorganize the general rate structure, make uncertain in advance the outbound basis of charge, give an undue preference to the users of transit balances over the users of proportional rates, depress the price of grain at the rate-break markets and, by direct reflection, at the country points, and reduce the revenues of the carriers." 205 I. C. C. 301, 334.

Thus, the issue before the Commission was "whether the rates through the primary markets shall be made on the combination of flat rates to and proportional rates from the markets exclusively, or in part, or at all." Put-

ting in the balance all the complex and conflicting interests, the Commission reached these conclusions: "Just so long as transit balances remain a substantial factor in the adjustment of rates from the primary markets, just so long will there be undue preferences between outbound shippers, as well as general instability in rates resulting from shippers seeking the translation of transit balances into proportional rates. . . . The best interests not only of the primary markets, but of the producer, consumer, and carrier will be served by the fullest possible application of the rate-break combinations through primary markets." 164 I. C. C. 619, 644–45.[2]

Accordingly, it prescribed new rate-break combinations[3] and made them applicable to transit both at pri-

[2] The Commission specifically found that the adoption of the exclusive rate-break combination at the primary markets would give the markets substantial competitive advantages over interior transit points: "The proportional rate is applicable over all outbound lines upon surrender of an inbound freight bill covering an inbound shipment by rail, whether the transportation through the rate-break market is over a reasonably direct route or not. It is the equivalent in all respects, and more, of a local rate. . . . It is designed for the final gathering in by the rate-break market, for through transportation at less than the combinations of local rates that would otherwise apply, of grain not procurable under one-factor through rates less than the rate-break combinations (and resulting transit balances less than the proportional), because of the limitations on out-of-line and back-haul movement incident to the usual application of the one-factor through rates only over reasonably direct routes, and because of the further usual requirement of outbound shipment from the transit point over the rails of the inbound carrier. The proportional rates therefore open up to the rate-break markets the widest possible range of originating and distributing territory and afford, together with the larger number of carriers usually found converging inbound to and radiating outbound from the rate-break market, in the direction of the normal flow of the grain traffic, a decided advantage to that market over the interior transit point." 205 I. C. C. 301, 340–41.

[3] The Commission revised existing rate-break combinations, reducing both the inbound flat rates and the outbound proportionals, and ordered that the prescribed rate-break combinations be made the

mary markets and at interior points on routes passing through such markets.[4] The exclusive rate-break combinations were not made applicable to interior points not on routes passing through rate-break markets because the rate-break combinations had no relevance to these points. 164 I. C. C. 619, 645; 173 I. C. C. 511, 516–17.

A concrete illustration will rob this railroad jargon of its mystery. The through rate over numerous routes from Kansas City to Chicago was 16 cents. Some of these routes pass through Omaha, from which the proportional rate was also 16 cents. Other routes from Kansas City to Chicago do not pass through Omaha. Interior points like Falls City and Nebraska City, which are on routes through Omaha, had to pay 6½ cents, the local rate to Omaha, plus 16 cents, the proportional rate from Omaha to Chicago. But other interior points lying between Kansas City and Chicago on routes not passing through Omaha were required to pay only the 16 cents through rate. The net result was that interior points on routes passing through rate-break markets were placed at a substantial competitive disadvantage with interior points not on such routes.

Dealers at the interior points on routes passing through rate-break markets like Omaha petitioned the Commission to modify its orders so as to remove this discrimination between interior points. They urged on the Commission that, inasmuch as the fundamental purpose of the rate-break combinations was the establishment of uniform proportional rates on outbound shipments from

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exclusive basis of charge upon grain shipments moving through or stopping for transit at primary markets, and that overhead through rates less than the prescribed rate-break combinations be cancelled. 164 I. C. C. 619, 645.

[4] "The restriction is laid on the intermediate points other than the market, as well as upon the market, in order not to discriminate against the market in favor of the other intermediate points." 173 I. C. C. 511, 516.

primary markets, this purpose would not be frustrated if, in order to meet the lower through rate over competitive routes, transit on the through rate were permitted at interior points on routes through rate-break markets. The Commission found that the requested modification would remove the discrimination between interior points without subjecting the primary markets to any new substantial competitive disadvantages. 215 I. C. C. 83, 92–3. It found that under transit on an overhead through rate, dealers at interior points operated under important competitive disadvantages. The through rates were applicable only on "reasonably direct," not "markedly circuitous" routes, and outbound shipments from the transit point were usually limited to the rails of either the inbound carrier or a carrier participating with it in a joint rate via the transit point. Dealers at rate-break markets, on the other hand, were free from such restrictions as to circuity of routes and choice of outbound carrier. The proportional rate was applicable to all lines from primary market to destination, regardless of the inbound shipment's point of origin. The Commission found this to be a "substantial advantage to the transit operators at the rate-break markets over the transit operators at the interior transit points." 215 I. C. C. 83, 91. Accordingly, it modified its previous orders so as to permit transit at interior points on routes passing through a primary market "on the basis of a lower rate in effect over a competing route between the same points." 215 I. C. C. 83, 93.

To give this order practical application: At all interior points lying on routes from Kansas City to Chicago, transit privileges were available at the 16 cents rate, while shipments stopping for transit at primary markets along such routes, *e. g.*, Omaha, Atchison, Leavenworth, and St. Joseph, could move only at the rate-break combination of the 6½ cents inbound rate and the 16 cents outbound proportional rate.

The crux of this litigation is the validity of the differentiation between primary markets and interior points thus made by the Commission in the setting of the whole history of grain rate regulation.

Dealers at the primary markets complained against this differentiation. The Commission again canvassed the perplexing factors of the tangled problem before it. After pointing out that at the earlier stages of the grain rate inquiry "especially the markets" had supported the system of "rate-breaks at market points and overhead rates with transit at local points," the Commission observed: "No extensive rate structure can be made perfect nor can any rate structure be made permanent in any real sense in a changing world. . . . The two *Grain cases* together have demonstrated the impossibility, even on the part of those most experienced, most competent, and most expert, of seeing in advance the consequences of the particular changes in rates and practices here under consideration. Apparently nothing but experience can furnish a demonstration, and even the demonstration of experience may not prove to be conclusive unless it can be had on a scale sufficiently large and at intervals of time sufficiently close, and under substantially similar conditions." 223 I. C. C. 235, 245–46. It took occasion to recall these guiding considerations from its first report: "It would be impossible to take any comprehensive action without adversely affecting certain of the conflicting interests upon this record. Nothing but experience can demonstrate what the effect will be regarding certain of these issues. . . . All parties should cooperate to make careful note of the effect upon their interests, with the view to bringing to our attention from time to time, after a reasonable trial, those situations which may require further consideration." 164 I. C. C. 619, 698. To yield to the wish of the dealers of the primary markets would, the Commission found, work "a hardship upon the milling

industry at many intermediate points, with little or no benefit to the markets, which would still be at a disadvantage in competing with other rate-break markets and interior points on lower-rated routes." 223 I. C. C. 235, 245. It concluded, therefore, that the record did not justify the mandatory order sought by the markets. Instead it authorized the carriers by appropriate tariffs to make "restricted departures from the exclusive application of proportional rates at rate-break points for a limited period of time" upon condition that such departures "should be surrounded by such effective safeguards as will make it impossible to reestablish" the discriminations incident to the double system of rates at primary markets. 223 I. C. C. 235, 246.

The carriers having declined to act on this authorization, the markets again sought a compulsory order. Upon reargument, the Commission concluded that "the granting of the transit requested would break down the rate-break adjustment prescribed in the *Grain Case;* that said adjustment should be abandoned, if at all, only upon demonstration of its failure as a workable adjustment, over an adequate period of normal conditions in the grain trade; that such a test has not been given the adjustment." 229 I. C. C. 9, 16.[5] Accordingly, the Commission dismissed the complaints and withdrew its previous permission to the carriers voluntarily to establish the rates requested by the primary markets. After a second reargument the Commission adhered to this conclusion. 231 I. C. C. 793.

The appellants do not claim that the Commission's findings are devoid of proof or that they were reached without observance of appropriate procedures. Their claim, in

[5] To rescind the previous modifications, the Commission found, "would deprive these interior transit points of the same kind of transit accorded interior transit points on other routes and . . . would not materially benefit complainants, who would still be confronted with their major competition." 229 I. C. C. 9, 14.

substance, is that whatever benefits the double system affords the primary markets are natural advantages, and that to deprive them of these advantages works an unlawful discrimination.

The Act forbids the Commission to establish a rate structure which would give one transit point an "undue or unreasonable preference or advantage" and would subject another point to an "undue or unreasonable prejudice or disadvantage." But this does not mean that the law compels identity of treatment for like services at different places. It prohibits only "undue" or "unreasonable" discriminations. "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission . . ., and upon which its decisions, made the basis of administrative orders operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power." *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481; see *Nashville, C. & St. L. Ry.* v. *Tennessee*, 262 U. S. 318, 322; *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 352–53.

The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems. Cf. *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 581–82.

The wisdom of the narrow scope within which Congress has confined judicial participation in the rate-making process is strikingly vindicated by the history of this

controversy. The Commission's laborious investigation into the grain rate structure disclosed that discriminations were inseparable from the operation, side by side, of two systems of rates allowing transit of grain at primary markets. This basic finding is not challenged. And it is this fact which created the problem for solution by the Commission. There was no ready answer either in law reports or in economic experience. Any solution had to rest on informed judgment. And judgment in a situation like this implies, ultimately, prophecy based on the facts in the record as illumined by the seasoned wisdom of the expert body. In this perspective, the Commission had several choices before it—but all inevitably rested upon trial and error. It might have established the overhead through rate as the exclusive basis of transit at primary markets. It might have banked on the exclusive rate-break combination. It might have abolished the privilege of free transit entirely. Of only one thing could the Commission be completely certain: no action could be taken without "adversely affecting certain of the conflicting interests." 164 I. C. C. 619, 698. Weighing the prospective gains and hurts which were part of all of the proposed remedies, the Commission decided upon the exclusive rate-break combination. It did so, however, with full recognition that the wisdom of its action had to meet the test of experience. Therefore, it treated its conclusion as part of a continuing process, and requested the parties to give the system which it adopted a "reasonable trial," contemplating such further consideration as the practical operation of the system would require. The Commission refused the modifications asked by the appellants because the rate-break adjustment was "entitled to a thorough test over an adequate period of normal conditions in the grain trade" and it had "received no such fair test up to the present time." To grant the re-

quested modifications would "break down the rate-break adjustment." 229 I. C. C. 9, 15–16. These findings are incontestable.

That the Commission itself was of divided mind in the successive stages of this controversy emphasizes that the problem is enmeshed in difficult judgments of economic and transportation policy. Neither rule of thumb, nor formula, nor general principles provide a ready answer. We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission. It is not for us to tinker with so sensitive an organism as the grain rate structure, only a minor phase of which is caught in the record before us. If we were to grant the relief sought by the appellants, we would be restoring evils which the exclusive rate-break adjustment was designed to remove—evils which, for all we know, would be far more serious than those complained of by the appellants.

What we have said sufficiently disposes of the suggestion that the orders of the Commission must be stricken down because they wipe out natural competitive advantages of the primary markets. A rate structure found to involve serious discriminations among shippers, carriers, and transit points alike, is hardly a manifestation of nature beyond the Commission's power to repair.

Affirmed.

MR. JUSTICE ROBERTS is of opinion that the decree of the District Court should be reversed.

FISCHER, COMMISSIONER OF INSURANCE OF IOWA, RECEIVER, *v.* AMERICAN UNITED LIFE INSURANCE CO. ET AL.

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

No. 91. Argued December 18, 1941.—Decided January 5, 1942.

1. A suit in the federal District Court in Iowa, brought by an Iowa receiver of a Michigan insurance company, with the approval of an Iowa court, against the Michigan and Texas receivers of the company, for an adjudication of rights in assets of the company which were in his possession and which had been deposited pursuant to statutes of Iowa for the protection of a special class of policyholders, *held* (diversity of citizenship and jurisdictional amount being present) within the jurisdiction of the court under § 57 of the Judicial Code. P. 555.
2. The District Court is not prevented from exercising jurisdiction in such case by any rule of deference to state courts. P. 553.

117 F. 2d 811, reversed.

CERTIORARI, *post*, p. 589, to review a decree reversing the District Court and directing that the bill of complaint be dismissed for want of jurisdiction.

Messrs. Willis J. O'Brien and *John N. Hughes, Jr.*, with whom *Mr. John N. Hughes* was on the brief, for petitioner.

Mr. Clayton F. Jennings, with whom *Mr. Edmund C. Shields* was on the brief, for John G. Emery, Commissioner of Insurance of Michigan, respondent.

The administration of the estate of an insolvent life insurance company is within the exclusive jurisdiction of the court appointing the domiciliary receiver.

Under Michigan law title to all assets was in the Michigan receiver.

See *Relf* v. *Rundle*, 103 U. S. 222; *Bolen-Darnell Coal Co.* v. *Kirk*, 25 Okla. 279; *Chesapeake Ry. Co.* v. *McCabe*,

213 U. S. 218; *Rundle* v. *Life Assn.*, 10 F. 720; *Baltimore & Ohio R. Co.* v. *Koontz*, 104 U. S. 5; *Augusta* v. *Kimball*, 91 Me. 608; *Bernheimer* v. *Converse*, 206 U. S. 516; *Fish* v. *Smith*, 73 Conn. 281; *Barley* v. *Gittings*, 15 App. D. C. 438; *MacMurray* v. *Sidwell*, 155 Ind. 566; *Joy* v. *Midland State Bank*, 26 S. D. 254; *Hardee* v. *Wilson*, 129 Tenn. 513; *Avery* v. *Boston Safe Deposit Co.*, 72 F. 701; *Hale* v. *Hardon*, 95 F. 747; *American Water-Works Co.* v. *Farmers' Loan Co.*, 20 Colo. 211; *Gilman* v. *Ketcham*, 84 Wis. 69; *Life Assn. of America* v. *Goode*, 71 Tex. 95; *Childs* v. *Cleaves*, 95 Me. 514; *Nashua Savings Bank* v. *Anglo-American Land Co.*, 189 U. S. 221; *Lewis* v. *Clark*, 129 F. 570; *Clark* v. *Williard*, 292 U. S. 112.

The laws of Michigan are part of the charter of a Michigan insurance company.

Administration of the deposited assets was solely in the Michigan receiver. The federal court had no jurisdiction. *Fry* v. *Charter Oak Life Ins. Co.*, 31 F. 197; *Parsons* v. *Charter Oak Life Ins. Co.*, 31 F. 305; *Smith* v. *Taggart*, 87 F. 94; *Blake* v. *Old Colony Life Ins. Co.*, 209 F. 309; *Illinois Life Insurance Co.* v. *Tully*, 174 F. 355; *Motlow* v. *Southern Holding & Securities Corp.*, 95 F. 2d 721, cert. den. 305 U. S. 609; *International Co.* v. *Occidental Life Ins. Co.*, 98 F. 2d 138, cert. den. 305 U. S. 639; *Holloway* v. *Federal Reserve Life Ins. Co.*, 21 F. Supp. 516; *Holley* v. *General American Life Ins. Co.*, 101 F. 2d 172, cert. den. 307 U. S. 615; *Hutchins* v. *Pacific Mutual Life Ins. Co.*, 97 F. 58; *Hobbs* v. *Occidental Life Ins. Co.*, 87 F. 2d 380, cert. den. 305 U. S. 603; *Kansas* v. *Occidental Life Ins. Co.*, 95 F. 2d 935, cert. den. 305 U. S. 603; *Phipps* v. *Chicago, R. I. & P. Ry. Co.*, 284 F. 945; *Wilson* v. *Keels*, 54 S. C. 545; *People* v. *State Life of Illinois*, 296 Ill. App. 337.

The reinsurance treaties created a novation.

Mr. John M. Scott, with whom *Messrs. H. T. McGown* and *B. E. Godfrey* were on the brief, for Dan E. Lydick, Texas receiver; and *Mr. Robert A. Adams* for the American United Life Ins. Co., respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question presented by this case is whether the United States District Court for the Southern District of Iowa had jurisdiction to determine a dispute between the Iowa receiver of American Life Insurance Co., on the one hand, and the Michigan and Texas receivers, on the other,[1] as respects the title to, and the right to administer, certain assets of the company in the possession of the Iowa receiver. The District Court held that it had jurisdiction over the controversy; and it made a determination of the issues on the merits. The Circuit Court of Appeals, one judge dissenting, reversed, 117 F. 2d 811, holding that, in light of such cases as *Lion Bonding & Surety Co.* v. *Karatz,* 262 U. S. 77, the suit in the District Court could not be maintained and that the bill should be dismissed "for want of jurisdiction." We granted the petition for certiorari because an application of the principles underlying *United States* v. *Klein,* 303 U. S. 276, and *Commonwealth Trust Co.* v. *Bradford,* 297 U. S. 613, which were disregarded by the court below, would probably lead to a different result.

The Iowa receiver brought the suit pursuant to the authority and direction of the Iowa court. It is based upon diversity of citizenship (Judicial Code, § 24, 28 U. S. C. § 41) and seeks to enforce against nonresident defendants, as authorized by § 57 of the Judicial Code,

[1] The Iowa receiver also sought relief against respondent American United Life Insurance Co. which, after institution of the receivership proceedings and the appointment of receivers for American Life Insurance Co., entered into a written agreement for the reinsurance of the business of American Life Insurance Co. and issued a certificate of assumption for all insurance policies outstanding of American Life Insurance Co. We mention the fact without more, because the presence of that respondent is not material to the jurisdictional aspects of the case with which we are here solely concerned.

28 U. S. C. § 118, a "legal or equitable lien upon or claim to" personal property within the district where the suit is brought and to remove an "incumbrance or lien or cloud upon the title" to such property. The bill in substance alleged and the District Court found that the Iowa receiver was in possession of securities of a face amount in excess of $3,000,000; that those securities had been deposited with the Insurance Commissioner of Iowa, pursuant to statutes of Iowa and certain reinsurance agreements between American Life Insurance Co. and its Iowa predecessor, for protection of the policy holders of the latter company on its insolvency; that Iowa had title to those funds and the Iowa receiver had the sole and exclusive right to administer them. The District Court held that although the action was *in rem* it had not only jurisdiction over the subject matter but also over the defendants, since they all answered, and since two of them filed counterclaims asking that the securities in possession of the Iowa receiver be delivered to them, and since the other asked for general equitable relief. Accordingly, it ordered, *inter alia,* that the Michigan and Texas receivers account for certain collections [2] which they had made on the securities in the Iowa fund; that they deliver to the Iowa receiver certain records pertaining to those securities; that the Michigan receiver deliver to the Iowa receiver certain records pertaining to the policies protected by that fund; and that the Michigan and Texas receivers be enjoined from making collections on those securities and from interfering in any way with the Iowa receiver's administration of them.

[2] The Michigan receiver had been collecting in Michigan, and the Texas receiver in Texas, principal and income on the securities deposited in Iowa, from obligors residing in their respective states. Certain remittances have been made by the Michigan receiver to the Iowa receiver pursuant to an agreement between them. The Texas receiver holds the amounts collected in Texas.

We express no opinion on the merits of the controversy. Nor do we pass on the contention that *Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357, prevents the entry of an *in personam* judgment in the circumstances of this case. For the sole question passed upon by the court below was the power and propriety of the action of the District Court in taking jurisdiction of the cause under § 57 of the Judicial Code.

It is immaterial to this inquiry whether the Michigan receiver acquired no interest in or power over assets outside of Michigan (*Booth* v. *Clark*, 17 How. 322), or, as held by the court below, was the statutory successor under Michigan law of American Life Insurance Co. and as such had title to all of its assets wherever situated. *Relfe* v. *Rundle*, 103 U. S. 222, 225; *Clark* v. *Williard*, 292 U. S. 112, 120. Cf. *Converse* v. *Hamilton*, 224 U. S. 243. Even though the latter were true, claimants entitled to the benefits of the fund in Iowa might pursue their suits and remedies against it in derogation of the claim of the Michigan receiver, if that were Iowa's policy. *Clark* v. *Williard*, 294 U. S. 211. That is the asserted Iowa policy here. The Iowa receiver is in possession of the securities in question. He seeks, with the approval of the Iowa court, an authoritative determination by the federal court of the question whether under Iowa law those securities and the collections thereon should not be held for the special class of claimants for whom the fund was allegedly established. The federal court has the power to resolve the controversy. And there is no consideration of judicial administration, based on appropriate deference to the state courts, why it should not exercise it.

Lion Bonding & Surety Co. v. *Karatz, supra,* does not stand in the way. There the federal court, through its receivers, assumed command over property which was in the possession of the state court. That action was taken in violation of the well-settled principle (pp. 88–89) that

"Where a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts." Such possession of the *res* by the state court disenabled the federal court from exercising any control over it. But a determination of the issues in this controversy does not necessarily involve a disturbance of the possession or control of the Michigan and Texas courts over the property in their possession. It would indeed have no such necessary consequence even though the securities in question were in their possession. As held in *United States* v. *Klein, supra,* p. 281, a state court may properly adjudicate rights in property in possession of a federal court [3] and render any judgment "not in conflict with that court's authority to decide questions within its jurisdiction and to make effective such decisions by its control of the property." And see *Riehle* v. *Margolies,* 279 U. S. 218, 224–226. The same procedure may be followed by a federal court with respect to property in the possession of a state court. *General Baking Co.* v. *Harr,* 300 U. S. 433; *Commonwealth Trust Co.* v. *Bradford, supra,* 297 U. S. 613; *Waterman* v. *Canal-Louisiana Bank & Trust Co.,* 215 U. S. 33; *Ingersoll* v. *Coram,* 211 U. S. 335; *Byers* v. *McAuley,* 149 U. S. 608, 620. The appropriate exercise of the discretion of a federal court of equity may require it to refuse even to adjudicate rights in specific property if the state court has already undertaken such a determination. *Kelleam* v. *Maryland Casualty Co.,* 312 U. S. 377, 382. Furthermore, the federal court may not "seize and control the property which is in the possession of the state court" nor interfere with the state court or its functions. *Waterman* v. *Canal-Louisiana Bank & Trust Co., supra,* pp. 44, 45; *Princess Lida* v. *Thompson,* 305 U. S. 456. Short of that, how-

[3] As to bankruptcy, see *Isaacs* v. *Hobbs Tie & Timber Co.,* 282 U. S. 734; *Straton* v. *New,* 283 U. S. 318.

ever, the federal court may go. Cf. *Oakes* v. *Lake,* 290 U. S. 59.

Tested by those standards, assumption of jurisdiction by the federal court was wholly proper. A determination by it of the rights of the parties in the *res* could be had "with proper regard for the rightful independence of state governments in carrying out their domestic policy" (*Pennsylvania* v. *Williams,* 294 U. S. 176, 185) and in full recognition of the necessity for "harmonious coöperation of federal and state tribunals." *Princess Lida* v. *Thompson, supra,* p. 466. We repeat that neither Michigan nor Texas is entitled to the securities if such a disposition of them would contravene Iowa law. A determination of the nature and the extent of the rights of Iowa, and its receiver, in the securities clearly would not constitute an interference with the jurisdiction of the Michigan and Texas courts. For even if those courts were in possession of the fund, their jurisdiction would not be so exclusive as to bar an adjudication by the federal court of the rights of a claimant to the *res* or the quantum of his interest in it. *United States* v. *Klein, supra.* It follows *a fortiori* that where, as here, they are not in possession of the *res,* such a decree of the federal court is proper. Though binding on the parties, both as respects their rights to the fund and the collections thereon, it is not disruptive of orderly administration by the state courts nor conducive to unseemly collisions between the state and federal authorities. For, unlike the situation in *Kelleam* v. *Maryland Casualty Co., supra,* the state court which has command over the *res* has not only not undertaken an adjudication of the controversy; it has referred the matter to the federal court.

Whether the scope of the decree entered by the District Court was proper we do not decide. We only hold that the District Court had jurisdiction to resolve the controversy under § 57 of the Judicial Code. The Circuit Court of Appeals should have decided what rights, under Iowa

law, Iowa and its receiver had to the securities and the collections thereon, and whether the decree entered by the District Court was kept within the appropriate limits. Since the Circuit Court of Appeals did not decide those questions, we reverse its judgment and remand the cause to it for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE ROBERTS did not participate in the decision of this case.

IRVING TRUST CO. ET AL., EXECUTORS, ET AL. *v.* DAY, EXECUTOR.

APPEAL FROM THE SURROGATE'S COURT, KINGS COUNTY, NEW YORK.

No. 51. Argued December 11, 1941.—Decided January 5, 1942.

1. Where a state statute is challenged as violative of the contract clause of the Federal Constitution, the existence of the contract and the nature and extent of its obligations are federal questions, and the rulings of the state court thereon are not conclusive here. P. 561.
2. A State is not forbidden by the Federal Constitution to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction. P. 562.
3. Section 18 of the New York Decedent Estate Law, which, in the case of wills thereafter executed, gives to a surviving spouse a right of election to take as in intestacy, *held* not an unconstitutional impairment of the obligation of a previously executed waiver by the surviving spouse of any right in the estate of the decedent, and not inconsistent with due process of law, where, subsequently to the enactment of the Section, the decedent executed a codicil to his will and thereby made the Section operative. P. 562.

284 N. Y. 527, 32 N. E. 2d 539, affirmed.

APPEAL from a decree, entered on remittitur, sustaining the right of appellee's decedent to elect under § 18 of the New York Decedent Estate Law to take against the provi-

sions of a will. See also 171 Misc. 612, 13 N. Y. S. 2d 76; 258 App. Div. 596, 17 N. Y. S. 2d 316.

Mr. Philip Zierler for the Irving Trust Co. et al., appellants.

By prescribing a formality of execution more exacting than that required by pre-existing statutes, § 18 violated vested contract rights under agreements made before its effective date.

At the time of the agreement in this case, a contract between a man and woman, in contemplation of marriage, by which either one relinquished all rights in the estate of the other, was fully recognized and enforced and was not required to be acknowledged.

Under the instrument of February 2, 1922, which was acted upon by McGlone at the time of the marriage on February 4, 1922, he acquired a vested right to exclude Mrs. McGlone from claiming any interest in his estate.

The rights created by the agreement are within the constitutional guaranty against impairment of the obligations of contract and taking of property without due process of law.

The agreement constituted a deliberate and informed abandonment of known rights. McGlone altered his position relying thereon. Mrs. McGlone was estopped from asserting the right to elect to take against his last will and testament.

Mr. Ralph L. Kaskell, Jr., submitted for Edward McGlone et al., appellants.

Mr. Andrew F. Van Thun, Jr., with whom *Mr. George H. Burtis* was on the brief, for appellee.

Mr. Justice Jackson delivered the opinion of the Court.

The federal question presented upon this appeal is whether § 18 of the New York Decedent Estate Law

works an impairment of the obligation of contract, forbidden by Article I, § 10 of the Constitution, or a deprivation of property without due process, forbidden by the Fourteenth Amendment.

The instrument which appellants claim embodies a contract which has been impaired, and under which they claim property rights, reads as follows:

"I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McGlone, in London, England, on February 4th, 1922, wish to record, of my free will, that, as I already possess, in my own right, ample of this world's goods in the way of a fortune of my own, as a compliment to my aforesaid husband, and for other good and sufficient reasons, I hereby, voluntarily and irrevocably renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized."

Appellee's decedent, Helena Day Snyder, who died in the course of this litigation, executed this instrument in London two days before her marriage to John J. McGlone, appellants' decedent. The laws of New York at the time gave to a widow dower rights in her husband's real estate, but, except for restrictions on charitable gifts not involved here, left him otherwise free to make testamentary disposition of all his property to strangers.

On August 21, 1930, McGlone executed a will, one clause of which recited Helena's waiver but "nevertheless" made a bequest of $2,000 to her as a "slight token" of his affection and admiration. The legislation complained of, giving a testator's surviving spouse a right of election to take against the will, had been enacted as § 18 of the Decedent Estate Law on March 29, 1929, but it did not become effective until September 1, 1930, a

few days after McGlone executed his will.[1] It permitted waiver by a spouse or prospective spouse of the protection thus afforded, but in order to be effective the waiver was required to be "by an instrument subscribed and duly acknowledged." [2] The instrument signed by Helena was not acknowledged, and the new legislation was limited in operation to wills executed after its effective date.

McGlone so acted as to bring his estate under this new legislation. On July 6, 1934, he executed a codicil

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[1] Section 18–1 of the Decedent Estate Law, enacted by N. Y. Laws of 1929, c. 229, § 4, provided:

"Where a testator dies after August thirty-first, nineteen hundred and thirty, and leaves a will thereafter executed and leaves surviving a husband or wife, a personal right of election is given to the surviving spouse to take his or her share of the estate as in intestacy, subject to the limitations, conditions and exceptions contained in this section."

Section 18–1 (f) provided:

"Where the aggregate of the provisions under the will for the benefit of the surviving spouse including the principal of a trust, or a legacy or devise, or any other form of testamentary provision, is less than the intestate share, the surviving spouse shall have the limited right to elect to take the difference between such aggregate and the amount of the intestate share, and the terms of the will shall otherwise remain effective."

[2] Section 18–9 read as follows:

"The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument subscribed and duly acknowledged, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement of settlement so executed, made before or after marriage."

In the following year the words "of settlement" were deleted from this provision, and the following sentence was added: "An agreement so executed made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section." N. Y. Laws of 1930, c. 174, § 1.

to his will which, although it did not disturb the provision made for his wife in his earlier will, had the effect of bringing the entire will, modified and republished, within the provisions of the new law [3] and thus, according to the terms of § 18, of giving her a right of election to take under the statute and against the will.

Helena sought to exercise this right, and thus precipitated the present litigation, in which the quoted instrument was pleaded as a bar to the right. The Surrogate held that the instrument was not a contract, 171 Misc. 612, 13 N. Y. S. 2d 76; the Appellate Division held that it was, 258 App. Div. 596, 17 N. Y. S. 2d 316; and the New York Court of Appeals assumed, without deciding, that, apart from the effect of § 18 of the Decedent Estate Law, it was a binding contract, validly executed, and entitled to the protection of the Constitutional provisions here invoked. The Court of Appeals held, however, that "A wife cannot by agreement make the husband's right created by law immune from the right of the State to change the law which created the right nor waive in advance a right created for her benefit if the law does not permit such a waiver." Section 18 was held to confer a right of election upon Helena, and to be consistent with the requirements of the contract and due process clauses of the Federal Constitution. *Matter of McGlone,* 284 N. Y. 527, 533; 32 N. E. 2d 539, 542.

The reluctance of the New York Court of Appeals to decide the question whether the instrument in question did constitute a contract is quite understandable upon consideration of the record made up in this case. It appears from the face of the instrument that it was penned on stationery of the Savoy Hotel, London, by an unidentified scribe, and that the only signature was Helena's. The instrument does not recite mutuality of agreement. It recites no consideration, and none is

[3] Decedent Estate Law, § 2.

proved. It rather negatives the receipt of consideration, and the likelihood that marriage was such, by indicating that the parties had already exchanged promises to marry. Nor is there anything in text or context to help identify the source of the rights said to be waived. No circumstances are adduced to show that either of the parties, about to marry in a foreign land, then had New York as a domicile or was contracting with reference to its laws, either present or future. The marriage record in evidence shows that his "residence at the time of marriage" was "Savoy Hotel, London" and hers was "The Beverleys, Thornbury Road, Isleworth." If either was domiciled elsewhere, there is nothing to indicate it. There is not even any showing that, at the time, either of the parties owned or had any expectation of owning property in New York. No apparent heed has been given to the usual rule that the law of the place of contracting determines questions of form, capacity to contract, necessity of consideration, and some aspects of the duty of performance. Both sides seem to have assumed, but for reasons that are not revealed, that the law of New York governs these questions. The niggardliness of the record may be due in some part to the restriction imposed on the right of a survivor to testify by § 347 of the New York Civil Practice Act, but this does not warrant an ill-informed guess by this Court as to the existence of a contract or its meaning under properly applicable rules of law.

When this Court is asked to invalidate a state statute upon the ground that it impairs the obligation of a contract, the existence of the contract and the nature and extent of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the Federal Constitution, and for such purposes finality cannot be accorded to the views of a state court. *Douglas* v. *Kentucky,* 168 U. S. 488,

502; *Railroad Commission* v. *Eastern Texas R. Co.*, 264 U. S. 79, 86–87; *Coolidge* v. *Long*, 282 U. S. 582, 597; *U. S. Mortgage Co.* v. *Matthews*, 293 U. S. 232, 236; *Higginbotham* v. *Baton Rouge*, 306 U. S. 535, 538. In any view we might take of the constitutional questions urged here, we should not regard this record as an adequate basis for invalidating a state statute. But, lest a decision on this ground be taken as an invitation to further litigation in the New York courts and in this Court, we shall emulate the generosity shown by the Court of Appeals to the appellants and adopt its assumption as to the existence and nature of the contract for the purpose of disposing of the other questions urged.

Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction. *Mager* v. *Grima*, 8 How. 490; *United States* v. *Fox*, 94 U. S. 315; *United States* v. *Perkins*, 163 U. S. 625; cf. *Randall* v. *Kreiger*, 23 Wall. 137, 148. Expectations or hopes of succession, whether testate or intestate, to the property of a living person, do not vest until the death of that person. Appellants cannot successfully attack the constitutionality of the new legislation which went into effect before McGlone's death, and became operative only as the result of his own voluntary act.

McGlone was free to consent to a cancellation or revocation of Helena's waiver, or to make a valid bequest to her of all or any of his property despite it. Further, he could free her of the restraints of her waiver by voluntarily committing an act to which the applicable law attached that consequence. This is what he did by executing the codicil of July 6, 1934, voluntarily taking

advantage of the privilege of further testamentary disposition offered by the laws of New York. So long as McGlone stood on the will made before the effective date of the legislation, the law allowed him to avail himself of the full force and effect of the waiver. Given his choice between adhering to any will made before September 1, 1930, or of bringing his estate under the new law, McGlone saw fit to execute a further testamentary document after that date and thus to bring the new legislation into operation as to himself, his estate and survivors. For the purpose of considering the application of the contract and due process clauses of the Federal Constitution, the case is as if he had made a voluntary legacy to his wife despite her waiver. If the obligation of the waiver suffered impairment, it was only because he exercised further testamentary privileges with a condition attached, and thereby brought those consequences unwittingly or intentionally upon himself and his estate.

The condition clearly was such as New York might, without restraint from the Federal Constitution, annex to the privilege of making a will under its law. Its effect was to continue as obligations of his estate social responsibilities which he had assumed during life,[4] unless they had been waived with required formality. The State could have conditioned any further exercise of testamen-

[4] The Court of Appeals has said of this legislation:

"After September 1, 1930, the absence of protection to the widow under prior laws gave way to the widow's right of election to take a specific part of the estate against the will. The inconsistency in our old law which compelled a man to support his wife during his lifetime and permitted him to cut her off with a dollar at his death, has given way to a new public policy which no longer permits a testator to dispose of his property as he pleases." *Matter of Greenberg*, 261 N. Y. 474, 478; 185 N. E. 704, 705.

When it enacted § 18 of the Decedent Estate Law, New York at the same time abolished for the future the ancient estates and rights of dower and curtesy, and made important changes in the rules as to descent and distribution of property.

tary power upon giving a right of election to the surviving spouse regardless of any waiver, however formally executed; and having recognized the binding effect of a waiver, it could condition that recognition upon acknowledgment, which was no doubt considered a desirable safeguard against casual, informal, or ill-considered abandonment of statutory protection, as well as against overreaching or fraud.

Affirmed.

MR. JUSTICE ROBERTS took no part in the decision of this case.

MEILINK, TRUSTEE IN BANKRUPTCY, *v.* UNEMPLOYMENT RESERVES COMMISSION OF CALIFORNIA.

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

No. 61. Argued December 17, 18, 1941.—Decided January 5, 1942.

Section 45 of the Unemployment Reserves Act of California provides that an employer who fails to make the payments required of him by the Act "shall become additionally liable for interest on such payments at the rate of twelve per cent per annum." *Held*, that the exaction of twelve per cent per annum is not a "penalty" but is "interest" within the meaning of § 57j of the Bankruptcy Act, and a claim for the full amount thereof is allowable in bankruptcy. P. 569.

116 F. 2d 330, affirmed.

CERTIORARI, *post*, p. 588, to review the reversal of a decree denying in part a claim in bankruptcy.

Mr. W. Randolph Montgomery, with whom *Mr. John Walton Dinkelspiel* was on the brief, for petitioner.

Allowance of interest in excess of 7% per annum would permit respondent to share in the bankrupt's estate to an extent not represented by a pecuniary loss.

Merely calling the charge "interest" can not change its character if it be in fact a penalty. *United States* v. *LaFranca,* 282 U. S. 568, 572; *In re J. Menist & Co.,* 290 F. 947, 949; *In re Denver & R. G. W. R. Co.,* 27 F. Supp. 983; *In re Ashland Emery & Corundum Co.,* 229 F. 829, 832.

Interest on delinquent tax payments due to a State or any subdivision thereof will not be allowed in a bankruptcy proceeding in excess of the general rate of interest permitted by the applicable state law. *New York* v. *Jersawit,* 263 U. S. 493; *In re Pressed Steel Car Co.,* 100 F. 2d 147, 153; *In re Denver & R. G. W. R. Co.,* 27 F. Supp. 983; *In re 168 Adams Building Corp.,* 27 F. Supp. 247, aff'd 105 F. 2d 704, cert. den., 308 U. S. 623; *In re A. E. Fountain, Inc.,* 295 F. 873; *In re Wells,* 4 F. Supp. 329. Distinguishing *Beardsley & Wolcott Mfg. Co.,* 82 F. 2d 239; *Horn* v. *Boone Co.,* 44 F. 2d 920; *Martin* case, 75 F. 2d 618; *United States* v. *Childs,* 266 U. S. 304.

Federal and other California state taxing authorities demand only six per cent per annum interest on bankruptcy proofs of claim.

The Attorney General of California has himself characterized § 45 of the California Unemployment Reserves Act as a penalty section.

Mr. John J. Dailey, Deputy Attorney General of California, with whom *Messrs. Earl Warren,* Attorney General, and *Maurice P. McCaffrey* were on the brief, for respondent.

Mr. Justice Jackson delivered the opinion of the Court.

The petitioner is the trustee of a bankrupt which was indebted to the California Unemployment Reserves Commission for contributions which had accrued under the California Unemployment Reserves Act. Section 45 of that Act provided that, in the event of default in payment

of contributions due, the employer "shall become additionally liable for interest on such payments at the rate of twelve per cent per annum from the date such payment becomes due, both principal and interest being payable in the same manner as the contributions." Deering's Gen. Laws, 1937, Act 8780d, § 45. The Commission filed proof of a priority claim in the bankruptcy proceeding for the principal amount of the accrued contributions and interest thereon at the rate of twelve per cent.

The trustee paid the principal sum with interest at six per cent, but refused to pay more, relying on § 57j of the Bankruptcy Act, 11 U. S. C. § 93j, which provides that "Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law." The trustee asserted that any exaction in excess of six per cent, which he claimed was the "reasonable and customary rate of interest," was a penalty; the bankruptcy court decreed that all above seven per cent (a common, though not an invariable, legal rate in California) was a penalty and refused to allow so much of the claim; and the Circuit Court of Appeals for the Ninth Circuit reversed on the ground that no part of the twelve per cent was a penalty. 116 F. 2d 330. We granted certiorari because of the conflict between this decision and that of the Circuit Court of Appeals for the Third Circuit in *In re Pressed Steel Car Co. of New Jersey.*[1]

Petitioner seeks to establish that the twelve per cent exaction here in question is not "interest" by pointing to Article XX, § 22 of the California Constitution, which

[1] 100 F. 2d 147, certiorari denied *sub nom. Wick* v. *New Jersey*, 306 U. S. 648.

provides that, except for specified institutions, the rate of interest on loans, and on accounts after demand or judgment, shall be seven per cent, and leaves the parties free to contract in writing for a rate not exceeding ten per cent.[2] We do not understand that as a matter of State law the California legislature was thereby forbidden to prescribe the higher rate here involved. And the mere difference in rates does not establish that the twelve per cent rate is not "interest" within the meaning of § 57j of the Bankruptcy Act.

It is common knowledge that interest rates vary not only according to the general use value of money but also according to the hazard of particular classes of loans. Delinquent taxpayers as a class are a poor credit risk; tax default, unless an incident of legitimate tax litigation, is, to the eye sensitive to credit indications, a signal of distress. A rate of interest on tax delinquencies which is low in comparison to the taxpayer's borrowing rate—if he can borrow at all—is a temptation to use the state as a convenient, if involuntary, banker by the simple practice of deferring the payment of taxes.

Another variable is the amount necessary to compensate for the trouble of handling the item. The legislature may include compensation to the state for the increased costs of administration in the exaction for delay in paying taxes without thereby changing it from interest to penalty.

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[2] This reads in part as follows:

"The rate of interest upon the loan or forbearance of any money, goods or things in action, or on accounts after demand or judgment rendered in any court of the State, shall be seven per cent per annum but it shall be competent for the parties to any loan or forbearance of any money, goods or things in action to contract in writing for a rate of interest not exceeding ten per cent per annum."

Expressly excepted are building and loan associations, industrial loan companies, credit unions, pawnbrokers, personal property brokers, state and national banks, and coöperative associations.

These factors—risk, and the expenses of handling—are reflected in the interest rates permitted by California to certain types of financial institutions: for example, credit unions may charge interest at the rate of one per cent per month;[3] pawnbrokers, at two per cent per month on the first one hundred dollars of indebtedness;[4] and personal property brokers, two and one-half per cent per month on the first three hundred dollars.[5] A differentiation of treatment for particular types of loans similar in principle is commonly made by other states.[6]

New York v. *Jersawit,* 263 U. S. 493, is thought by petitioner to require a decision in his favor. That case involved a New York statute visiting tax delinquents with an additional liability of ten per cent of the tax, and adding thereto a further liability of one per cent per month, which was not denominated interest. The Circuit Court of Appeals had held that such provision was penal, but had allowed interest at the usual legal rate on the theory that it represented actual damage. *In re Ajax Dress Co.,* 290 F. 950. This Court, speaking through Mr. Justice Holmes, said:

"There can be no doubt that the additional ten per centum charged for failure to pay by January 1 is a penalty, disallowed by the Bankruptcy Act, § 57j, but it is urged that the one per centum for each month of default is statutory interest and that the State is entitled to that and otherwise would be entitled to none. As the one per centum is more than the value of the use of the money and is added by the statute to the ten to make a single sum it must be treated as part of one corpus and must fall with that. We presume that in this event the State does not object to receiving the

[3] Deering's Gen. Laws, 1939 Supp., Act 1887, § 3 (5).

[4] Deering's Gen. Laws, 1939 Supp., Act 5826, § 2.

[5] Deering's Gen. Laws, 1939 Supp., Act 5825 (2d), § 17.

[6] Clark, Financing the Consumer (1933), Appendix I.

simple interest allowed. That part of the order will stand." 263 U. S. at 496.

Here the exaction computed according to lapse of time is not lumped together with another percentage computed without reference to lapse of time; here the exaction is denominated interest by the statute, and there it was not; and we cannot be so confident here that twelve per cent "is more than the value of the use of the money," or of the validity of the implied major premise that an exaction in excess of such value cannot be merely an interest charge.[7]

The decision which controls here is the more recent one of *United States* v. *Childs,* 266 U. S. 304, where the statute separately denominated a flat five per cent exaction as a penalty, and an additional one of one per cent a month as interest. The latter was held to be "interest" within the meaning of § 57j of the Bankruptcy Act. The distinction from the fact that the exaction in that case was by the United States and in this case by a State calls for no difference in result. We must give credit to a state legislature acting within its Constitutional sphere like that accorded to Congress acting in its Constitutional

[7] Compare the following exactions, provided by the various Unemployment Compensation Acts for non-payment of contributions due:

"Interest" at 6% per annum or its equivalent on a monthly basis: United States, Delaware, Florida, Georgia, Indiana, Massachusetts, New York, North Carolina, Oregon, Utah, Wisconsin; at 8%: Ohio; at 81/100% per month: Kansas; at 9%: Connecticut, Michigan; at 12%: District of Columbia, Alabama, Arizona, Arkansas, Colorado, Illinois, Iowa, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, Wyoming.

"Penalty" at 12%: Kentucky, Texas; at 2% to 25% per month: Idaho.

sphere. And the distinction which Congress made in the legislation considered in the *Childs* case, and in other revenue legislation, between penalty as a fixed *ad valorem* amount taking no account of time, and interest which does depend on time, is persuasive that its use of the word "penalty" in the Bankruptcy Act will bear a like differentiation from interest.

Finally, it may be observed that Congress itself has provided in the District of Columbia Unemployment Compensation Act that, in the event contributions are not paid when due, "there shall be added, as part of the contributions, *interest* at the rate of 1 per centum per month." (Italics supplied.) D. C. Code (Supp. V. 1939) tit. 8, § 314 (c).

Affirmed.

MR. JUSTICE ROBERTS took no part in the decision of this case.

DECISIONS PER CURIAM, ETC., FROM OCTOBER 6, 1941, THROUGH JANUARY 5, 1942.*

No. 185. REUTER ET AL. *v.* WISCONSIN EX REL. DEPARTMENT OF AGRICULTURE. Appeal from the Supreme Court of Wisconsin. October 13, 1941. *Per Curiam:* The motion for leave to file statement of jurisdiction is granted. The motion to dismiss is also granted, and the appeal is dismissed for want of a substantial federal question. (1) *Highland Farms Dairy* v. *Agnew,* 300 U. S. 608, 612; (2) *Nebbia* v. *New York,* 291 U. S. 502; *Borden's Co.* v. *Ten Eyck,* 297 U. S. 251; *United States* v. *Rock Royal Co-op.,* 307 U. S. 533, 562–71; *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157. *Messrs. Morris Karon* and *Walter D. Corrigan, Sr.* for appellants. *Mr. Fred M. Wylie* for appellee. Reported below: 237 Wis. 607, 296 N. W. 622.

No. 190. E. E. MORGAN CO., INC. *v.* ARKANSAS FOR USE AND BENEFIT OF PHILLIPS COUNTY. Appeal from the Supreme Court of Arkansas. October 13, 1941. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. (1) *Stewart & Co.* v. *Sadrakula,* 309 U. S. 94, 105; *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 149; *General Construction Co.* v. *Fisher,* 295 U. S. 715; *Trinityfarm Construction Co.* v. *Grosjean,* 291 U. S. 466, 472; (2) *International Harvester Co.* v. *Kentucky,* 234 U. S. 579, 588–

*MR. JUSTICE ROBERTS took no part in the consideration and decision of the orders announced on January 5th.

For decisions on applications for certiorari, see *post,* pp. 587, 606; for rehearing, *post,* pp. 704, 706. For cases disposed of without consideration by the Court, *post,* p. 701.

89; *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, 306–7. *Mr. Wm. M. Hall* for appellant. *Mr. Leo J. Mundt* for appellee. Reported below: 202 Ark. 404, 150 S. W. 2d 736.

No. 199. EMPIRE OIL & REFINING CO., KNOWN AS CITIES SERVICE OIL CO., ET AL. *v.* FIELDS. Appeal from the Supreme Court of Oklahoma. October 13, 1941. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 583; *Washington* v. *Superior Court*, 289 U. S. 361, 366. *Messrs. A. Carey Hough* and *R. E. Cullison* for appellants. *Mr. Herbert K. Hyde* for appellee. Reported below: 188 Okla. 666, 112 P. 2d 395.

No. 313. O'KEEFE, SURVIVING EXECUTOR, ET AL. *v.* ADAMS ET AL. Appeal from the Supreme Court of Florida. October 13, 1941. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *United States* v. *Fox*, 94 U. S. 315, 320–21; *United States* v. *Perkins*, 163 U. S. 625, 627–28; *Ferry* v. *Spokane, P. & S. Ry. Co.*, 258 U. S. 314, 319; *Stebbins* v. *Riley*, 268 U. S. 137. *Mr. Olin E. Watts* for appellants. *Messrs. Stafford Caldwell* and *E. T. McIlvaine* for appellees. Reported below: 147 Fla. 267, 2 So. 2d 855.

No. 331. MORRIS PLAN INDUSTRIAL BANK OF NEW YORK *v.* GRAVES ET AL., CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK. Appeal from the Supreme Court of New York. October 13, 1941. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a final judgment of the highest court of the State on the constitutional question presented. The CHIEF JUSTICE took no part in this decision. *Mr. R.*

Randolph Hicks for appellant. *Messrs. John J. Bennett, Jr.*, Attorney General of New York, and *Wendell P. Brown*, Assistant Attorney General, for appellees. Reported below: 260 App. Div. 978, 23 N. Y. S. 2d 312; 261 App. Div. 1018, 26 N. Y. S. 2d 854.

No. 533. STANDARD OIL CO. OF LOUISIANA *v.* TENNESSEE EX REL. MCCANLESS, COMMISSIONER OF FINANCE & TAXATION, ET AL. Appeal from the Supreme Court of Tennessee. October 13, 1941. *Per Curiam:* The judgment is affirmed. *General Oil Co.* v. *Crain*, 209 U. S. 211; *Bacon* v. *Illinois*, 227 U. S. 504; *Susquehanna Coal Co.* v. *South Amboy*, 228 U. S. 665; *Minnesota* v. *Blasius*, 290 U. S. 1, 10–12. *Messrs. T. M. Milling, William Waller*, and *J. Paschall Davis* for appellant. *Mr. William F. Barry*, Assistant Attorney General of Tennessee, for appellees.

No. 566. TRENT ET AL. *v.* HUNT ET AL. Appeal from the District Court of the United States for the Southern District of Indiana. October 13, 1941. *Per Curiam:* The judgment is affirmed. *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45, 49–51; *Watson* v. *Buck*, 313 U. S. 387, 400–01. *Messrs. Hayden C. Covington* and *Joseph F. Rutherford* for appellants. *Mr. Urban C. Stover*, Deputy Attorney General of Indiana, for appellees. Reported below: 39 F. Supp. 373.

No. 567. BEVINS ET AL. *v.* PRINDABLE ET AL. Appeal from the District Court of the United States for the Eastern District of Illinois. October 13, 1941. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45, 49–51; *Watson* v. *Buck*, 313 U. S. 387, 400–01. *Messrs.*

Hayden C. Covington and *Joseph F. Rutherford* for appellants. *Mr. George F. Barrett,* Attorney General of Illinois, for appellees. Reported below: 39 F. Supp. 708.

No. 568. PENDERGAST *v.* UNITED STATES; and

No. 569. O'MALLEY *v.* UNITED STATES. Appeals from the District Court of the United States for the Western District of Missouri. October 13, 1941. *Per Curiam:* It does not appear that the proceedings sought to be reviewed required the presence of three judges under § 266 of the Judicial Code as amended, 28 U. S. C. § 380. *Public Service Commission* v. *Brashear Lines,* 312 U. S. 621, 625–26; *Phillips* v. *United States,* 312 U. S. 246, 248–51. The motion to dismiss is therefore granted and the appeals are dismissed. The appeals filed under § 238 of the Judicial Code as amended, 28 U. S. C. § 345, are dismissed for want of jurisdiction. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in this decision. *Messrs. R. R. Brewster* and *John G. Madden* for appellant in No. 568. *Messrs. James P. Aylward* and *Terence M. O'Brien* for appellant in No. 569. *Assistant Solicitor General Fahy* and *Mr. William S. Hogsett* for the United States. Reported below: 39 F. Supp. 189.

No. 591. WHITNEY, DOING BUSINESS AS WHITNEY TRANSFER CO., INC., ET AL. *v.* JOHNSON, CHIEF EXECUTIVE, ET AL. Appeal from the District Court of the United States for the Eastern District of Kentucky. October 13, 1941. *Per Curiam:* The judgment is affirmed. (1) *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177; *Maurer* v. *Hamilton,* 309 U. S. 598; *Philadelphia-Detroit Lines, Inc.* v. *Simpson,* 312 U. S. 655; *Darnall Trucking Co.* v. *Simpson,* 313 U. S. 549; (2) *Sproles* v. *Binford,* 286 U. S. 374, 395–96. *Mr. H. W. Vincent* for appellants. Reported below: 37 F. Supp. 65.

No. 596. IRVINE *v.* SPAETH, COMMISSIONER OF TAXATION. Appeal from the Supreme Court of Minnesota. October 13, 1941. *Per Curiam:* The appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C. § 344 (a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) of the Judicial Code as amended, 28 U. S. C. § 344 (c), certiorari is denied. *Mr. Leland W. Scott* for appellant. *Mr. J. A. A. Burnquist,* Attorney General of Minnesota, for appellee. Reported below: 210 Minn. 489, 299 N. W. 204.

Nos. 360 to 496, inclusive. AMERICAN INSURANCE CO. AND OTHERS *v.* LUCAS, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF MISSOURI, ET AL. Appeals from the District Court of the United States for the Western District of Missouri. October 13, 1941. *Per Curiam:* The decrees here sought to be reviewed modify consent decrees for the distribution of funds theretofore impounded by the District Court and direct a different distribution of these funds. They are not decrees "granting or denying" an injunction. Therefore direct appeals to this Court do not lie. § 266 of the Judicial Code, as amended, 28 U. S. C. § 380. See *Public Service Comm'n* v. *Brashear Lines,* 306 U. S. 204, 207, and *Phillips* v. *United States,* 312 U. S. 246, 248–251. The appeals are dismissed. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in this decision. *Messrs. Wm. Marshall Bullitt, E. R. Morrison,* and *D. A. Murphy* for appellants. *Messrs. Roy McKittrick,* Attorney General of Missouri, *James H. Linton,* and *Charles L. Henson* for Ray B. Lucas, Superintendent of Insurance, appellee. Reported below: 38 F. Supp. 896, 926.

No. 181. MAGNOLIA PETROLEUM CO. ET AL. *v.* HULL ET AL. On petition for writ of certiorari to the Circuit

Court of Appeals for the Fifth Circuit. October 13, 1941. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is reversed and the cause remanded to the District Court to permit trial of the issues raised by petitioners' answer and for further proceedings. *Messrs. Walace Hawkins, Wm. A. Vinson,* and *Hugh Carney* for petitioners. Reported below: 119 F. 2d 123.

No. 168. HOLLEY *v.* GEORGIA. Appeal from the Supreme Court of Georgia. October 13, 1941. *Per Curiam:* The motion to strike the motion to dismiss is denied. The motion to dismiss is granted, and the appeal is dismissed for want of a properly presented federal question. *McCorquodale* v. *Texas,* 211 U. S. 432, 436–37; *Forbes* v. *State Council of Virginia,* 216 U. S. 396, 398–99; § 6–1607, Code of Georgia of 1933; Rule 40 (c) of the Supreme Court of Georgia. The motion for leave to proceed further *in forma pauperis* is therefore denied. *Mr. W. K. Miller* for appellant. *Mr. Ellis Arnall,* Attorney General of Georgia, for appellee. Reported below: 191 Ga. 804, 14 S. E. 2d 103.

No. 666, October Term, 1940. DETROLA RADIO & TELEVISION CORP. *v.* HAZELTINE CORPORATION. October 13, 1941. The opinion is amended by substituting the figure "8" for the figure "9" in the seventh line of the third paragraph of the opinion. The petition for rehearing is denied.

Opinion reported as amended, 313 U. S. 261.

No. 196. FERGUSON *v.* UNITED STATES. October 14, 1941. Order denying petition for writ of certiorari, *post,* p. 623, withheld on motion of *Mr. William D. Donnelly* for the petitioner.

No. 285. PIKE ET AL. *v.* WALKER, POSTMASTER GENERAL, ET AL. October 15, 1941. Order denying certiorari, *post,* p. 625, withheld on motion of *Mr. Horace J. Donnelly, Jr.* for petitioners.

No. 354. MORTON, TRUSTEE, ET AL. *v.* DARDANELLE SPECIAL SCHOOL DISTRICT No. 15. October 16, 1941. Order denying certiorari, *post,* p. 655, withheld on motion of counsel for the petitioners.

No. —, original. LOUISIANA *v.* CUMMINS ET AL. On motion for leave to file complaint. October 20, 1941. *Per Curiam:* Leave to file the complaint is denied for want of jurisdiction, it appearing that one of the named parties defendant is a citizen of Louisiana. *California* v. *Southern Pacific Co.,* 157 U. S. 229, 256–262; *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199, 238; *New Mexico* v. *Lane,* 243 U. S. 52, 58; *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158, 163. The rule to show cause is discharged. *Messrs. Eugene Stanley,* Attorney General of Louisiana, and *James J. Morrison* for plaintiff. *Messrs. Roger Siddall* and *Eberhard P. Deutsch* for Claude Cummins et al., and *Mr. Bon Geaslin* for Abraham L. Shushan, defendants.

No. 626. APONAUG MANUFACTURING CO. *v.* STONE, CHAIRMAN STATE TAX COMM'N, ET AL. Appeal from the Supreme Court of Mississippi. October 20, 1941. *Per Curiam:* The judgment is affirmed. *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459; *Department of Treasury* v. *Ingram-Richardson Mfg. Co.,* 313 U. S. 252. *Mr. Ben F. Cameron* for appellant. Reported below: 190 Miss. 805, 1 So. 2d 763.

No. —. MIDDLEMAN *v.* UNITED STATES;
No. —. EX PARTE GODFREY D. RICKETTS; and
No. —. EX PARTE MRS. JULE S. JACKSON. October 20, 1941. Applications denied.

No. —, original. EX PARTE VIRGIL CURRENT. October 20, 1941. The motion for leave to file petition for writ of habeas corpus is denied without prejudice to an application to the United States District Court.

No. —, original. EX PARTE LLOYD WILEY;
No. —, original. EX PARTE DAVID H. JOHNSON;
No. —, original. EX PARTE ANDREW FREY;
No. —, original. EX PARTE BEN SIMS;
No. —, original. EX PARTE DANIEL PATRICK DOYLE;
No. —, original. EX PARTE CHARLES LEFKOWITZ;
No. —, original. EX PARTE HOMER FRANKS;
No. —, original. EX PARTE WILLIAM H. PADGETT;
No. —, original. EX PARTE FRED REGER;
No. —, original. EX PARTE WILLIAM BARBER;
No. —, original. EX PARTE FRANK ROBERSON;
No. —, original. EX PARTE STANLEY B. PEPLOWSKI;
No. —, original. EX PARTE HERMAN BARMORE;
No. —, original. EX PARTE KENNETH GERARD;
No. —, original. EX PARTE GEORGE D. LATIMER;
No. —, original. EX PARTE ERNEST DIEFENBACH; and
No. —, original. EX PARTE JOHN R. MILLER. October 20, 1941. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —, original. EX PARTE JAMES M. WRIGHT. October 20, 1941. The motion for leave to file petition for writ of prohibition is denied.

No. —, original. Ex parte Thomas M. McNeill;
No. —, original. Ex parte Jessie E. Moore;
No. —, original. Ex parte Samuel White; and
No. —, original. Ex parte Edward Casebeer. October 20, 1941. The motions for leave to file petitions for writs of mandamus are denied.

No. —, original. Ex parte State of Texas et al. October 20, 1941. A rule is ordered to issue returnable November 10 next, requiring the respondents to show cause why leave to file the petition for writ of mandamus should not be granted.

No. 150. Pelley *v.* Colpoys, U. S. Marshal. October 20, 1941. The motion to withhold the order denying petition for writ of certiorari is denied. Mr. Justice Jackson took no part in the consideration and decision of this application. *Post,* p. 622.

No. 352. General Motors Corp. et al. *v.* United States. October 20, 1941. The motion to withhold the order denying petition for writ of certiorari is granted. Mr. Justice Jackson took no part in the consideration and decision of this application. *Post,* p. 618.

No. 901, October Term, 1940. Bakery & Pastry Drivers & Helpers Local 802 of the International Brotherhood of Teamsters et al. *v.* Wohl et al. See *post,* p. 704.

No. 303. C. M. Lane Lifeboat Co., Inc. et al. *v.* United States. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. October

20, 1941. Dismissed for failure to comply with the rules. *Mr. Cornelius C. Webster* for petitioners. Reported below: 118 F. 2d 793.

No. —, original. LOUISIANA *v.* CUMMINS ET AL. On motion for leave to file complaint. October 27, 1941. *Per Curiam:* The motion to strike Abraham L. Shushan, the citizen of Louisiana, as a party defendant is granted. The petition for rehearing is granted. Leave to file the complaint is denied. *Massachusetts* v. *Missouri,* 308 U. S. 1, 19–20. *Messrs. Eugene Stanley,* Attorney General of Louisiana, and *James J. Morrison* were on the petition for rehearing. See *ante,* p. 577.

No. —. EX PARTE ROBERT WRIGHT. October 27, 1941. Application denied.

No. —, original. EX PARTE J. L. STEWART. October 27, 1941. Motion for leave to file petition for writ of mandamus denied.

No. 244. READY TRUCK LINES, INC. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Northern District of Illinois. November 10, 1941. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. § 209 (a), Part II, Interstate Commerce Act, 49 U. S. C., § 309 (a); *United States* v. *Maher,* 307 U. S. 148, 153–4. MR. JUSTICE JACKSON took no part in the consideration and decision of this case. *Messrs. Gerald T. Wiley* and *J. Austin Latimer* for appellant. *Assistant Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for appellees.

No. 701. MILLER *v.* WISCONSIN DEPARTMENT OF TAXATION. Appeal from the Supreme Court of Wisconsin. November 10, 1941. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Mr. A. W. Schutz* for appellant. *Mr. Harold H. Persons* for appellee. Reported below: 238 Wis. 287, 299 N. W. 28.

No. —, original. EX PARTE GEORGE C. YAUNT;

No. —, original. EX PARTE C. C. CREBS; and

No. —, original. EX PARTE HILLIARD SANDERS. November 10, 1941. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. TINKOFF *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. —. PEOPLE EX REL. TINKOFF *v.* BRISTOW, JUDGE. November 10, 1941. The motions to vacate orders denying applications for extension of time within which to file petitions for writs of certiorari are denied. MR. JUSTICE JACKSON took no part in the consideration and decision of these applications.

No. 710. TEMPLETON *v.* CALIFORNIA. Appeal from the Supreme Court of California. November 17, 1941. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed because the record does not show that the federal question presented was necessarily passed on by the Supreme Court of California. *Herndon* v. *Lowry,* 301 U. S. 242, 247; *Honeyman* v. *Hanan,* 300 U. S. 14, 18; *Lynch* v. *New York ex rel. Pierson,* 293 U. S. 52. *Mr. Thos. D. Aitken* for appellant. *Mr. Earl Warren,* Attorney General of California, for appellee.

No. —, original. Ex parte Frank Contardi;
No. —, original. Ex parte Glen Wilkerson; and
No. —, original. Ex parte Manuel Manzano. November 17, 1941. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —, original. Ex parte State of Texas. November 17, 1941. The motion of Lone Star Gas Company for leave to intervene is granted.

No. 16. Toucey *v.* New York Life Insurance Co. November 17, 1941. The motion of petitioner relative to New York Life Policy No. 8,611,895 is denied. See *ante*, p. 118.

No. 714. Harrington *v.* California. Appeal from the Superior Court of Los Angeles County, California. November 24, 1941. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Nicchia* v. *New York*, 254 U. S. 228. *George F. Harrington, pro se.*

No. —, original. Ex parte James R. Keller. November 24, 1941. The motion for leave to file petition for writ of habeas corpus is denied.

No. 223. United States et al. *v.* Railway Labor Executives Association et al. Appeal from the District Court of the United States for the District of Columbia. November 24, 1941. Appeal dismissed as to appellant United States, on motion of *Solicitor General Fahy* for the United States.

No. 40. CHRYSLER CORPORATION ET AL. *v.* UNITED STATES; and

No. 41. COMMERCIAL CREDIT CO. ET AL. *v.* UNITED STATES. Appeals from the District Court of the United States for the Northern District of Indiana. Argued October 24, 1941. Decided December 8, 1941. *Per Curiam:* The Court orders that the appeals in these cases be dismissed for want of a quorum of Justices qualified to sit in them. The CHIEF JUSTICE, MR. JUSTICE ROBERTS, MR. JUSTICE MURPHY, and MR. JUSTICE JACKSON are unable to take part in the consideration or decision of these cases on the merits. *Mr. Nicholas Kelley,* with whom *Messrs. William Stanley, Carl McFarland,* and *S. J. Crumpacker* were on the brief, for appellants in No. 40; and *Messrs. Duane R. Dills* and *W. Russell Mules* submitted for appellants in No. 41. *Assistant Attorney General Arnold,* with whom *Assistant Solicitor General Fahy* and *Mr. Charles H. Weston* were on the brief, for the United States.

No. 50. HOLMES *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. December 8, 1941. *Per Curiam:* The motion for leave to proceed *in forma pauperis* is granted. On the Government's consent, the petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded to the Circuit Court of Appeals with instructions to enter an order affording reasonable opportunity for the preparation, presentation, settling, and filing of a suitable bill of exceptions, and with permission to the court to hear argument and redetermine the case insofar as that course may be required if such a bill is filed, or to take such further proceedings and enter such further orders as may seem appropriate if no adequate bill can be settled. MR. JUSTICE DOUGLAS took no part in the

consideration and decision of this case. *Leo S. Holmes, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *W. Marvin Smith* for the United States. Reported below: 115 F. 2d 528.

No. 736. MORRIS, SPECIAL ADMINISTRATRIX, ET AL. *v.* CLARK ET AL. Appeal from the Supreme Court of Utah. December 8, 1941. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C. § 344 (a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) of the Judicial Code as amended, 28 U. S. C. § 344 (c), certiorari is denied. *Mr. Roy L. Black* for appellants. *Mr. William J. Lowe* for appellees. Reported below: 112 P. 2d 153.

No. —, original. EX PARTE JAMES W. KAUFFMAN;

No. —, original. EX PARTE FREDERICK H. MULLINS;

No. —, original. EX PARTE THADDEUS DEATHERAGE; and

No. —, original. EX PARTE LOUIS DEATHERAGE. December 8, 1941. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 271. SMITH *v.* FOURTH NATIONAL BANK. December 8, 1941. The motion of petitioner to tax costs is denied.

No. 81. RILEY ET AL., EXECUTORS, *v.* NEW YORK TRUST CO., ADMINISTRATOR. December 8, 1941. The motion of the Tax Commission of New York for leave to appear and present oral argument as *amicus curiae* is granted.

No. —, original. Ex parte William Cherry;

No. —, original. Ex parte Clarence M. Brummitt; and

No. —, original. Ex parte Paul B. Roubay. December 15, 1941. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —, original. Ex parte George Acret. December 15, 1941. The motion for leave to file petition for writ of mandamus is denied.

No. —, original. Ex parte G. H. Burnham. December 15, 1941. The motion for leave to file petition for writ of mandamus is denied. The rule to show cause is discharged.

No. 16. Toucey *v.* New York Life Insurance Co.; and

No. 19. Phoenix Finance Corp. *v.* Iowa-Wisconsin Bridge Co. December 15, 1941. On page 6 of the opinion in these cases, the words "have *pro tanto* amended" in lines twenty-five and twenty-six are changed to "qualify *pro tanto*." The petitions for rehearing are denied.

Opinion reported as amended, *ante*, p. 133, line 14.

No. —. In the matter of Joe Tenner. December 22, 1941. It is now here ordered by this Court that the State of California, its officers, agents, and servants and all other persons, are hereby prohibited from removing Joe Tenner or permitting him to be removed from the State of California pending the filing by him of a petition for a writ of habeas corpus in the Supreme Court of California and pending the disposition of that petition. The

petitioner is directed to file his petition for a writ of habeas corpus on or before January 7, 1942. This order prohibiting the removal of Joe Tenner from the State of California is to remain in effect until the further order of this Court.

No. —, original. Ex parte Thomas Contreras; and
No. —, original. Ex parte Harley Stewart. December 22, 1941. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —, original. DeWolfe *v.* California. December 22, 1941. The motion for leave to file bill of complaint is denied. *Mr. William H. Metson* for complainant.

No. —, original. Ex parte John Botwinski. January 5, 1942. *Per Curiam:* It does not appear that petitioner has exhausted his state remedies by applying for a writ of error coram nobis. *State ex rel. Dowd* v. *Superior Court of La Porte County,* 36 N. E. 2d 765; *State ex rel. Kunkel* v. *Circuit Court of La Porte County,* 209 Ind. 682, 200 N. E. 614. The motion for leave to file a petition for writ of habeas corpus is therefore denied without prejudice. *Mooney* v. *Holohan,* 294 U. S. 103. *Mr. Oscar B. Thiel* for petitioner.

No. 794. Perkins, Trading as Perkins Battery Co., *v.* Pennsylvania. Appeal from the Supreme Court of Pennsylvania. January 5, 1942. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. § 1606 (a) of the Internal Revenue Code as amended, 53 Stat. 1391; *Kentucky Whip & Collar Co.* v. *Illinois Central Railroad Co.,* 299 U. S. 334. *Mr. Samuel Kagle* for

appellant. *Mr. Claude T. Reno,* Attorney General of Pennsylvania, for appellee. Reported below: 342 Pa. 529, 21 A. 2d 45.

No. —, original. Ex parte Stephen Rogalski; and No. —, original. Ex parte Kenneth Gerard. January 5, 1942. The motion for leave to file petitions for writs of habeas corpus are denied.

No. 108. Identification Devices, Inc. *v.* United States. January 5, 1942. The motion for leave to file an amended petition for writ of certiorari is denied.

No. 37. Cuno Engineering Corp. *v.* Automatic Devices Corp. January 5, 1942. It is ordered that the mandate of this Court in the above-entitled cause on file in the District Court of the United States for the District of Connecticut be, and the same is hereby, recalled; and that said mandate be amended so as to give petitioner recovery for additional costs in the sum of $70.60, being the expense incurred in furnishing copies of certain patents for inclusion in the record.

DECISIONS GRANTING CERTIORARI, FROM OCTOBER 6, 1941, THROUGH JANUARY 5, 1942.

No. 181. Magnolia Petroleum Co. et al. *v.* Hull et al. See *ante,* p. 575.

No. 1023, October Term, 1940. Pickett, General Chairman of the Brotherhood of Railway & Steamship Clerks, *v.* Union Terminal Co. See *post,* p. 704.

No. 101. HALLIDAY *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit, and motion for leave to proceed further *in forma pauperis,* granted. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Messrs. R. K. Wise* and *Warren E. Miller* for petitioner. *Assistant Solicitor General Fahy* and *Messrs. Julius C. Martin, Wilbur C. Pickett, Fendall Marbury, Keith L. Seegmiller,* and *W. Marvin Smith* for the United States. Reported below: 116 F. 2d 812.

No. 256. GOLDSTEIN ET AL. *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit, and motion for leave to proceed further *in forma pauperis,* granted. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. Theodore Kiendl* for Dr. Maximilian Goldstein; *Dr. Benjamin Schwartz, Herman Rubin,* and *Irving Elentuch, pro se. Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Richard H. Demuth, Oscar A. Provost,* and *Louis B. Schwartz* for the United States. Reported below: 120 F. 2d 485.

No. 510. COCHRAN *v.* KANSAS ET AL. October 13, 1941. Petition for writ of certiorari to the Supreme Court of Kansas, and motion for leave to proceed further *in forma pauperis,* granted. *C. H. Cochran, pro se.* Reported below: 153 Kan. 777, 113 P. 2d 1048.

No. 61. MEILINK, TRUSTEE IN BANKRUPTCY, *v.* UNEMPLOYMENT RESERVES COMMISSION OF CALIFORNIA. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. John Walton Dinkelspiel* for petitioner. Reported below: 116 F. 2d 330.

No. 78. DUNCAN *v.* THOMPSON, TRUSTEE. October 13, 1941. Petition for writ of certiorari to the Springfield Court of Appeals of Missouri granted. *Messrs. Harry G. Waltner, Jr.* and *John Moberly* for petitioner. Reported below: 146 S. W. 2d 112.

No. 83. MERION CRICKET CLUB *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. John Lewis Evans* for petitioner. *Solicitor General Biddle* for the United States. Reported below: 119 F. 2d 578.

No. 91. FISCHER, COMMISSIONER OF INSURANCE OF IOWA, RECEIVER, *v.* AMERICAN UNITED LIFE INSURANCE CO. ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Willis J. O'Brien* and *John N. Hughes* for petitioner. *Messrs. Clayton F. Jennings* and *Robert A. Adams* for respondents. Reported below: 117 F. 2d 811.

No. 95. PUERTO RICO *v.* RUSSELL & CO., S. EN C. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. William Cattron Rigby, George A. Malcolm,* Attorney General of Puerto Rico, and *Nathan R. Margold* for petitioner. *Mr. George M. Wolfson* for respondent. Reported below: 118 F. 2d 225.

No. 96. PUERTO RICO *v.* RUBERT HERMANOS, INC. ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. William Cattron Rigby, George A. Malcolm,* Attorney General of Puerto Rico, and *Nathan R. Margold* for petitioner. *Mr. Henri Brown* for respondents. Reported below: 118 F. 2d 752.

No. 112. WILLIAMS ET AL. *v.* JACKSONVILLE TERMINAL Co. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Frank F. L'Engle* for petitioners. *Messrs. Julian Hartridge* and *John Dickinson* for respondent. Reported below: 118 F. 2d 324.

No. 124. HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122, ET AL. *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD ET AL. October 13, 1941. Petition for writ of certiorari to the Supreme Court of Wisconsin granted. *Messrs. Joseph A. Padway* and *I. E. Goldberg* for petitioners. *Messrs. John E. Martin,* Attorney General of Wisconsin, *James Ward Rector,* Deputy Attorney General, and *N. S. Boardman,* Assistant Attorney General, for the Wisconsin Employment Relations Board; and *Mr. Herman M. Knoeller* for the Plankinton House Co., respondents. Reported below: 236 Wis. 329, 294 N. W. 632, 295 N. W. 634.

No. 128. BONDHOLDERS COMMITTEE, MARLBOROUGH INVESTMENT CO., FIRST MORTGAGE BONDS *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 129. MARLBOROUGH HOUSE, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Stephen V. Carey* for petitioners. *Assistant Solicitor General Fahy* for respondent. Reported below: 118 F. 2d 511.

No. 139. THOMSON, TRUSTEE, ET AL. *v.* GASKILL ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted.

Messrs. Wymer Dressler, Robert D. Neely, W. C. Fraser, and *W. T. Faricy* for petitioners. *Mr. Nelson C. Pratt* for respondents. Reported below: 119 F. 2d 105.

No. 151. UNITED STATES *v.* JOLIET & CHICAGO RAILROAD CO. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Biddle* for the United States. *Messrs. Silas H. Strawn, Frank H. Towner, Edward G. Ince,* and *Arthur D. Welton, Jr.* for respondent. Reported below: 118 F. 2d 174.

No. 161. STEWART, ADMINISTRATOR, *v.* SOUTHERN RAILWAY CO. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Charles M. Hay* and *William H. Allen* for petitioner. *Messrs. Wilder Lucas, H. O'B. Cooper, Sidney S. Alderman,* and *S. R. Prince* for respondent. Reported below: 115 F. 2d 317, 119 *id.* 85.

No. 179. MACGREGOR, EXECUTOR, *v.* STATE MUTUAL LIFE ASSURANCE CO. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. William B. Giles* for petitioner. *Mr. Oscar C. Hull* for respondent. Reported below: 119 F. 2d 148.

No. 186. CITY OF TEXARKANA, TEXAS, *v.* ARKANSAS LOUISIANA GAS CO. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Ed B. Levee* and *Benjamin E. Carter* for petitioner. *Messrs. Henry C. Walker, Jr., William C. Fitzhugh,* and *William H. Arnold, Jr.* for respondent. Reported below: 118 F. 2d 289.

No. 206. D'OENCH, DUHME & Co., INC. *v.* FEDERAL DEPOSIT INSURANCE CORP. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Franklin E. Reagan* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Warner W. Gardner, Paul A. Sweeney, Francis C. Brown,* and *James E. Markham* for respondent. Reported below: 117 F. 2d 491.

No. 229. WRIGHT ET AL. *v.* LOGAN ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Elmer McClain* and *William Lemke* for petitioners. *Mr. Paul F. Jones* for respondents. Reported below: 119 F. 2d 354.

No. 238. UNITED STATES *v.* STATE OF NEW YORK; and

No. 251. STATE OF NEW YORK *v.* UNITED STATES. October 13, 1941. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Richard H. Demuth,* and *Michael H. Cardozo, IV,* for the United States. *Messrs. John J. Bennett, Jr.,* Attorney General, and *Henry Epstein,* Solicitor General, for the State of New York. Reported below: 118 F. 2d 537.

No. 245. CUDAHY PACKING CO. *v.* FLEMING, ADMINISTRATOR, WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. James V. Hayes* and *Robert E. Sher* for petitioner. *Assistant Solicitor General Fahy* and

Messrs. Warner W. Gardner, Gerard D. Reilly, Irving J. Levy, and *Miss Bessie Margolin* for respondent. Reported below: 119 F. 2d 209.

No. 265. FEDERAL POWER COMMISSION ET AL. *v.* NATURAL GAS PIPELINE CO. ET AL.; and

No. 268. NATURAL GAS PIPELINE CO. ET AL. *v.* FEDERAL POWER COMMISSION ET AL. October 13, 1941. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Assistant Solicitor General Fahy* and *Mr. George F. Barrett,* Attorney General of Illinois, for petitioners in No. 265 and respondents in No. 268. *Messrs. J. J. Hedrick, George I. Haight,* and *S. A. L. Morgan* for respondents in No. 265 and petitioners in No. 268. Reported below: 120 F. 2d 625.

No. 277. DINAN ET AL. *v.* FIRST NATIONAL BANK. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. John R. Rood* for petitioners. *Messrs. Robert S. Marx* and *George P. Barse* for respondent. Reported below: 117 F. 2d 459.

No. 280. JONES *v.* OPELIKA. October 13, 1941. Petition for writ of certiorari to the Supreme Court of Alabama granted. *Messrs. Joseph F. Rutherford* and *Hayden C. Covington* for petitioner. *Mr. John W. Guider* for respondent. Reported below: 3 So. 2d 74, 76.

No. 306. PEARCE *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit

granted. *Mr. Gordon S. P. Kleeberg* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Michael H. Cardozo, IV,* for respondent. Reported below: 120 F. 2d 228.

No. 320. SOUTHERN STEAMSHIP CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Joseph W. Henderson* and *Randolph W. Childs* for petitioner. *Assistant Solicitor General Fahy* and *Messrs. Robert B. Watts, Morris P. Glushien,* and *Miss Ruth Weyand* for respondents. Reported below: 120 F. 2d 505.

No. 321. STONITE PRODUCTS CO. *v.* MELVIN LLOYD CO. ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Charles W. Rivise* for petitioner. *Mr. Isaac J. Silin* for respondents. Reported below: 119 F. 2d 883.

No. 323. MUNCIE GEAR WORKS, INC. ET AL. *v.* OUTBOARD, MARINE & MANUFACTURING CO. ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Samuel E. Darby, Jr., Charles W. Rummler,* and *Floyd H. Crews* for petitioners. *Messrs. Geo. L. Wilkinson, S. L. Wheeler,* and *Isadore Levin* for respondents. Reported below: 119 F. 2d 404.

No. 500. UNITED STATES EX REL. TENNESSEE VALLEY AUTHORITY *v.* POWELSON, ASSIGNEE, ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court

of Appeals for the Fourth Circuit granted. *Assistant Solicitor General Fahy* and *William C. Fitts, Jr.* for petitioner. *Messrs. George Lyle Jones* and *George H. Wright* for respondents. Reported below: 118 F. 2d 79.

No. 505. CRANCER ET AL., CO-PARTNERS, DOING BUSINESS AS VALLEY STEEL PRODUCTS CO., ET AL. *v.* LOWDEN ET AL., TRUSTEES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Abraham B. Frey* for petitioners. *Messrs. William S. Hogsett* and *Hale Houts* for respondents. Reported below: 121 F. 2d 645.

No. 527. CARPENTERS & JOINERS UNION OF AMERICA, LOCAL NO. 213, ET AL. *v.* RITTER'S CAFE ET AL. October 13, 1941. Petition for writ of certiorari to the Court of Civil Appeals, First Supreme Judicial District of Texas, granted. *Mr. Sewall Myer* for petitioners. Reported below: 138 S. W. 2d 223; 149 S. W. 2d 694.

No. 589. JACOB *v.* NEW YORK CITY. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Silas B. Axtell* and *Dominick Blasi* for petitioner. *Messrs. William C. Chanler* and *Paxton Blair* for respondent. Reported below: 119 F. 2d 800.

No. 86. YOUNG *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. Fred Patterson* for petitioner. *Assist-*

ant Solicitor General Fahy, Assistant Attorney General Berge, and *Messrs. Oscar A. Provost, Louis B. Schwartz,* and *W. Marvin Smith* for the United States. Reported below: 119 F. 2d 399.

No. 131. UNITED STATES *v.* LOCAL 807 OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS ET AL.; and

No. 132. LOCAL 807 OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS ET AL. *v.* UNITED STATES. October 13, 1941. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. MR. JUSTICE JACKSON took no part in the consideration and decision of these applications. *Solicitor General Biddle* for the United States. *Messrs. Louis B. Boudin, Edward C. Maguire,* and *James D. C. Murray* for respondents in No. 131 and petitioners in No. 132. Reported below: 118 F. 2d 684.

No. 149. GREAT NORTHERN RAILWAY CO. *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. F. G. Dorety* for petitioner. *Assistant Solicitor General Fahy* for the United States. Reported below: 119 F. 2d 821.

No. 188. NATIONAL LABOR RELATIONS BOARD *v.* AUTOMOTIVE MAINTENANCE MACHINERY CO. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Assistant Solicitor General Fahy* and *Mr. Robert B. Watts* for petitioner. *Mr. Charles S. Baker* for respondent. Reported below: 116 F. 2d 350.

No. 281. NATIONAL LABOR RELATIONS BOARD *v.* SPARKS-WITHINGTON CO. ET AL. October 31, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Assistant Solicitor General Fahy* and *Mr. Robert B. Watts* for petitioner. *Mr. John T. Scott* for the Sparks-Withington Co., and *Mr. Benjamin Kleinstiver* for the United Cooperative Society, respondents. Reported below: 119 F. 2d 78.

No. 311. SCHNEIDERMAN *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Carol Weiss King* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Warner W. Gardner* for the United States. *Pearl M. Hart* filed a brief on behalf of the American Committee for Protection of Foreign Born, as *amicus curiae,* in support of the petition. Reported below: 119 F. 2d 500.

No. 348. SEMINOLE NATION *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Court of Claims granted. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Messrs. Paul M. Niebell* and *W. W. Pryor* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Littell,* and *Mr. Vernon L. Wilkinson* for the United States. Reported below: 93 Ct. Cls. 500.

No. 325. RODIEK, ANCILLARY EXECUTOR, *v.* UNITED STATES ET AL. October 13, 1941. Petition for writ of

certiorari to the Circuit Court of Appeals for the Second Circuit granted. The CHIEF JUSTICE and MR. JUSTICE MURPHY took no part in the consideration and decision of this application. *Messrs. Reuben D. Silliman, Sherwood E. Silliman, Russell C. Gay,* and *Charles H. Lawson* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Melvin H. Siegel, Paul A. Sweeney, Richard H. Demuth,* and *Harry Leroy Jones* for the respondents. Reported below: 117 F. 2d 588; 120 F. 2d 760.

No. 328. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* ALABAMA ASPHALTIC LIMESTONE CO. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Assistant Solicitor General Fahy* for petitioner. Reported below: 119 F. 2d 819.

No. 286. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* SOUTHWEST CONSOLIDATED CORP. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Assistant Solicitor General Fahy* for petitioner. *Mr. A. Chauncey Newlin* for respondent. Reported below: 119 F. 2d 561.

No. 503. PALM SPRINGS HOLDING CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Thomas R. Dempsey* for petitioner. *Assistant Solicitor General Fahy* for respondent. Reported below: 119 F. 2d 846.

No. 248. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* LERNER STORES CORPORATION (MD.). Octo-

ber 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Assistant Solicitor General Fahy* for petitioner. *Mr. Andrew B. Trudgian* for respondent. Reported below: 118 F. 2d 455.

No. 529. FLEMING, ADMINISTRATOR, WAGE & HOUR DIVISION, U. S. DEPARTMENT OF LABOR *v.* LOWELL SUN CO. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Assistant Solicitor General Fahy* and *Mr. Gerard D. Reilly* for petitioner. *Mr. Elisha Hanson* for respondent. Reported below: 120 F. 2d 213.

No. 602. ALABAMA *v.* KING & BOOZER, A PARTNERSHIP, ET AL.; and

No. 603. CURRY, COMMISSIONER OF REVENUE, *v.* UNITED STATES ET AL. October 13, 1941. Petitions for writs of certiorari to the Supreme Court of Alabama granted. MR. JUSTICE JACKSON took no part in the consideration and decision of these applications. *Messrs. Thomas S. Lawson,* Attorney General of Alabama, *John W. Lapsley,* and *J. Edward Thornton,* Assistant Attorneys General, for petitioners. *Assistant Solicitor General Fahy* and *Mr. Fred L. Blackmon* for respondents. Reported below: 241 Ala. 557, 569; 3 So. 2d 572, 582.

No. 962, October Term, 1940. MARTIN M. GOLDMAN *v.* UNITED STATES;

No. 963, October Term, 1940. SHULMAN *v.* UNITED STATES; and

No. 980, October Term, 1940. THEODORE GOLDMAN *v.* UNITED STATES. See *post,* p. 704.

No. 332. WILLIAMS MANUFACTURING CO. *v.* UNITED SHOE MACHINERY CORP. October 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. H. A. Toulmin* and *H. A. Toulmin, Jr.* for petitioner. *Messrs. Harrison F. Lyman* and *Thomas J. Ryan* for respondent. Reported below: 121 F. 2d 273.

Nos. 581 and 582. SPRECKELS *v.* COMMISSIONER OF INTERNAL REVENUE. October 20, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Walter Slack* for petitioner. *Assistant Solicitor General Fahy* for respondent. Reported below: 119 F. 2d 667.

No. 588. NATIONAL LABOR RELATIONS BOARD *v.* ELECTRIC VACUUM CLEANER CO., INC. ET AL. October 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Assistant Solicitor General Fahy* and *Mr. Robert B. Watts* for petitioner. *Mr. Lawrence C. Spieth* for the Electric Vacuum Cleaner Co., and *Messrs. Joseph A. Padway* and *Herbert S. Thatcher* for the International Molders' Union of North America, Local 430, et al., respondents. Reported below: 120 F. 2d 611.

No. 142. COLUMBIA RIVER PACKERS ASSN., INC. *v.* HINTON ET AL. October 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Ralph E. Moody* for petitioner. *Mr. Lee Pressman* for respondents. Reported below: 117 F. 2d 310.

No. 523. WEBER *v.* UNITED STATES. October 20, 1941. Petition for writ of certiorari to the Circuit Court of Ap-

peals for the Ninth Circuit granted. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. A. L. Wirin* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Warner W. Gardner* for the United States. Reported below: 119 F. 2d 932.

No. 600. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* SAFE DEPOSIT & TRUST CO. OF BALTIMORE, TRUSTEE, ET AL. October 27, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Assistant Solicitor General Fahy* for petitioner. *Mr. Charles McH. Howard* for respondents. Reported below: 121 F. 2d 307.

No. 601. MAGRUDER, COLLECTOR OF INTERNAL REVENUE, *v.* WASHINGTON, BALTIMORE & ANNAPOLIS REALTY CORP. October 27, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Assistant Solicitor General Fahy* for petitioner. *Mr. Richard F. Cleveland* for respondent. Reported below: 120 F. 2d 441.

No. 604. GRAVES ET AL., CONSTITUTING THE STATE TAX COMM'N OF NEW YORK, *v.* SCHMIDLAPP ET AL., EXECUTORS. October 27, 1941. Petition for writ of certiorari to the Surrogates Court of the County of New York, State of New York, granted. *Mr. Mortimer M. Kassell* for petitioners. *Mr. Harrison Tweed* for respondents. Reported below: 285 N. Y. 741, 34 N. E. 2d 901; 286 N. Y. 596, 35 N. E. 2d 937.

No. 622. FLEMING, ADMINISTRATOR, *v.* A. H. BELO CORPORATION. October 27, 1941. Petition for writ of

certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Assistant Solicitor General Fahy* and *Mr. Gerard D. Reilly* for petitioner. *Messrs. Eugene P. Locke* and *Maurice E. Purnell* for respondent. Reported below: 121 F. 2d 207.

No. 154. EXHIBIT SUPPLY CO. *v.* ACE PATENTS CORP.;
No. 155. GENCO, INC. *v.* ACE PATENTS CORP.; and
No. 156. CHICAGO COIN MACHINE CO. *v.* ACE PATENTS CORP. See *post*, p. 705.

No. 665. PENCE *v.* UNITED STATES. November 10, 1941. 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*, granted. *Mr. William B. Collins* for petitioner. *Assistant Solicitor General Fahy* and *Messrs. Julius C. Martin, Fendall Marbury*, and *Keith L. Seegmiller* for the United States. Reported below: 121 F. 2d 804.

No. 272. MILES ET AL. *v.* ILLINOIS CENTRAL RAILROAD CO. November 10, 1941. Petition for writ of certiorari to the Court of Appeals of Tennessee granted. *Messrs. William G. Cavett* and *Louis E. Miller* for petitioners. *Messrs. Marion G. Evans, Thos. A. Evans, Clinton H. McKay*, and *Chas. A. Helsell* for respondent.

No. 658. UNITED STATES TO THE USE OF NOLAND COMPANY, INC. *v.* IRWIN ET AL. November 10, 1941. Petition for writ of certiorari to the Court of Appeals for the District of Columbia granted. *Messrs. Bynum E. Hinton* and *Alexander M. Heron* for petitioner. *Messrs. Prentice E. Edrington* and *Amasa M. Holcombe* for respondents. Reported below: 122 F. 2d 73.

No. 532. CENTERS *v.* SANFORD, WARDEN. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Augustus M. Roan* for petitioner. *Assistant Attorney General Berge* and *Messrs. Warner W. Gardner* and *W. Marvin Smith* for respondent. Reported below: 120 F. 2d 217.

No. 680. U. S. INDUSTRIAL CHEMICALS, INC. *v.* CARBIDE & CARBON CHEMICALS CORP. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. William H. Davis, Dean S. Edmonds,* and *Thomas D. Thacher* for petitioner. *Messrs. Leonard A. Watson, Clair V. Johnson,* and *Clair W. Fairbank* for respondent. Reported below: 121 F. 2d 665.

No. 648. PECHEUR LOZENGE CO., INC. *v.* NATIONAL CANDY CORP. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. Counsel are requested to present their views as to whether state law governs and, if so, what the applicable state law is. *Messrs. Joseph Fairbanks* and *Alfred J. L'Heureux* for petitioner. *Mr. James D. Carpenter, Jr.* for respondent. Reported below: 122 F. 2d 318.

No. 649. MISHAWAKA RUBBER & WOOLEN MANUFACTURING CO. *v.* S. S. KRESGE CO. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted, limited to the first and second questions presented in the petition for certiorari. *Mr. George L. Wilkinson* for petitioner. *Mr. William B. Giles* for respondent. Reported below: 119 F. 2d 316.

No. 706. CHICAGO ET AL. *v.* FIELDCREST DAIRIES, INC. November 24, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Barnet Hodes, James A. Velde,* and *Walter V. Schaefer* for petitioners. *Mr. Owen Rall* for respondent. Reported below: 122 F. 2d 132.

No. 707. VALENTINE, POLICE COMMISSIONER, *v.* CHRESTENSEN. November 24, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. William C. Chanler* for petitioner. *Mr. Walter W. Land* for respondent. Reported below: 122 F. 2d 511.

No. 708. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* CREDIT ALLIANCE CORP. November 24, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Assistant Solicitor General Fahy* for petitioner. *Messrs. Newell W. Ellison, Duane R. Dills,* and *Christopher S. Sargent* for respondent. Reported below: 122 F. 2d 361.

No. 711. GORMAN, CITY TREASURER, ET AL. *v.* WASHINGTON UNIVERSITY. November 24, 1941. Petition for writ of certiorari to the Supreme Court of Missouri granted. *Mr. William E. Kemp* for petitioners. *Messrs. R. B. Caldwell* and *Richard S. Bull* for respondent. Reported below: 348 Mo. 310, 153 S. W. 2d 35.

No. 50. HOLMES *v.* UNITED STATES. See *ante,* p. 583.

No. 720. MILCOR STEEL CO. *v.* GEORGE A. FULLER CO. ET AL. December 8, 1941. Petition for writ of certiorari

to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. George L. Wilkinson* and *Asher Blum* for petitioner. *Messrs. Malcolm K. Buckley* and *Conrad Christel* for respondents. Reported below: 122 F. 2d 292.

No. 744. UNITED STATES *v.* WRIGHTWOOD DAIRY CO.; and

No. 783. WRIGHTWOOD DAIRY CO. *v.* UNITED STATES. December 8, 1941. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Fahy* for the United States. *Mr. Alvin E. Stein* for the Wrightwood Dairy Co. Reported below: 123 F. 2d 100.

No. 738. UNITED STATES *v.* KERR, ADMINISTRATRIX. December 15, 1941. Petition for writ of certiorari to the Court of Appeals for the District of Columbia granted. *Solicitor General Fahy* for the United States. *Mr. Camden R. McAtee* for respondent. Reported below: 122 F. 2d 638.

No. 990, October Term, 1940. UNITED STATES *v.* NUNNALLY INVESTMENT CO. See *post*, p. 705.

No. 745. SCHENECTADY UNION PUBLISHING CO. *v.* SWEENEY. December 22, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Messrs. Morris L. Ernst, William A. Roberts,* and *Benjamin Kaplan* for petitioner. *Messrs. John O'Connor* and *William F. Cusick* for respondent. Reported below: 122 F. 2d 288.

No. 757. PRUDENCE REALIZATION CORP. *v.* GEIST, TRUSTEE. January 5, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Irving L. Schanzer* for petitioner. *Mr. A. Joseph Geist* for respondent. Reported below: 122 F. 2d 503.

No. 772. BRILLHART, ADMINISTRATOR, *v.* EXCESS INSURANCE CO. January 5, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mr. Clarence C. Chilcott* for petitioner. *Mr. Paul R. Stinson* for respondent. Reported below: 121 F. 2d 776.

DECISIONS DENYING CERTIORARI, FROM OCTOBER 6, 1941, THROUGH JANUARY 5, 1942.

No. 596. IRVINE *v.* SPAETH, COMMISSIONER OF TAXATION. See *ante*, p. 575.

No. 177. SPAULDING *v.* SANFORD, WARDEN. October 13, 1941. 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 and MR. JUSTICE JACKSON took no part in the consideration and decision of these applications. *J. O. Spaulding, pro se. Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for respondent. Reported below: 119 F. 2d 783.

No. 198. VANCE *v.* SANFORD, WARDEN. October 13, 1941. 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. *Joe Vance,*

pro se. *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *W. Marvin Smith* for respondent. Reported below: 119 F. 2d 784.

No. 216. SWEETNEY *v.* JOHNSTON, WARDEN. October 13, 1941. 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. *Clarence Mackel Sweetney, pro se.* *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for respondent. Reported below: 121 F. 2d 445.

No. 273. LOVVORN *v.* JOHNSTON, WARDEN. October 13, 1941. 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. *James A. Lovvorn, pro se.* *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for respondent. Reported below: 118 F. 2d 704.

No. 276. BROWN ET AL. *v.* FEDERAL LAND BANK OF LOUISVILLE, KY. October 13, 1941. 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. *Messrs. Samuel E. Cook* and *Walter L. Clements* for petitioners. *Assistant Solicitor General Fahy* and *Messrs. Mastin G. White* and *Robert K. McConnaughey* for respondent. Reported below: 118 F. 2d 871.

No. 297. MOYER *v.* HINES, ADMINISTRATOR OF VETERANS AFFAIRS. October 13, 1941. 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. Paul D. Smith* and *Thomas H. Sutherland* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Melvin H. Siegel* and *Paul A. Sweeney* for respondent.

No. 335. JORDAN *v.* UNITED STATES. October 13, 1941. 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 JACKSON took no part in the consideration and decision of these applications. *Mr. John J. McCreary* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *W. Marvin Smith* for the United States. Reported below: 120 F. 2d 65.

No. 250. FLETCHER *v.* KRISE, RECEIVER. October 13, 1941. The petition for writ of certiorari to the Court of Appeals for the District of Columbia; the motion to strike; and the motion for leave to proceed further *in forma pauperis,* are denied. *Edmond C. Fletcher, pro se. Messrs. William Stanley* and *J. Edward Burroughs, Jr.* for respondent. Reported below: 120 F. 2d 809.

No. 284. WESLEY *v.* TEXAS. On petition for writ of certiorari to the Court of Criminal Appeals of Texas;

No. 296. ENGELS *v.* AMRINE, WARDEN, ET AL. On petition for writ of certiorari to the Supreme Court of Kansas; and

No. 507. PYLE *v.* KANSAS ET AL. On petition for writ of certiorari to the Supreme Court of Kansas. October 13, 1941. The motions for leave to proceed further *in*

forma pauperis are denied for the reason that the Court, upon examination of the papers herein submitted, finds that the applications for writs of certiorari were not filed within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940). The petitions for writs of certiorari are therefore also denied. *Mr. A. S. Baskett* for petitioner in No. 284. *William Hugh Engels* and *Harry Pyle, pro se.* Reported below: No. 284, 147 S. W. 2d 493; No. 507, 153 Kan. 568, 112 P. 2d 354.

No. 344. BEST *v.* CALIFORNIA. On petition for writ of certiorari to the District Court of Appeal, 2d Appellate District, of California; and

No. 586. HAMILTON *v.* TEXAS. On petition for writ of certiorari to the Court of Criminal Appeals of Texas. October 13, 1941. The motions for leave to proceed further *in forma pauperis* are denied for the reason that the Court, upon examination of the papers herein submitted, finds that the applications for writs of certiorari were not filed within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940); *Finn* v. *Railroad Commission,* 286 U. S. 559. The petitions for writs of certiorari are therefore also denied. *James Best, pro se. Mr. Charles Mooney* for petitioner in No. 586. Reported below: No. 344, 43 Cal. App. 2d 100, 110 P. 2d 504; No. 586, 138 Tex. Cr. R. 205, 135 S. W. 2d 476; 150 S. W. 2d 395.

No. 302. DE MARCOS *v.* OVERHOLSER, SUPERINTENDENT OF ST. ELIZABETHS HOSPITAL. October 13, 1941. The petition for writ of certiorari to the Court of Appeals for the District of Columbia; the motion for a supplemental record; and the motion for leave to proceed further *in forma pauperis,* are denied. *J. Ralph De Marcos, pro se.*

Assistant Solicitor General Fahy, Assistant Attorney General Berge, and *Mr. W. Marvin Smith* for respondent. Reported below: 122 F. 2d 16.

No. 68. WYANT *v.* CALDWELL, RECEIVER. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Claude Wyant, pro se.* Reported below: 116 F. 2d 83.

No. 99. BROOKS *v.* HILL-SHAW COMPANY. October 13, 1941. 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. *Messrs. Joseph D. Ryan* and *Marshall Solberg* for petitioner. *Messrs. Joseph H. Hinshaw* and *Oswell G. Treadway* for respondent. Reported below: 117 F. 2d 682.

No. 148. DUGAN *v.* ASHE, WARDEN. October 13, 1941. Petition for writ of certiorari to the Supreme Court of Pennsylvania, and motion for leave to proceed further *in forma pauperis,* denied. *Raymond Dugan, pro se.* Reported below: 342 Pa. 77, 19 A. 2d 461.

No. 158. GOODALE *v.* CAMPBELL ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Hazel Frances Goodale, pro se. Mr. Harry C. Howard* for respondents.

No. 159. NEW YORK EX REL. MARK *v.* WARDEN OF THE ATTICA STATE PRISON. October 13, 1941. Petition for

writ of certiorari to the Court of Appeals of New York, and motion for leave to proceed further *in forma pauperis*, denied. *Ralph Mark, pro se.* Reported below: 285 N. Y. 847, 35 N. E. 2d 509.

No. 176. CARROLL *v.* CARROLL ET AL. October 13, 1941. Petition for writ of certiorari to the Supreme Court of California, and motion for leave to proceed further *in forma pauperis*, denied. *Catherine M. Carroll, pro se. Messrs. Archibald H. Vernon* and *Gilbert E. Harris* for respondents. Reported below: 103 P. 2d 233; 16 Cal. 2d 761, 108 P. 2d 420.

No. 178. SWEENEY *v.* STATE BOARD OF PUBLIC ASSISTANCE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and motion for leave to proceed further *in forma pauperis*, denied. *Frank Sweeney, pro se.* Reported below: 119 F. 2d 1023.

No. 189. CONRAD *v.* ASHE, WARDEN. October 13, 1941. Petition for writ of certiorari to the Supreme Court of Pennsylvania, and motion for leave to proceed further *in forma pauperis*, denied. *Donald Conrad, pro se.*

No. 208. PIANEZZI *v.* CALIFORNIA; and

No. 209. PIANEZZI ET AL. *v.* CALIFORNIA. October 13, 1941. Petitions for writs of certiorari to the District Court of Appeal, 2d Appellate District, of California, and motions for leave to proceed further *in forma pauperis*, denied. *Peter Pianezzi* and *Martin E. McGowan, pro se.* Reported below: 42 Cal. App. 2d 270, 108 P. 2d 685.

No. 235. WILLEY ET AL. *v.* MAINE CENTRAL RAILROAD CO. October 13, 1941. Petition for writ of certiorari to the Supreme Judicial Court of Maine, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Henry F. Butler* for petitioners. *Mr. Edward W. Wheeler* for respondent. Reported below: 137 Me. 336, 18 A. 2d 316.

No. 241. JENKINS *v.* ASHE, WARDEN. October 13, 1941. Petition for writ of certiorari to the Supreme Court of Pennsylvania, and motion for leave to proceed further *in forma pauperis,* denied. *James Jenkins, pro se.* Reported below: 341 Pa. 334, 19 A. 2d 472.

No. 242. GROLEMUND *v.* CAFERATA ET AL. October 13, 1941. Petition for writ of certiorari to the Supreme Court of California, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Thos. D. Aitken* for petitioner. Reported below: 17 Cal. 2d 679, 111 P. 2d 641.

No. 249. DONAHUE *v.* BURNS, SHERIFF. October 13, 1941. Petition for writ of certiorari to the Supreme Court of Tennessee, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. George W. Chamlee* for petitioner.

No. 264. NULSEN *v.* JOHNSON. October 13, 1941. Petition for writ of certiorari to the 57th District Court of Bexar County, Texas, and motion for leave to proceed further *in forma pauperis,* denied. *Joseph K. Nulsen, pro se.*

No. 275. KING *v.* SOUTH DAKOTA ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court

of Appeals for the Eighth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *J. B. King, pro se.* Reported below: 121 F. 2d 455.

No. 345. FENZEL, TRUSTEE, *v.* FENSTERWALD ET AL. October 13, 1941. Petition for writ of certiorari to the Supreme Court of Ohio, and motion for leave to proceed further *in forma pauperis,* denied. *Maud L. Fenzel, pro se.* Reported below: 138 Ohio St. 257, 34 N. E. 2d 211.

No. 509. BARTON ET AL. *v.* PHELAN COMPANY. October 13, 1941. Petition for writ of certiorari to the Court of Appeal, 1st Circuit, of Louisiana, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Julius T. Long* for petitioners. *Mr. Charles A. McCoy* for respondent. Reported below: 200 So. 508.

No. 530. ROBERTS *v.* PRATT ET AL. October 13, 1941. Petition for writ of certiorari to the Court of Appeals of New York, and motion for leave to proceed further *in forma pauperis,* denied. *Sam Roberts, pro se.* Reported below: 285 N. Y. 848, 35 N. E. 2d 510; 286 N. Y. 568, 35 N. E. 2d 922.

No. 531. PULLEN *v.* SUN LIFE INSURANCE CO. October 13, 1941. 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. *Mr. Samuel W. McCart* for petitioner. Reported below: 121 F. 2d 110.

No. 541. GRAY *v.* EUREKA-MARYLAND ASSURANCE CORP. October 13, 1941. 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. *Mr. Thurman L. Dodson* for petitioner. Reported below: 121 F. 2d 104.

No. 546. FARREN *v.* MAHONEY, ACTING WARDEN. October 13, 1941. Petition for writ of certiorari to the Supreme Court of the State of Washington, and motion for leave to proceed further *in forma pauperis*, denied. *Patrick Farren, pro se.*

No. 556. CURLEY *v.* CURLEY. October 13, 1941. 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. *Mr. Wm. J. Neale* for petitioner. *Messrs. Alvin L. Newmyer* and *David G. Bress* for respondent. Reported below: 120 F. 2d 730.

No. 47. OATES ET UX. *v.* NEW YORK LIFE INSURANCE CO. October 13, 1941. The motion to dispense with the printing of the record is granted. The petition for writ of certiorari to the Supreme Court of Florida is denied. *Mr. W. B. Dickenson, Jr.* for petitioners. *Messrs. Raymond D. Knight* and *Henry P. Adair* for respondent. Reported below: 144 Fla. 744, 198 So. 681.

No. 94. BOARD OF COMMISSIONERS OF SAN JUAN *v.* DE CASTRO. October 13, 1941. The motion for leave to file opposition to the petition is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit is denied. *Mr. F. Fernandez Cuyar* for petitioner. *Mr. Hugh R. Francis* for respondent. Reported below: 116 F. 2d 806.

No. 108. IDENTIFICATION DEVICES, INC. *v.* UNITED STATES. October 13, 1941. The motion to proceed on typewritten papers is granted. The petition for writ of certiorari to the Court of Appeals for the District of Columbia is denied. *James M. Rulong, pro se.* Reported below: 121 F. 2d 895.

No. 239. OSLAND *v.* STAR FISH & OYSTER CO. October 13, 1941. The motion to proceed on typewritten papers is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit is denied. *Mr. Alex T. Howard* for petitioner. *Messrs. Palmer Pillans* and *Alexis T. Gresham* for respondent. Reported below: 118 F. 2d 772.

No. 295. WEBER, PRESIDENT OF THE AMERICAN FEDERATION OF MUSICIANS, ET AL. *v.* OPERA ON TOUR, INC. October 13, 1941. It does not appear from the record that the federal question presented by the petition was necessarily decided by the Court of Appeals. The petition for writ of certiorari to the Court of Appeals of New York is denied. *Lynch* v. *New York ex rel. Pierson,* 293 U. S. 52; *Honeyman* v. *Hanan,* 300 U. S. 14, 18. *Mr. William Macy* for petitioners. *Mr. Jack Lewis Kraus, II,* for respondent. Reported below: 285 N. Y. 348, 34 N. E. 2d 349; 286 N. Y. 565, 35 N. E. 2d 920.

No. 60. PUERTO RICO *v.* BANK OF NOVA SCOTIA. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. The CHIEF JUSTICE took no part in the consideration and decision of this application. *Messrs. William Cattron Rigby, George A. Malcolm,* Attorney General of Puerto

Rico, and *Nathan R. Margold* for petitioner. *Messrs. J. Henri Brown* and *Walter L. Newson, Jr.* for respondent. Reported below: 116 F. 2d 379.

No. 217. BAILEY *v.* SEARS, ROEBUCK & Co. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. The CHIEF JUSTICE took no part in the consideration and decision of this application. *Mr. John F. Reilly* for petitioner. *Messrs. Stephen H. Philbin* and *Clyde A. Norton* for respondent. Reported below: 115 F. 2d 904.

No. 72. MORTIMER *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Messrs. John T. Dooling, Theodore Kiendl,* and *Christopher S. Sargent* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost,* and *W. Marvin Smith* for the United States. Reported below: 118 F. 2d 266.

No. 192. SIMONS ET AL. *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. Mark L. Herron* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 119 F. 2d 539.

No. 169. LECHE *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. Martin W. Littleton, Jr.* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost, Louis B. Schwartz,* and *W. Marvin Smith* for the United States. Reported below: 118 F. 2d 246.

No. 194. GUNDELFINGER *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. H. F. Stambaugh* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *W. Marvin Smith* for the United States. Reported below: 119 F. 2d 1023.

No. 520. MCDONALD *v.* HUDSPETH, WARDEN. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. John F. Rhodes* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. W. Marvin Smith* for respondent. Reported below: 120 F. 2d 962.

No. 304. PFLEUGER *v.* UNITED STATES ET AL. October 13, 1941. 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. Reuben D. Silliman, Sherwood E. Silliman,* and *William R. Rodenberg* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Paul A. Sweeney* and *Harry Leroy Jones* for respondents. Reported below: 73 App. D. C. 364, 121 F. 2d 732.

No. 349. DETROIT EDISON CO. *v.* SECURITIES & EXCHANGE COMMISSION. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. The CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Messrs. John Foster Dulles* and *Oscar C. Hull* for petitioner. *Assistant Solicitor General Fahy* and *Messrs. Arnold Raum, Chester T. Lane, Christopher M. Jenks, Lawrence S. Lesser, J. Leonard Townsend,* and *Homer Kripke* for respondent. Reported below: 119 F. 2d 730.

No. 352. GENERAL MOTORS CORP. ET AL. *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. The CHIEF JUSTICE, MR. JUSTICE MURPHY, and MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Messrs. John Thomas Smith, Ernest S. Ballard,* and *Herbert Pope* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Arnold,* and *Mr. Robert L. Stern* for the United States. Reported below: 121 F. 2d 376.

No. 359. CHINESE CONSOLIDATED BENEVOLENT ASSN., INC. *v.* SECURITIES & EXCHANGE COMMISSION. October

13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Mr. William M. Chadbourne* for petitioner. *Assistant Solicitor General Fahy* and *Messrs. Richard H. Demuth, Chester T. Lane, Christopher M. Jenks,* and *John T. Davis* for respondent. Reported below: 120 F. 2d 738.

No. 65. CROCKETT *v.* UNITED STATES; and

No. 66. CROCKETT *v.* MCELROY ET AL. October 13, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Messrs. Joseph M. Sanders* and *Oliver M. Loomis* for petitioner. *Solicitor General Biddle, Assistant Attorney General Shea,* and *Mr. Melvin H. Siegel* for respondents. Reported below: 116 F. 2d 646.

No. 74. MOORE *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Court of Claims denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. J. C. Murphy* for petitioner. *Solicitor General Biddle* and *Assistant Solicitor General Fahy* for the United States. Reported below: 93 Ct. Cls. 209, 37 F. Supp. 136.

No. 89. FIRST NATIONAL STEAMSHIP CO. ET AL. *v.* U. S. SHIPPING BOARD MERCHANT FLEET CORP. October 13, 1941. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Messrs. Stanley Suydam* and *Prew Sa-*

voy for petitioners. *Solicitor General Biddle, Assistant Attorney General Shea,* and *Messrs. Melvin H. Siegel* and *Richard H. Demuth* for respondent. Reported below: 73 App. D. C. 237, 119 F. 2d 6.

No. 97. KATZBERG ET AL. *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Court of Claims denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. David Steckler* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Melvin H. Siegel* for the United States. Reported below: 93 Ct. Cls. 281, 36 F. Supp. 1023.

No. 105. RECONSTRUCTION FINANCE CORPORATION *v.* TETER ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Solicitor General Biddle* and *Assistant Solicitor General Fahy* for petitioner. *Mr. Vincent O'Brien* for Lucius Teter et al., and *Mr. Leland K. Neeves* for Fletcher M. Durbin et al., respondents. Reported below: 117 F. 2d 716.

No. 113. AMEREX HOLDING CORPORATION *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. Bertram F. Shipman* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Richard H. Demuth,* and *Arthur A. Armstrong* for respondent. Reported below: 117 F. 2d 1009.

No. 117. PIRTLE *v.* BROWN ET AL., JUDGES OF ELECTION, ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Messrs. Crampton Harris* and *Lee Pressman* for petitioner. *Messrs. Nat Tipton* and *W. F. Barry* for respondents. Reported below: 118 F. 2d 218.

No. 119. DONEGHY ET AL., RESIDUARY TRUSTEES, *v.* ALEXANDER, FORMERLY COLLECTOR OF INTERNAL REVENUE; and

No. 120. DONEGHY ET AL., RESIDUARY TRUSTEES, *v.* JONES, COLLECTOR OF INTERNAL REVENUE. October 13, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. Chas. H. Garnett* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *William L. Cary* for respondents. Reported below: 118 F. 2d 521.

No. 125. ESTATE OF GUGGENHEIM *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Messrs. John W. Davis, Montgomery B. Angell, Lucius A. Buck, Henry Breckinridge,* and *Paul B. Barringer* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Warren F. Wattles* for respondent. Reported below: 117 F. 2d 469.

No. 150. PELLEY *v.* COLPOYS, U. S. MARSHAL. October 13, 1941. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. T. Edward O'Connell* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *Edward M. Curran* for respondent. Reported below: 73 App. D. C. 395, 122 F. 2d 12.

No. 166. RYAN, EXECUTRIX, *v.* ALEXANDER, FORMERLY COLLECTOR OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. Chas. H. Garnett* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *William L. Cary* for respondent. Reported below: 118 F. 2d 744.

No. 171. HADEN COMPANY *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. Homer L. Bruce* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch, Richard H. Demuth,* and *Arthur A. Armstrong* for respondent. Reported below: 118 F. 2d 285.

No. 180. WAGNER *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. MR. JUSTICE

JACKSON took no part in the consideration and decision of this application. *Mr. David H. Cannon* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Warner W. Gardner, Gordon B. Tweedy,* and *Earl C. Crouter* for the United States. Reported below: 118 F. 2d 801.

No. 193. SIMON *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Messrs. Arthur Garfield Hays* and *Sidney Struble* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 119 F. 2d 679.

No. 196. FERGUSON *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Messrs. Harry P. Lawther, Maury Hughes,* and *D. A. Frank* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 119 F. 2d 582.

No. 200. DUPONT *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 201. RASKOB *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Messrs. Joseph M.*

Hartfield, Walter S. Orr, and *A. Chauncey Newlin* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Arnold Raum* for respondent. Reported below: 118 F. 2d 544.

No. 226. UNITED STATES EX REL. FLETCHER *v.* FAHEY ET AL. October 13, 1941. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Edmond C. Fletcher, pro se. Assistant Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Paul A. Sweeney, Harold Lee, E. K. Neumann,* and *Neil Thompson* for respondents. Reported below: 73 App. D. C. 257, 121 F. 2d 28.

Nos. 257, 258 and 259. MINNESOTA MINING & MANUFACTURING CO. *v.* COE, COMMISSIONER OF PATENTS. October 13, 1941. Petition for writs of certiorari to the Court of Appeals for the District of Columbia denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Messrs. Paul Carpenter* and *Harold J. Kinney* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Melvin H. Siegel* and *Paul A. Sweeney* for respondent. Reported below: 73 App. D. C. 146, 118 F. 2d 593.

No. 278. NATIONAL LIFE & ACCIDENT INSURANCE CO. *v.* BREWER, FORMER COLLECTOR OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Messrs. Frederick Schwertner* and *James E. McCabe* for petitioner. *Assistant So-*

licitor General Fahy, Assistant Attorney General Clark, and *Messrs. J. Louis Monarch* and *Harry Marselli* for respondent. Reported below: 119 F. 2d 313.

No. 285. PIKE ET AL. *v.* WALKER, POSTMASTER GENERAL, ET AL. October 13, 1941. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. Horace J. Donnelly, Jr.* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for respondents. Reported below: 73 App. D. C. 289, 121 F. 2d 37.

No. 300. HUNT *v.* UNITED STATES; and

No. 301. HENDERSON *v.* UNITED STATES. October 13, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. Henry L. Balaban* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 120 F. 2d 592.

No. 351. ANHEUSER-BUSCH, INC. ET AL. *v.* BECKER, COLLECTOR OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Messrs. Daniel N. Kirby* and *Harry W. Kroeger* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Miss Helen R. Carloss* and *Mr. Paul R. Russell* for respondent. Reported below: 120 F. 2d 403.

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No. 355. HARVEY COAL CORP. *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. J. Nelson Anderson* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Miss Helen R. Carloss* and *Mr. William L. Cary* for the United States. Reported below: 118 F. 2d 350.

No. 498. POLAKOFF ET AL. *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Messrs. Irving Spieler* and *Louis Halle* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. W. Marvin Smith* for the United States. Reported below: 121 F. 2d 333.

No. 501. DOLLOFF *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Messrs. L. P. Brooks* and *A. V. Roberts* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *W. Marvin Smith* for the United States. Reported below: 121 F. 2d 157.

No. 502. LELLES *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. William A. Gilmore* for petitioner.

Assistant Solicitor General Fahy, Assistant Attorney General Berge, and *Messrs. Oscar A. Provost* and *W. Marvin Smith* for the United States. Reported below: 120 F. 2d 447.

No. 525. HEMPHILL *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. Melville Monheimer* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *Louis B. Schwartz* for the United States. Reported below: 120 F. 2d 115.

No. 526. HILLIARD *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Messrs. John W. Carter, Jr.* and *Hugh T. Williams* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *W. Marvin Smith* for the United States. Reported below: 121 F. 2d 992.

No. 62. PUENTE *v.* SPANISH NATIONAL STATE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Julius I. Puente, pro se.* Reported below: 116 F. 2d 43.

No. 69. C. A. ROSS, AGENT, INC. *v.* VENUTO, ADMINISTRATOR, ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Saul Nemser* for petitioner. *Mr.*

Louis Spiegel for respondents. Reported below: 118 F. 2d 679.

No. 77. LEWIS *v.* ILLINOIS. October 13, 1941. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Ode L. Rankin* for petitioner. *Messrs. George F. Barrett,* Attorney General of Illinois, and *Thomas J. Courtney* for respondent. Reported below: 375 Ill. 330, 31 N. E. 2d 795.

No. 79. CITY OF HARVEY ET AL. *v.* GETZ. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John J. Dowdle* for petitioners. *Mr. Henry O. Nickel* for respondent. Reported below: 118 F. 2d 817.

No. 80. CITY OF HARVEY *v.* GETZ. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John J. Dowdle* for petitioner. *Mr. Henry O. Nickel* for respondent. Reported below: 118 F. 2d 817.

No. 84. SARGENT & COMPANY ET AL. *v.* MOORE ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Raymond J. Scully* and *Hilbert I. Trachman* for petitioners. *Mr. Frank Weinstein* for respondents. Reported below: 117 F. 2d 140.

No. 85. HALL ET AL. *v.* BARNES ET AL., MEMBERS OF THE UNEMPLOYMENT COMPENSATION COMMISSION OF KEN-

TUCKY, ET AL. October 13, 1941. Petition for writ of certiorari to the Court of Appeals of Kentucky denied. *Mr. John Y. Brown* for petitioners. *Mr. A. E. Funk* for respondents. Reported below: 285 Ky. 160, 146 S. W. 2d 929.

No. 87. COCA-COLA COMPANY *v.* DIXIE-COLA LABORATORIES, INC., ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Harry D. Nims* and *Edward S. Rogers* for petitioner. *Mr. W. Hamilton Whiteford* for respondents. Reported below: 117 F. 2d 352.

No. 88. HUNTER & CO., INC. *v.* VILLAGE OF BELLWOOD. October 13, 1941. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. John F. Voight* for petitioner. *Mr. Henry O. Nickel* for respondent. Reported below: 375 Ill. 627, 32 N. E. 2d 160.

No. 90. JOGGER MANUFACTURING CORP. *v.* ROQUEMORE, DOING BUSINESS AS MULTIGRAPH SALES AGENCY. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Sidney Neuman* for petitioner. *Mr. Philip M. Aitken* for respondent. Reported below: 118 F. 2d 867.

No. 92. MITCHELL, ADMINISTRATOR, *v.* NEW ENGLAND MUTUAL LIFE INSURANCE CO. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John W. Carter, Jr.* for petitioner. *Mr. John L. Walker* for respondent. Reported below: 118 F. 2d 414.

No. 93. M. JACOBSON & SONS TRUST *v.* BOMEISLER ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Francis P. Garland* and *Frank P. Ryan* for petitioner. *Mr. Marcien Jenckes* for respondents. Reported below: 118 F. 2d 261.

No. 102. ORFANOS, ADMINISTRATOR, *v.* ZOLINTAKIS, EXECUTOR. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. P. T. Farnsworth, Jr.* and *W. Q. Van Cott* for petitioner. *Messrs. Calvin W. Rawlings* and *H. E. Wallace* for respondent. Reported below: 119 F. 2d 571.

No. 104. ALBERTY, TRADING AS ALBERTY'S FOOD PRODUCTS, ET AL. *v.* FEDERAL TRADE COMMISSION. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. W. I. Gilbert, Jr.* and *Charles H. Carr* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Arnold,* and *Messrs. Charles H. Weston* and *W. T. Kelley* for respondent. Reported below: 118 F. 2d 669.

No. 106. MISSISSIPPI FOR THE USE AND BENEFIT OF SHOEMAKER, ADMINISTRATOR, *v.* THAMES ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Webb M. Mize* for petitioner. *Messrs. William H. Watkins* and *George Butler* for respondents. Reported below: 117 F. 2d 949.

No. 107.. POPE ESTATE CO. *v.* LEWIS, FORMER COLLECTOR OF INTERNAL REVENUE. October 13, 1941. Petition

for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James Farraher* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark* and *Messrs. Sewall Key, J. Louis Monarch,* and *S. Dee Hanson* for respondent. Reported below: 116 F. 2d 328.

No. 109. BURDICK ET AL., TRUSTEES, *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Dallas S. Townsend* and *Gardner D. Howie* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Carlton Fox* for respondent. Reported below: 117 F. 2d 972.

No. 111. AMERICAN BRAKE SHOE & FOUNDRY CO. *v.* ALLTEX PRODUCTS CORP. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Edward S. Rogers, George H. Wallace,* and *Karl D. Loos* for petitioner. *Mr. Jacob W. Friedman* for respondent. Reported below: 117 F. 2d 983.

No. 114. DUNNING *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Vernon Cook* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *L. W. Post* for respondent. Reported below: 118 F. 2d 341.

No. 115. SKOUSEN ET AL. *v.* CONSOLIDATED MOTORS, INC. October 13, 1941. Petition for writ of certiorari

to the Supreme Court of Arizona denied. *Mr. John J. McCullough* for petitioners. *Mr. Charles L. Strouss* for respondent. Reported below: 56 Ariz. 481, 109 P. 2d 41.

No. 116. PENNSYLVANIA RAILROAD CO. *v.* MISTROT. October 13, 1941. Petition for writ of certiorari to the Court of Appeal, 1st District, of Louisiana denied. *Messrs. Frederic D. McKenney, John S. Flannery, G. Bowdoin Craighill, R. Aubrey Bogley,* and *E. B. Dubuisson* for petitioner. *Mr. Wade O. Martin, Jr.* for respondent. Reported below: 199 So. 163.

No. 118. PITTMAN, TRUSTEE, *v.* UNION PLANTERS NATIONAL BANK & TRUST CO. ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Lowell W. Taylor* and *Thos. A. Evans* for petitioner. *Mr. J. W. Canada* for Union Planters National Bank & Trust Co. et al., and *Messrs. F. M. Bass* and *Cecil Sims* for the American National Bank, respondents. Reported below: 118 F. 2d 211.

No. 123. MAR DE PASSY CORPORATION *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Harry S. Hall* and *George Gordon Battle* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 92 Ct. Cls. 316, 37 F. Supp. 141.

No. 126. FIXLER BROS., INC. *v.* AUTOMOBILE INSURANCE CO. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit

denied. *Mr. Joseph McCormack* for petitioner. *Mr. Thomas V. Koykka* for respondent. Reported below: 117 F. 2d 979.

No. 127. HEMLER *v.* HOPE PRODUCING CO. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. G. P. Bullis* for petitioner. *Mr. Henry P. Dart, Jr.* for respondent. Reported below: 117 F. 2d 231.

No. 130. STEPHENS ET AL. *v.* ST. LOUIS UNION TRUST CO. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. George Thompson, Jr., Sidney L. Samuels, Rosser J. Coke,* and *Charles Kassel* for petitioners. *Mr. Henry Davis* for respondent. Reported below: 116 F. 2d 574.

No. 133. KROUSE *v.* LOWDEN ET AL., TRUSTEES. October 13, 1941. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Mr. Charles A. Horsky* for petitioner. Reported below: 153 Kan. 181, 109 P. 2d 138.

No. 73. PYLE *v.* TENNESSEE CENTRAL RAILWAY CO. October 13, 1941. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *Mr. J. W. Stone* for petitioner. *Mr. Geo. H. Armistead, Jr.* for respondent.

No. 134. ARROW DISTILLERIES, INC., AN ILLINOIS CORPORATION, *v.* ARROW DISTILLERIES, INC., A MICHIGAN CORPORATION. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Donald A. Gardiner* for petitioner.

Mr. Ralph M. Snyder for respondent. Reported below: 117 F. 2d 636.

No. 135. ESTATE OF WILDER *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. W. Spalding* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Arnold Raum,* and *Joseph M. Jones* for respondent. Reported below: 118 F. 2d 281.

No. 136. BADGER OIL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Geo. S. McCarthy* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Joseph M. Jones* for respondent. Reported below: 118 F. 2d 791.

No. 137. PETTIT *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. B. Harrell* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Mr. J. Louis Monarch,* and *Miss Louise Foster* for respondent. Reported below: 118 F. 2d 816.

No. 138. PETTIT *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. B. Harrell* for petitioner. *Assistant Solicitor General Fahy* for respondent. Reported below: 118 F. 2d 816.

No. 191. ROESER & PENDLETON, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George Thompson, Jr.* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Joseph M. Jones* for respondent. Reported below: 118 F. 2d 462.

No. 140. BIRCKNER *v.* TILCH ET AL. October 13, 1941. Petition for writ of certiorari to the Court of Appeals of Maryland denied. *Mr. Wm. J. O'Mahony* for petitioner. Reported below: 18 A. 2d 222.

No. 141. EASTMAN ET AL. *v.* UNITED STATES ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. W. A. Ackerman, Otto B. Rupp,* and *Alfred J. Schweppe* for petitioners. *Assistant Solicitor General Fahy* and *Assistant Attorney General Littell* for respondents. Reported below: 118 F. 2d 421.

No. 144. EWEN ET AL. *v.* PEORIA & EASTERN RAILWAY CO. October 13, 1941. Petition for writ of certiorari to the District Court of the United States for the Southern District of New York denied. *Mr. Charles S. Aronstam* for petitioners. *Messrs. Jacob Aronson* and *John Puryear* for respondent. Reported below: 37 F. Supp. 917.

No. 145. BALABANOFF *v.* KELLOGG ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. H. Metson* for petitioner. *Mr. Guy C. Calden* for respondents. Reported below: 118 F. 2d 597.

No. 146. HILL-BEHAN LUMBER CO. *v.* STATE HIGHWAY COMMISSION. October 13, 1941. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Jacob M. Lashly* and *Frank E. Atwood* for petitioner. *Mr. Daniel C. Rogers* for respondent. Reported below: 347 Mo. 671, 148 S. W. 2d 499.

No. 147. HOLMES *v.* McCOLGAN, BANK & CORPORATION FRANCHISE TAX COMMISSIONER. October 13, 1941. Petition for writ of certiorari to the Supreme Court of California denied. *Messrs. Ralph D. Brown* and *E. H. Conley* for petitioner. *Messrs. Earl Warren,* Attorney General of California, and *H. H. Linney,* Deputy Attorney General, for respondent. Reported below: 17 Cal. 2d 426, 110 P. 2d 428.

No. 152. KEYES *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. W. Gwynn Gardiner* and *James M. Earnest* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Littell,* and *Mr. Warner W. Gardner* for the United States. Reported below: 73 App. D. C. 273, 119 F. 2d 444.

No. 153. CHICKERING, ADMINISTRATOR, *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Frederick H. Nash* and *Richard Wait* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Richard H. Demuth,* and *Miss Louise Foster* for respondent. Reported below: 118 F. 2d 254.

No. 324. MILLARD, EXECUTOR, *v.* MALONEY. October 13, 1941. Petition for writ of certiorari to the Circuit

Court of Appeals for the Third Circuit denied. *Mr. George W. C. McCarter* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Miss Helen R. Carloss* and *Mr. Lee A. Jackson* for respondent. Reported below: 121 F. 2d 257.

No. 154. EXHIBIT SUPPLY CO. *v.* ACE PATENTS CORP.;
No. 155. GENCO, INC. *v.* ACE PATENTS CORP.; and
No. 156. CHICAGO COIN MACHINE CO. *v.* ACE PATENTS CORP. October 13, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Clarence E. Threedy* and *John H. Sutherland* for petitioners. *Mr. Casper W. Ooms* for respondent. Reported below: 119 F. 2d 349.

No. 157. VINCE *v.* GREAT NORTHERN LIFE INSURANCE CO. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Arthur J. Abbott* for petitioner. *Mr. Albert F. Beasley* for respondent. Reported below: 118 F. 2d 232.

No. 162. PHILLIPS PETROLEUM CO. *v.* GREEN, CHAIRMAN OF THE IOWA STATE BOARD OF ASSESSMENT & REVIEW, ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. H. D. Emery* and *Rayburn L. Foster* for petitioner. Reported below: 119 F. 2d 466.

No. 163. OBERGFELL ET AL. *v.* GREEN ET AL. October 13, 1941. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Martin F. O'Donoghue* and *William J. Hughes, Jr.* for petitioners. *Mr. Joseph A. Padway* for respondents. Reported below: 73 App. D. C. 298, 121 F. 2d 46.

No. 164. PITCAIRN ET AL., RECEIVERS, *v.* WILD. October 13, 1941. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. Homer Hall* for petitioners. *Messrs. Mark D. Eagleton* and *Roberts P. Elam* for respondent. Reported below: 347 Mo. 915, 149 S. W. 2d 800.

No. 165. BORIN CORPORATION, FORMERLY ZERO ICE CORP., *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Theodore Levin* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Hubert L. Will* for respondent. Reported below: 117 F. 2d 917.

No. 167. SONKEN-GALAMBA CORPORATION ET AL. *v.* BUTLER IRON & STEEL CO., INC. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. I. J. Ringolsky, Harry L. Jacobs,* and *Wm. G. Boatright* for petitioners. *Messrs. Maurice J. O'Sullivan* and *David R. Milsten* for respondent. Reported below: 119 F. 2d 283.

No. 172. BRIGHAM YOUNG UNIVERSITY *v.* LILLYWHITE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Robert L. Judd, Paul H. Ray,* and *S. J. Quinney* for petitioner. *Mr. Calvin W. Rawlings* for respondent. Reported below: 118 F. 2d 836.

No. 173. MASON, TRUSTEE IN BANKRUPTCY, *v.* WYLDE ET AL. October 13, 1941. Petition for writ of certiorari to the Superior Court, Worcester County, Massachusetts,

denied. *Mr. Joseph Talamo* for petitioner. *Mr. Clarence W. Rowley* for respondents. Reported below: 308 Mass. 268, 32 N. E. 2d 615.

No. 174. CASALDUC, TRUSTEE, *v.* GONZALEZ ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Benicio F. Sanchez* for petitioner. Reported below: 117 F. 2d 915.

No. 175. CHEWNING *v.* DISTRICT OF COLUMBIA. October 13, 1941. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Cornelius H. Doherty* for petitioner. *Messrs. Richmond B. Keech* and *Vernon E. West* for respondent. Reported below: 73 App. D. C. 392, 119 F. 2d 459.

No. 182. PAULY JAIL BUILDING CO. ET AL. *v.* INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Gustavus A. Buder, Jr.* for petitioners. Reported below: 118 F. 2d 615.

No. 183. HAWKINSON *v.* JOHNSTON. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Maurice J. O'Sullivan, J. Francis O'Sullivan,* and *Leo T. Schwartz* for petitioner. Reported below: 119 F. 2d 110.

No. 187. RIOS *v.* BOWIE ET AL., TRUSTEES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Henry*

G. Molina for petitioner. *Mr. Earle T. Fiddler* for respondents. Reported below: 118 F. 2d 435.

No. 195. KILLOREN, TRUSTEE IN BANKRUPTCY, *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Lon O. Hocker* and *Harry S. Gleick* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Mr. J. Louis Monarch* and *Miss Louise Foster* for the United States. Reported below: 119 F. 2d 364.

No. 202. NEW AMSTERDAM CASUALTY CO. *v.* MIAMI CONSERVANCY DISTRICT. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Byron B. Harlan* for petitioner. *Mr. Andrew U. Thomas* for respondent. Reported below: 118 F. 2d 604.

No. 203. RYAN ET AL., TRADING AS KEYSTONE TRANSFER CO., *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION. October 13, 1941. Petition for writ of certiorari to the Superior Court of Pennsylvania denied. *Mr. Harold S. Shertz* for petitioners. *Messrs. Claude T. Reno,* Attorney General of Pennsylvania, and *Harry M. Showalter* for respondent. Reported below: 143 Pa. Super. 517, 17 A. 2d 637.

No. 204. MEYER ET AL. *v.* KENMORE-GRANVILLE HOTEL CO. ET AL. October 13, 1941. Petition for writ of certiorari to the Appellate Court, First District, of Illinois denied. *Mr. Meyer Abrams* for petitioners. *Mr. Claude A. Roth* for respondents. Reported below: 308 Ill. App. 78, 31 N. E. 2d 330.

No. 205. GREENE, GUARDIAN, *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. J. M. Mannon, Jr.* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Michael H. Cardozo, IV,* for respondent. Reported below: 119 F. 2d 383.

No. 207. RUBERT HERMANOS, INC. ET AL. *v.* PUERTO RICO. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Henri Brown* for petitioners. *Messrs. William Cattron Rigby, George A. Malcolm,* Attorney General of Puerto Rico, and *Nathan R. Margold* for respondent. Reported below: 118 F. 2d 752.

No. 211. HANNAN ET AL. *v.* CITY OF HAVERHILL ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Joseph F. Rutherford* and *Hayden Covington* for petitioners. Reported below: 120 F. 2d 87.

No. 213. PASCONE *v.* MASSACHUSETTS. October 13, 1941. Petition for writ of certiorari to the Supreme Judicial Court of Massachusetts denied. *Messrs. Joseph F. Rutherford* and *Hayden Covington* for petitioner. *Mr. Frank G. Volpe,* Assistant Attorney General of Massachusetts, for respondent. Reported below: 308 Mass. 591, 33 N. E. 2d 522.

No. 212. BARNETT ET AL. *v.* RECONSTRUCTION FINANCE CORPORATION. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh

Circuit denied. *Messrs. Dominic P. Sevald* and *Fred Barnett* for petitioners. *Assistant Solicitor General Fahy* and *Messrs. C. J. Durr* and *Hans A. Klagsbrunn* for respondent. Reported below: 118 F. 2d 190.

No. 214. FORT STREET UNION DEPOT CO. *v.* HILLEN, SPECIAL ADMINISTRATRIX. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John C. Shields* for petitioner. *Messrs. Tom Davis, Ernest A. Michel,* and *Carl L. Yaeger* for respondent. Reported below: 119 F. 2d 307.

No. 215. S. NATHAN & CO., INC. ET AL. *v.* RED CAB, INC. ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Burke G. Slaymaker* and *William Otis Badger* for petitioners. *Mr. William E. Reiley* for respondents. Reported below: 118 F. 2d 864.

No. 218. HAYES *v.* C. C. MOORE CONSTRUCTION CO., INC. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Toxey Hall* and *Lee D. Hall* for petitioner. *Mr. Thomas C. Hannah* for respondent. Reported below: 119 F. 2d 742.

No. 219. NEWFIELD, TRUSTEE, *v.* EAST RIVER SAVINGS BANK. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. W. Cameron Burton* for petitioner. *Mr. Edwin A. Falk* for respondent. Reported below: 118 F. 2d 453.

No. 220. CASPERSEN *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Jackson R. Collins* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *L. W. Post* for respondent. Reported below: 119 F. 2d 94.

No. 221. BROCK ET AL. *v.* BARNSDALL OIL CO. ET AL.; and

No. 222. ASH ET AL. *v.* BARNSDALL OIL CO. ET AL. October 13, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. B. Lewright* for petitioners in No. 221, and *Mr. Chas. M. Alderson* for petitioners in No. 222. *Messrs. W. J. Howard, E. E. Townes,* and *R. E. Seagler* for Barnsdall Oil Co. et al., and *Mr. David B. Trammell* for J. O. Phillips et al., respondents. Reported below: 118 F. 2d 699.

No. 224. URSETH *v.* SUN LIFE ASSURANCE CO. OF CANADA. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. L. London* for petitioner. *Mr. Harold R. Small* for respondent. Reported below: 119 F. 2d 529.

No. 225. WEGENER *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Chas. H. Garnett* and *C. F. Miller* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Samuel H. Levy* for respondent. Reported below: 119 F. 2d 49.

No. 227. TWIN PORTS OIL CO. *v.* PURE OIL CO. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Tom Davis* and *Ernest A. Michel* for petitioner. *Messrs. S. A. Mitchell, H. H. Thomas,* and *Harry S. Stearns* for respondent. Reported below: 119 F. 2d 747.

No. 228. S. S. WHITE DENTAL MANUFACTURING CO. *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Court of Claims denied. *Messrs. J. Henry Walters* and *Harry Levine* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Mr. J. Louis Monarch* and *Mrs. Elizabeth B. Davis* for the United States. Reported below: 93 Ct. Cls. 469, 38 F. Supp. 301.

No. 230. TRIPPETT ET AL., TRANSFEREES, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Chas. D. Turner* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. F. E. Youngman* and *J. Louis Monarch* for respondent. Reported below: 118 F. 2d 764.

No. 231. GORDON *v.* VALLEE ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Joel H. Berry* for petitioner. Reported below: 119 F. 2d 118.

No. 232. KOEBERLEIN *v.* DURBIN ET AL. October 13, 1941. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Anan Raymond* for petitioner.

Messrs. Craig Van Meter and *Fred H. Kelly* for respondents. Reported below: 376 Ill. 398, 34 N. E. 2d 407.

No. 233. PENN, DOING BUSINESS AS SUPERLITE COMPANY, ET AL. *v.* NOVADEL-AGENE CORPORATION. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Samuel E. Darby, Jr., Robert A. Ritchie,* and *Louis D. Fletcher* for petitioners. *Messrs. Drury W. Cooper* and *Brady Cole* for respondent. Reported below: 119 F. 2d 764.

No. 234. OMAHA PACKING CO. *v.* PITTSBURGH, FORT WAYNE & CHICAGO RAILWAY CO. ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. John S. Lord* and *Austin V. Clifford* for petitioner. *Messrs. Frederic D. McKenney, Silas H. Strawn, Frank J. Loesch, John D. Black, Edward M. Burke,* and *David L. Dickson* for respondents. Reported below: 120 F. 2d 594.

No. 236. CLARKE *v.* BARCLAY PARK CORP. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *John T. Clarke, pro se. Mr. Russell C. MacFall* for respondent.

No. 237. WHEAT *v.* FORD MOTOR CO. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Martin J. O'Donnell* for petitioner. *Mr. Frank Parker Davis* for respondent. Reported below: 118 F. 2d 612.

No. 240. HANSON *v.* LEHIGH VALLEY RAILROAD CO. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied.

Mr. James Raymond Berry for petitioner. *Mr. Edward A. Markley* for respondent. Reported below: 120 F. 2d 498.

No. 243. MARYLAND & VIRGINIA MILK PRODUCERS' ASSN., INC. *v.* DISTRICT OF COLUMBIA. October 13, 1941. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. John S. Barbour* and *Christopher B. Garnett* for petitioner. *Messrs. Richmond B. Keech, Vernon E. West,* and *Glenn Simmon* for respondent. *Mr. Charles W. Wilson* filed a brief on behalf of the National Cooperative Milk Producers' Federation, as *amicus curiae,* in support of the petition. Reported below: 73 App. D. C. 399, 119 F. 2d 787.

No. 246. KOPKE ET AL. *v.* ILLINOIS. October 13, 1941. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Wm. Scott Stewart* for petitioners. *Mr. George F. Barrett,* Attorney General of Illinois, for respondent. Reported below: 376 Ill. 171, 33 N. E. 2d 216.

No. 247. SUPPLEE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Louis A. Spiess* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Warren F. Wattles* for respondent. Reported below: 119 F. 2d 423.

No. 253. ELSTELNAT HOLDING CORPORATION *v.* PALMER, TRUSTEE IN BANKRUPTCY. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Herman A. Benjamin* for petitioner. Reported below: 119 F. 2d 605.

No. 254. HUNTEMAN, GUARDIAN, *v.* NEW ORLEANS PUBLIC SERVICE, INC. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John W. Harrell* for petitioner. *Mr. William W. Ogden* for respondent. Reported below: 119 F. 2d 465.

No. 260. SPRINKLE *v.* DAVIS. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. S. S. Lambeth, Jr.* for petitioner. *Mr. S. H. Williams* for respondent. Reported below: 117 F. 2d 938.

No. 261. BACHELDER, RECEIVER, *v.* NATIONAL LABOR RELATIONS BOARD. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. H. K. Bachelder* and *W. C. Bachelder* for petitioner. *Assistant Solicitor General Fahy* and *Messrs. Richard H. Demuth, Robert B. Watts, Laurence A. Knapp,* and *Frederick M. Davenport, Jr.* for respondent. Reported below: 120 F. 2d 574.

No. 263. WALKER, TRUSTEE IN BANKRUPTCY, *v.* L. MAXCY, INC. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Claude L. Gray* for petitioner. *Messrs. O. K. Reaves* and *Howell M. Hampton* for respondent. Reported below: 119 F. 2d 535.

No. 266. MCCLAVE & CO. *v.* CARDEN ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel C. Duberstein* for petitioner. *Mr. Louis Boehm* for respondents. Reported below: 118 F. 2d 677.

No. 269. YOUNG MEN'S CHRISTIAN ASSOCIATION *v.* NEW YORK CASUALTY CO. ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Vincent Starzinger* for petitioner. *Messrs. Donald Evans* and *Wm. F. Riley* for New York Casualty Co., and *Messrs. Jesse A. Miller* and *Fred C. Huebner* for Employers Mutual Casualty Co., respondents. Reported below: 119 F. 2d 387.

No. 270. FIRST TRUST & SAVINGS BANK *v.* KENT, RECEIVER. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. J. A. Fowler* for petitioner. Reported below: 119 F. 2d 151.

No. 271. SMITH *v.* FOURTH NATIONAL BANK OF TULSA. October 13, 1941. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Mr. Neal E. McNeill* for petitioner. *Messrs. Chas. L. Yancey* and *G. C. Spillers* for respondent. Reported below: 181 Okla. 280, 73 P. 2d 414; 189 Okla. 1, 112 P. 2d 158.

No. 274. MASSMAN CONSTRUCTION CO. *v.* BASSETT, DEPUTY COMMISSIONER OF U. S. EMPLOYEES' COMPENSATION COMM'N, ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Ben Ely* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Melvin H. Siegel* for respondents. Reported below: 120 F. 2d 230.

No. 279. WHITE SWAN CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 13, 1941. Petition for writ of cer-

tiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. H. C. A. Hofacker* for petitioner. *Assistant Solicitor General Fahy* and *Messrs. Warner W. Gardner, Robert B. Watts, Laurence A. Knapp,* and *Miss Ruth Weyand* for respondent. Reported below: 118 F. 2d 1002.

No. 282. POWELL ET AL., RECEIVERS, *v.* WIGGINS. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. F. P. Fleming* and *Charles R. Scott* for petitioners. *Mr. Charles O. Andrews, Jr.* for respondent. Reported below: 119 F. 2d 751.

Nos. 287 and 288. KEEFE ET AL. *v.* BLOOMFIELD VILLAGE DRAIN DISTRICT ET AL. October 13, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Raymond K. Dykema* and *David M. Wood* for petitioners. *Mr. James R. Breakey, Jr.* for respondents. Reported below: 119 F. 2d 157.

No. 289. KEEFE ET AL. *v.* MARTIN DRAIN AND BRANCHES DRAIN DISTRICT ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Raymond K. Dykema* and *David M. Wood* for petitioners. *Messrs. Alex. J. Groesbeck* and *Bert V. Nunneley* for respondents. *Mr. Joseph W. Hutchinson* filed a brief on behalf of the Board of Trustees of the Indiana State Teachers' Retirement Fund, as *amicus curiae,* in support of the petition. Reported below: 119 F. 2d 157.

No. 290. KEEFE ET AL. *v.* CENTER LINE RELIEF DRAIN DISTRICT ET AL. October 13, 1941. Petition for writ of

certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Raymond K. Dykema* and *David M. Wood* for petitioners. *Messrs. Alex. J. Groesbeck* and *Bert V. Nunneley* for respondents. Reported below: 119 F. 2d 157.

No. 291. KEEFE ET AL. *v.* NINE-MILE-HALFWAY DRAIN DISTRICT ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Raymond K. Dykema* and *David M. Wood* for petitioners. *Messrs. Alex. J. Groesbeck* and *Bert V. Nunneley* for respondents. Reported below: 119 F. 2d 157.

No. 292. BAHR ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. William Fulton Tarver* and *John C. White* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *John J. Pringle, Jr.* for respondent. Reported below: 119 F. 2d 371.

No. 293. TILLMAN *v.* NATIONAL CITY BANK OF NEW YORK. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Borris M. Komar* for petitioner. *Mr. Philip A. Carroll* for respondent. Reported below: 118 F. 2d 631.

No. 294. LONTOK *v.* BATTUNG ET AL. October 13, 1941. Petition for writ of certiorari to the Court of Appeals of the Philippines denied. *Marcelino Lontok, pro se.*

No. 298. GETTY *v.* KINZBACH TOOL CO., INC. ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Nelson J. Jewett, J. O. Modisette,* and *George B. Springston* for petitioner. Reported below: 119 F. 2d 249.

No. 299. STEPHENS *v.* RICHMAN & SAMUELS, INC. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Sawnie B. Smith* for petitioner. *Mr. Morris Cukor* for respondent. Reported below: 118 F. 2d 1011.

No. 310. LOWDEN ET AL., TRUSTEES, *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Court of Claims denied. *Messrs. M. L. Bell, W. F. Peter, Thomas P. Littlepage, W. R. Bleakmore,* and *Robert E. Lee* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Richard H. Demuth* and *Vernon L. Wilkinson* for the United States. Reported below: 93 Ct. Cls. 584.

No. 312. AMES ET UX. *v.* EMPIRE STAR MINES CO., LTD. October 13, 1941. Petition for writ of certiorari to the Supreme Court of California denied. *Messrs. Simeon E. Sheffey* and *Herman Weinberger* for petitioners. *Messrs. Robert M. Searls* and *William E. Colby* for respondent. Reported below: 17 Cal. 2d 213, 110 P. 2d 13.

No. 314. BOWDEN ET AL. *v.* CITY OF FORT SMITH. October 13, 1941. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. Joseph F.*

Rutherford and *Hayden Covington* for petitioners. Reported below: 202 Ark. 614, 151 S. W. 2d 1000.

No. 316. LYNCH, RECEIVER, ET AL. *v.* JACKSON, TRUSTEE IN BANKRUPTCY, ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Leonard J. Mayberg* for petitioners. *Mr. Earl E. Moss* for respondents. Reported below: 121 F. 2d 152.

No. 317. COGGAN *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Lawrence E. Green* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Miss Helen R. Carloss* and *Mr. Harry Marselli* for respondent. Reported below: 119 F. 2d 504.

No. 319. BEAR GULCH WATER CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John U. Calkins, Jr.* for petitioner. *Assistant Solicitor General Fahy* and *Assistant Attorney General Clark* for respondent. Reported below: 116 F. 2d 975.

No. 326. MAIER *v.* CONTINENTAL OIL CO. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. William H. Thompson, Perry E. O'Neal,* and *Patrick J. Smith* for petitioner. *Messrs. William H. Zwick* and *T. Morton McDonald* for respondent. Reported below: 120 F. 2d 237.

No. 329. BLAIR *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Court of Claims denied. *Messrs. John W. Gaskins, George R. Shields,* and *Herman J. Galloway* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 93 Ct. Cls. 555.

No. 330. HYDROILOID, INCORPORATED, ET AL. *v.* L. L. BROWN PAPER CO. ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William Morton Carden* for petitioners. Reported below: 118 F. 2d 674.

No. 333. CHICAGO & EASTERN ILLINOIS RAILROAD CO. *v.* GOURLEY. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. George I. Haight* and *K. L. Richmond* for petitioner. *Mr. Joseph D. Ryan* for respondent. Reported below: 121 F. 2d 785.

No. 334. JOSEPH E. SEAGRAM & SONS, INC. *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Joseph E. Davies* and *Raymond N. Beebe* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Miss Helen R. Carloss* and *Mr. Samuel E. Blackham* for the United States. Reported below: 93 Ct. Cls. 538, 36 F. Supp. 1013.

No. 336. SPIKES *v.* STREET & SMITH PUBLICATIONS, INC. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied.

Mr. Mark McMahon for petitioner. *Mr. Neil P. Cullom* for respondent. Reported below: 120 F. 2d 895.

No. 337. PRIME SECURITIES CORP. *v.* UNITED STATES;

No. 338. MICHIGAN SILICA CO. *v.* UNITED STATES;

No. 339. GENERAL CHROMIUM CORP. *v.* UNITED STATES;

No. 340. SENIOR INVESTMENT CORP. *v.* UNITED STATES;

No. 341. UDYLITE COMPANY *v.* UNITED STATES; and

No. 342. STANDARD COTTON PRODUCTS CO. *v.* UNITED STATES. October 13, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Benjamin E. Jaffe* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Richard H. Demuth* and *Paul S. McMahon* for the United States. Reported below: 119 F. 2d 939.

No. 343. AMERICAN NATIONAL BANK, TRUSTEE, *v.* SERVICE LIFE INSURANCE CO. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. William H. Thompson, Perry E. O'Neal,* and *Patrick J. Smith* for petitioner. Reported below: 120 F. 2d 579.

No. 346. LOUISIANA DELTA CATTLE CO., INC. *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Court of Claims denied. *Mr. Camden R. McAtee* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 93 Ct. Cls. 662.

No. 347. TASTY BAKING CO. *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Court

of Claims denied. *Mr. Hugh Satterlee* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Mr. J. Louis Monarch* for the United States. Reported below: 93 Ct. Cls. 667, 38 F. Supp. 844.

No. 350. WISCONSIN CO-OPERATIVE MILK POOL *v.* FIRST WISCONSIN NATIONAL BANK ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John Ernest Roe* for petitioner. *Mr. Bert Vandervelde* for respondents. Reported below: 119 F. 2d 999.

No. 353. HASKINS, RECEIVER, *v.* ROSEBERRY ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Thomas F. Ryan, Joseph M. Hartfield,* and *Eugene Frederick Roth* for petitioner. *Messrs. George B. Thatcher* and *William Woodburn* for respondents. Reported below: 119 F. 2d 803.

No. 354. MORTON, TRUSTEE, ET AL. *v.* DARDANELLE SPECIAL SCHOOL DISTRICT No. 15. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. J. W. House* and *James B. McDonough* for petitioners. *Mr. Wallace Townsend* for respondent. *Mr. Justin D. Bowersock* filed a brief on behalf of Martin-Holloway-Purcell, a Copartnership, as *amicus curiae,* in support of the petition. Reported below: 121 F. 2d 423.

No. 358. STEIN *v.* DELANO, COMPTROLLER OF THE CURRENCY, ET AL. October 13, 1941. Petition for writ of

certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Saul J. Zucker* and *Lionel P. Kristeller* for petitioner. Reported below: 121 F. 2d 975.

No. 497. EDWARDS *v.* BINGHAM PUMP CO. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. George P. Dike, Cedric W. Porter,* and *John F. McCarthy* for petitioner. *Mr. Robert F. Maguire* for respondent. Reported below: 118 F. 2d 338.

No. 506. SYSTEM FEDERATION No. 59 OF THE RAILWAY EMPLOYEES DEPT. *v.* LOUISIANA & ARKANSAS RAILWAY CO. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. S. P. Jones* for petitioner. *Messrs. A. L. Burford* and *T. W. Holloman* for respondent. Reported below: 119 F. 2d 509.

No. 511. TEXAS & PACIFIC RAILWAY CO. ET AL. *v.* CITIZENS NATIONAL BANK. October 13, 1941. Petition for writ of certiorari to the Supreme Court of Texas denied. *Mr. M. E. Clinton* for petitioners. *Mr. Paul E. Lesh* for respondent. Reported below: 136 Tex. 333, 150 S. W. 2d 1003.

No. 512. BOARD OF PUBLIC INSTRUCTION FOR THE COUNTY OF HERNANDO, FLORIDA, *v.* MEREDITH ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. O. K. Reaves* for petitioner. *Mr. Robert J. Pleus* for respondents. Reported below: 119 F. 2d 712.

No. 513. OUTBOARD, MARINE & MANUFACTURING CO. *v.* MUNCIE GEAR WORKS, INC. ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. George L. Wilkinson, S. L. Wheeler,* and *Isadore Levin* for petitioner. *Mr. Chas. W. Rummler* for respondents. Reported below: 119 F. 2d 404.

No. 514. COMMERCE TITLE GUARANTY CO. *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Walter P. Armstrong* and *J. E. McCadden* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Miss Helen R. Carloss* and *Michael H. Cardozo, IV,* for the United States. Reported below: 121 F. 2d 452.

No. 515. SHERMAN, TRUSTEE, *v.* BUCKLEY ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Sydney C. Perell* for petitioner. *Messrs. Russell C. Gay* and *Loring M. Black* for respondents. Reported below: 119 F. 2d 280.

No. 516. WHITELEY *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Frederick H. Spotts* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Arnold Raum, L. W. Post,* and *Miss Helen R. Carloss* for respondent. Reported below: 120 F. 2d 782.

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No. 517. SIROCCO COMPANY *v.* MIAMI. October 13, 1941. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. Sol A. Rosenblatt* for petitioner. *Mr. John W. Watson, Jr.* for respondent. Reported below: 145 Fla. 500, 1 So. 2d 725.

No. 519. CAMDEN FIRE INSURANCE ASSN. *v.* SUNDQUIST, ADMINISTRATRIX. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Herbert W. Hirsh* for petitioner. *Mr. Harry C. Heyl* for respondent. Reported below: 119 F. 2d 955.

No. 521. DARLING STORES CORP. *v.* YOUNG REALTY CO. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Eugene F. Roth* and *George Cosson* for petitioner. *Mr. Vincent Starzinger* for respondent. Reported below: 121 F. 2d 112.

No. 522. HERCULES MINING CO. *v.* UNITED STATES. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John H. Wourms* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Misses Helen R. Carloss* and *Louise Foster* for the United States. Reported below: 119 F. 2d 288.

No. 528. OHIO OIL CO. ET AL. *v.* THOMPSON, TRUSTEE, ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Thos. H. Cobbs, Craig Van Meter, Wm.*

H. Armstrong, and *Fred H. Kelly* for petitioners. *Mr. Thomas T. Railey* for respondents. Reported below: 120 F. 2d 831.

No. 534. HALL *v.* GEORGIA. October 13, 1941. Petition for writ of certiorari to the Court of Appeals of Georgia denied. *Mr. Augustus M. Roan* for petitioner. Reported below: 64 Ga. App. 644, 13 S. E. 2d 868.

No. 537. KENT *v.* ROTHENSIES, COLLECTOR OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Robert H. Montgomery, James O. Wynn, Thomas G. Haight, Leighton P. Stradley, J. Marvin Haynes, Chester J. McGuire,* and *George G. Tyler* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Arnold Raum* and *J. Louis Monarch* for respondent. Reported below: 120 F. 2d 476.

No. 538. SOUTHARD *v.* JACKSON, WARDEN. October 13, 1941. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Thomas Marshall* for petitioner. *Mr. Herbert J. Rushton,* Attorney General of Michigan, for respondent. Reported below. 298 Mich. 75, 298 N. W. 457.

No. 539. WHITE *v.* STEINMAN, TRUSTEE, ET AL. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John P. McGrath* for petitioner. *Mr. Harry H. Schutte* for Irving Steinman, Trustee, respondent. Reported below: 120 F. 2d 799.

No. 540. NICHOLS ET AL. *v.* TUFFY, TRUSTEE IN BANKRUPTCY. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles M. Lyman* for petitioners. *Mr. Emmet L. Holbrook* for respondent. Reported below: 120 F. 2d 906.

No. 542. HOUSMAN *v.* CALIFORNIA. October 13, 1941. Petition for writ of certiorari to the District Court of Appeal, 1st Appellate District, of California, denied. *Mr. Leo R. Friedman* for petitioner. *Mr. Earl Warren,* Attorney General of California, for respondent. Reported below: 44 Cal. App. 2d 619, 112 P. 2d 944.

No. 547. MAHLER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harry Friedman* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *F. E. Youngman* for respondent. Reported below: 119 F. 2d 869.

No. 560. FEDERAL LIFE INSURANCE CO. *v.* ETTMAN. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Wayne Ely* for petitioner. *Mr. J. L. London* for respondent. Reported below: 120 F. 2d 837.

No. 561. THE LACKAWANNA ET AL. *v.* STEAMTUG "S. & H. No. 2," INC. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Oscar R. Houston* for petitioners. *Mr. James A. Martin* for respondent. Reported below: 119 F. 2d 666.

No. 565. JONES *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Lon O. Hocker* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Mr. J. Louis Monarch* for respondent. Reported below: 120 F. 2d 828.

No. 573. MURPHY, DOING BUSINESS AS LA FRANCE TOLEDO CO., *v.* BRADY, ACTING COLLECTOR OF INTERNAL REVENUE. October 13, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. William O. Ballard* and *U. G. Denman* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Mr. J. Louis Monarch* for respondent. Reported below: 120 F. 2d 243.

No. 10, original. EX PARTE RAYMOND OSWALD DE MAUREZ. October 20, 1941. The motion for leave to file petition for writ of certiorari is granted. The motion for leave to proceed further *in forma pauperis,* and the petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, are denied. *Raymond Oswald DeMaurez, pro se. Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for P. J. Squier, Warden, respondent.

No. 305. HARRISON *v.* UNITED STATES. October 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Louis Harrison, pro se. Assistant Solicitor General Fahy* and *Assistant Attorney General Berge* for the United States. Reported below: 121 F. 2d 930.

No. 562. MARTINDALE *v.* LOS ANGELES COUNTY FLOOD CONTROL DISTRICT. October 20, 1941. Petition for writ of certiorari to the District Court of Appeal, 2d Appellate District, of California, and motion for leave to proceed further *in forma pauperis,* denied. *E. D. Martindale, pro se. Mr. W. B. McKesson* for respondent.

No. 570. FAIN *v.* UNITED STATES. October 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Messrs. Newell Blair* and *Harry W. Blair* for petitioner. *Assistant Solicitor General Fahy* and *Messrs. Julius C. Martin, Wilbur C. Pickett, Fendall Marbury,* and *W. Marvin Smith* for the United States. Reported below: 119 F. 2d 208.

No. 574. SAMPLES *v.* UNITED STATES. October 20, 1941. 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. *E. C. Samples, pro se. Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. W. Marvin Smith* for the United States. Reported below: 121 F. 2d 263.

No. 583. KICAK *v.* HAUBER, EXECUTOR. October 20, 1941. Petition for writ of certiorari to the Supreme Court of Ohio, and motion for leave to proceed further *in forma pauperis,* denied. *Messrs. Joseph Sheban* and *J. Francis Kicak* for petitioner. Reported below: 138 Ohio St. 456.

No. 593. FLETCHER *v.* MCMAHON ET AL. October 20, 1941. Petition for writ of certiorari to the Court of Ap-

peals for the District of Columbia, and motion for leave to proceed further *in forma pauperis*, denied. *Edmond C. Fletcher, pro se. Assistant Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for John P. McMahon et al., and *Messrs. Richmond B. Keech* and *Vernon E. West* for Thomas M. Rives, respondents. Reported below: 121 F. 2d 729.

No. 303. C. M. Lane Lifeboat Co., Inc., et al. *v.* United States. See *ante*, p. 579.

Nos. 121 and 122. Wallace *v.* Fiske et al. On petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit. October 20, 1941. In No. 122, the petition for writ of certiorari to review the judgment entered November 16, 1940, rehearing denied November 27, 1940, is denied on the ground that it was not filed within the time provided by law. 28 U. S. C., § 350. In No. 121, the motion for leave to dispense with the filing and printing of unnecessary portions of the record is denied for the reason that the Court, upon examination of the papers submitted, finds no ground upon which a writ of certiorari should be issued. The petition for writ of certiorari is therefore also denied. *Messrs. James C. Jones, Lon O. Hocker,* and *Frank Y. Gladney* for petitioner. Reported below: 115 F. 2d 1003.

No. 160. Springfield, Ohio, Local No. 352, of the International Alliance of Theatrical Stage Employees, et al. *v.* Settos, Lessee. October 20, 1941. On petition for writ of certiorari to the Supreme Court of Ohio. It does not appear from the record that the federal

question presented by the petition was necessarily decided by the court below. The petition for writ of certiorari is denied. *Lynch* v. *New York ex rel. Pierson,* 293 U. S. 52; *Honeyman* v. *Hanan,* 300 U. S. 14, 18. *Mr. Joseph A. Padway* for petitioners. *Messrs. A. C. Link* and *Samuel A. Bowman* for respondent. Reported below: 138 Ohio St. 40, 32 N. E. 2d 22.

No. 524. STEIN, TRADING AS JEAN CHEMICAL CO., ET AL. *v.* UNITED STATES. October 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. Patrick J. Friel* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Newton K. Fox* for the United States. Reported below: 119 F. 2d 677.

No. 548. RALPH W. CREWS *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 549. ROBERT E. CREWS *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 550. TRESNER *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 551. CHARLES CREWS *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 552. EVERETT J. CREWS *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 553. WILLIS *v.* COMMISSIONER OF INTERNAL REVENUE. October 20, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. J. D. Lydick* for petitioners. *Assistant Solicitor General Fahy,*

Assistant Attorney General Clark, and *Messrs. J. Louis Monarch* and *Richard H. Demuth* for respondent. Reported below: 120 F. 2d 749.

No. 555. C. R. KIRK & Co. *v.* UNITED STATES. October 20, 1941. Petition for writ of certiorari to the Court of Claims denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. James A. Cosgrove* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Mr. J. Louis Monarch* and *Mrs. Elizabeth B. Davis* for the United States. Reported below: 93 Ct. Cls. 488, 37 F. Supp. 934.

No. 543. ILSENG *v.* UNITED STATES;

No. 544. ILSENG *v.* UNITED STATES; and

No. 545. MCKERCHER *v.* UNITED STATES. October 20, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. David H. Cannon* for petitioners. *Assistant Solicitor General Fahy* and *Assistant Attorney General Berge* for the United States. Reported below: 120 F. 2d 823.

No. 585. JONES *v.* KENNEDY ET AL. October 20, 1941. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. MR. JUSTICE REED, MR. JUSTICE DOUGLAS, and MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. James J. Laughlin* for petitioner. *Assistant Solicitor General Fahy* and *Messrs. Richard H. Demuth, Chester T. Lane, James A. Pike,* and *Robert E. Kline, Jr.* for James M. Landis et al., respondents. Reported below: 73 App. D. C. 292, 121 F. 2d 40.

No. 559. POWELL ET AL., RECEIVERS, ET AL. *v.* LAUGHTER. October 20, 1941. The motion to substitute is granted and A. B. Laughter, administrator of the estate of John Grant Laughter, deceased, is substituted as the party respondent herein. The petition for writ of certiorari to the Supreme Court of North Carolina is denied. *Mr. Murray Allen* for petitioners. *Mr. Daniel A. Reed* for respondent. Reported below: 219 N. C. 689, 14 S. E. 2d 826.

No. 356. OLIVER *v.* UNITED STATES; and

No. 357. SELLERS *v.* UNITED STATES. October 20, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Hugh B. Woodward* and *C. Ray Smith* for petitioners. *Assistant Solicitor General Fahy* and *Assistant Attorney General Berge* for the United States. Reported below: 121 F. 2d 245.

No. 504. GETZ ET AL. *v.* TOWN OF BELLEAIR; and

No. 609. TOWN OF BELLEAIR *v.* GETZ ET AL. October 20, 1941. Petitions for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Giles J. Patterson* for petitioners in No. 504 and respondents in No. 609. *Mr. O. K. Reaves* for respondent in No. 504 and petitioner in No. 609. Reported below: 120 F. 2d 494.

No. 557. HANCOCK OIL CO. *v.* UNIVERSAL OIL PRODUCTS CO. October 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. F. A. Knight* for petitioner. *Messrs. Frederick S. Lyon* and *Leonard S. Lyon* for respondent. Reported below: 120 F. 2d 959.

No. 563. CARSTENS ET AL. *v.* PUBLIC UTILITY DISTRICT No. 1 OF LINCOLN COUNTY ET AL. October 20, 1941. Petition for writ of certiorari to the Supreme Court of the State of Washington denied. *Messrs. Antone E. Russell* and *Henry E. T. Herman* for petitioners. *Mr. E. K. Murray* for respondents. Reported below: 8 Wash. 2d 136, 111 P. 2d 583.

No. 571. COEN *v.* AMERICAN SURETY CO. October 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. John T. Harding* and *David A. Murphy* for petitioner. *Mr. Mitchel J. Henderson* for respondent. Reported below: 120 F. 2d 393.

No. 572. CREEK NATION *v.* UNITED STATES. October 20, 1941. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Paul M. Niebell* and *W. W. Spalding* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Littell* and *Mr. Vernon L. Wilkinson* for the United States. Reported below: 92 Ct. Cls. 346; 93 Ct. Cls. 767.

No. 575. SHARP, SUPERINTENDENT, ET AL. *v.* MITCHELL IRRIGATION DISTRICT. October 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Ewing T. Kerr* for petitioners. Reported below: 121 F. 2d 964.

No. 576. FINSTERWALD FURNITURE CO. *v.* FINSTERWALD CLOTHING CO. October 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Theodore Levin* for petitioner. *Mr.*

Jason L. Honigman for respondent. Reported below: 121 F. 2d 453.

No. 577. EHRMAN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Sidney M. Ehrman* and *Lloyd W. Dinkelspiel* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Warner W. Gardner* for respondent. Reported below: 120 F. 2d 607.

No. 578. MAY *v.* MIDWEST REFINING CO. ET AL. October 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Harry T. Smith* for petitioner. *Mr. Robert Hale* for respondents. Reported below: 121 F. 2d 431.

No. 579. TSERIONI ET AL. *v.* UNITED STATES. October 20, 1941. Petition for writ of certiorari to the Court of Claims denied. *Mr. David Steckler* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Melvin H. Siegel* for the United States. Reported below: 94 Ct. Cls. 142.

No. 580. FORD MOTOR CO. *v.* FEDERAL TRADE COMMISSION. October 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Clifford B. Longley* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Arnold,* and *Messrs. Charles H. Weston* and *W. T. Kelley* for respondent. Reported below: 120 F. 2d 175.

No. 587. REICH, DOING BUSINESS AS AUTOMOTIVE PRODUCTS CO., *v.* CHAMPION SPARK PLUG CO. October 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Donald W. Johnson* and *Charles V. Garnett* for petitioner. *Mr. Wilber Owen* for respondent. Reported below: 121 F. 2d 769.

No. 590. STANDARD OIL CO. OF NEW JERSEY *v.* UNITED STATES. October 20, 1941. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. Edward P. Sharretts* for petitioner. *Assistant Solicitor General Fahy* and *Messrs. Paul P. Rao, Charles D. Lawrence,* and *John R. Benney* for the United States. Reported below: 29 C. C. P. A. (Customs) 82, 120 F. 2d 340.

No. 592. SPRAGUE, RECEIVER, *v.* WOLL, U. S. ATTORNEY, ET AL. October 20, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Ralph R. Bradley* and *Robert E. Quirk* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Arnold,* and *Messrs. Robert L. Stern, Daniel W. Knowlton,* and *Nelson Thomas* for J. Albert Woll et al., and *Mr. Wm. B. Rubin* for Division 900 of the Amalgamated Association of Street Electric Railway & Motor Coach Employees, respondents. Reported below: 122 F. 2d 128.

No. 584. POPE *v.* CURRAN ET AL. October 27, 1941. 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. *Haywood Pope, pro se.* Reported below: 73 App. D. C. 170, 117 F. 2d 779.

No. 598. Cox *v.* Wilson, Warden. October 27, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Thomas R. Cox, pro se.* Reported below: 120 F. 2d 808.

No. 618. Fretwell *v.* Peoples Service Drug Stores, Inc. October 27, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Julian W. Fretwell, pro se.* Reported below: 118 F. 2d 76.

No. 620. Wright *v.* Union Central Life Insurance Co. October 27, 1941. 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 respondent.

No. 605. Groves *v.* United States. October 27, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. Mr. Justice Reed, Mr. Justice Douglas, and Mr. Justice Jackson took no part in the consideration and decision of this application. *Messrs. James B. Alley* and *George Z. Medalie* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. W. Marvin Smith* for the United States. Reported below: 122 F. 2d 87.

No. 624. McLean *v.* Commissioner of Internal Revenue. October 27, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit

denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. L. J. Benckenstein* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Richard H. Demuth* and *Warren F. Wattles* for respondent. Reported below: 120 F. 2d 942.

No. 612. TERMINAL & SHAKER HEIGHTS REALTY CO. *v.* VAN SWERINGEN COMPANY;

No. 613. TERMINAL & SHAKER HEIGHTS REALTY CO. *v.* VAN SWERINGEN CORPORATION ET AL.; and

No. 614. TERMINAL & SHAKER HEIGHTS REALTY CO. *v.* CLEVELAND TERMINAL BUILDING CO. ET AL. October 27, 1941. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE REED and MR. JUSTICE DOUGLAS took no part in the consideration and decision of these applications. *Mr. William H. Thompson* for petitioner. *Mr. Robert M. Calfee* for respondent in No. 612. *Mr. Frederick L. Leckie* for the Trustees of Van Sweringen Corp., respondents in No. 613; *Messrs. Joseph L. Stern* and *Meyer Abrams* for A. B. Gochenour et al., intervenor-respondents in Nos. 613 and 614, and *Mr. J. Hall Kellogg* for the Cleveland Terminal Bldg. Co., respondent in No. 614. Reported below: 119 F. 2d 231.

No. 606. STILL *v.* UNITED STATES. October 27, 1941. The motion to proceed on the typewritten record is granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. R. K. Wise* and *Warren E. Miller* for petitioner. *Assistant Solicitor General Fahy* and *Messrs. Julius C. Martin, Wilbur C. Pickett,* and *Fendall Marbury* for the United States. Reported below: 120 F. 2d 876.

No. 623. WEST ET AL. *v.* AMERICAN TELEPHONE & TELEGRAPH CO. October 27, 1941. The motion to use the certified record in Nos. 44 and 45, October Term, 1940, and to dispense with the printing thereof, is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit is denied. *Messrs. Harry L. Deibel* and *Orlin F. Goudy* for petitioners. *Mr. William B. Cockley* for respondent. Reported below: 121 F. 2d 142.

No. 38. LOVELL ET AL. *v.* DULAC CYPRESS CO., LTD. ET AL; and

No. 82. DULAC CYPRESS CO., LTD. ET AL. *v.* LOVELL ET AL. October 27, 1941. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James Q. Smith* for petitioners in No. 38 and respondents in No. 82. *Mr. Roberts C. Milling* for respondents in No. 38 and petitioners in No. 82. Reported below: 117 F. 2d 1.

No. 594. TAKOMA PARK BANK, INC. *v.* ABBOTT. October 27, 1941. Petition for writ of certiorari to the Court of Appeals of Maryland denied. *Messrs. Leonard J. Ganse, John W. Cragun,* and *Carl F. Bauersfeld* for petitioner. *Mr. W. C. Sullivan* for respondent. Reported below: 19 A. 2d 169.

No. 597. COLLIN & GISSEL (LUDWIG BAER) *v.* UNITED STATES. October 27, 1941. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. Ernest F. Mechlin* for petitioner. *Assistant Solicitor General Fahy* and *Messrs. Paul P. Rao, Charles D. Lawrence,* and *John R. Benney* for the United States. Reported below: 29 C. C. P. A. (Customs) 96.

No. 599. LOFLAND *v.* FOX, RECEIVER. October 27, 1941. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Mr. Joseph Ominsky* for petitioner. *Mr. Abraham Wernick* for respondent. Reported below: 341 Pa. 401, 20 A. 2d 224.

No. 607. MORGAN *v.* POTTER, SUPERINTENDENT OF MILWAUKEE PUBLIC SCHOOLS. October 27, 1941. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Mr. A. W. Richter* for petitioner. *Messrs. Walter J. Mattison* and *Omar T. McMahon* for respondent. Reported below: 238 Wis. 246, 298 N. W. 763.

No. 608. FRIEND ET AL., TRUSTEES, *v.* COMMISSIONER OF INTERNAL REVENUE. October 27, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. A. J. Pflaum* and *Harry N. Wyatt* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Clark* and *Messrs. Arnold Raum, J. Louis Monarch,* and *Joseph M. Jones* for respondent. Reported below: 119 F. 2d 959.

No. 615. GAMMONS ET AL., EXECUTORS AND TRUSTEES, *v.* HASSETT, COLLECTOR OF INTERNAL REVENUE. October 27, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Harold Williams* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Joseph M. Jones* for respondent. Reported below: 121 F. 2d 229.

No. 616. WARDELL, RECEIVER, *v.* DISTRICT OF COLUMBIA. October 27, 1941. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied.

Messrs. Brice Clagett, Charles E. Wainwright, George P. Barse, John F. Anderson, and *Lee Roy Stover* for petitioner. *Messrs. Richmond B. Keech, Vernon E. West,* and *Glenn Simmon* for respondent. Reported below: 122 F. 2d 202.

No. 617. BROWN ET AL. *v.* J. B. SIMPSON, INC. October 27, 1941. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Herbert J. Rushton,* Attorney General, for petitioners. *Mr. Isadore Levin* for respondent. Reported below: 297 Mich. 403, 298 N. W. 81.

No. 625. NORTH MIAMI *v.* MEREDITH ET AL. October 27, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. D. H. Redfearn* for petitioner. *Messrs. D. C. Hull, Erskine W. Landis, Francis P. Whitehair, John L. Graham* and *J. Compton French* for respondents. Reported below 121 F. 2d 279.

No. 627. WAREHOUSEMEN'S UNION, LOCAL 117, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC. *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 628. MCKESSON & ROBBINS, INC. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. October 27, 1941. Petitions for writs of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Joseph A. Padway* and *Herbert S. Thatcher* for petitioner in No. 627. *Mr. Clinton Robb* for petitioners in No. 628. *Assistant Solicitor General Fahy* and *Messrs. Richard H. Demuth, Robert B. Watts, Laurence A. Knapp,* and *Morris P. Glushien* for respondent. Reported below: 121 F. 2d 84.

No. 315. UNITED STATES EX REL. ROBINSON *v.* JOHNSTON, WARDEN. November 10, 1941. 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. MR. JUSTICE JACKSON took no part in the consideration and decision of these applications. *Thomas Henry Robinson, Jr., pro se. Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. W. Marvin Smith* for respondent. Reported below: 118 F. 2d 998.

No. 695. CLARK *v.* BARLOW ET AL. November 10, 1941. 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. MR. JUSTICE JACKSON took no part in the consideration and decision of these applications. *Mr. Carl L. Ristine* for petitioner. *Mr. Dean Hill Stanley* for Lester P. Barlow, and *Assistant Attorney General Shea* and *Messrs. Warner W. Gardner, Sidney J. Kaplan,* and *Paul A. Sweeney* for Henry Morgenthau, Jr., Secretary of the Treasury, et al., respondents. Reported below: 122 F. 2d 337.

No. 684. MCGOLDRICK *v.* EQUITABLE LIFE ASSURANCE SOCIETY. November 10, 1941. The motion to consider certain orders of the District Court as a part of the record is granted. 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. *Mr. William Lemke* for petitioner. *Mr. E. D. Weller* for respondent. Reported below: 121 F. 2d 746.

No. 621. KNIGHT *v.* CALIFORNIA. November 10, 1941. Petition for writ of certiorari to the District Court of Appeal, 2d Appellate District, of California, and motion

for leave to proceed further *in forma pauperis,* denied. *Mr. Jack W. Hardy* for petitioner. Reported below: 44 Cal. App. 2d 887, 113 P. 2d 226.

No. 647. GLOVER *v.* TEXAS. November 10, 1941. Petition for writ of certiorari to the Court of Criminal Appeals of Texas, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. F. S. K. Whittaker* for petitioner. *Mr. Geo. W. Barcus,* Assistant Attorney General of Texas, for respondent. Reported below: 152 S. W. 2d 747.

No. 650. WEST *v.* STATE OF WASHINGTON. November 10, 1941. Petition for writ of certiorari to the Supreme Court of the State of Washington, and motion for leave to proceed further *in forma pauperis,* denied. *Fred Hartzell West, pro se.*

No. 611. LOVVORN *v.* WELSH, DISTRICT JUDGE. November 10, 1941. 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. *James A. Lovvorn, pro se. Assistant Attorney General Berge* and *Messrs. Warner W. Gardner* and *W. Marvin Smith* for respondent.

No. 677. PIERRE *v.* LOUISIANA. November 10, 1941. Petition for writ of certiorari to the Supreme Court of Louisiana, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Maurice R. Woulfe* for petitioner. Reported below: 198 La. 619, 3 So. 2d 895.

No. 681. STEFFLER *v.* JOHNSTON, WARDEN. November 10, 1941. 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. *Fred Steffler, pro se.* *Assistant Attorney General Berge* and *Mr. Warner W. Gardner* for respondent. Reported below: 121 F. 2d 447.

No. 636. A. G. REEVES STEEL CONSTRUCTION CO. *v.* WEISS, EXECUTRIX. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. John E. Hughes* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Warren F. Wattles* for respondent. Reported below: 119 F. 2d 472.

No. 662. FLIPPIN ET AL. *v.* UNITED STATES. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. J. Forrest McCutcheon* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *W. Marvin Smith* for the United States. Reported below: 121 F. 2d 742.

No. 670. KRUEGER ET AL. *v.* UNITED STATES. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. Arthur T. Vanderbilt* for petitioners. *Assistant Attorney General Clark* and *Messrs. Warner W. Gardner, J. Louis Monarch,* and *Paul R. Russell* for the United States. Reported below: 121 F. 2d 842.

Nos. 641 and 642. GLIDDEN COMPANY ET AL. *v.* UNITED STATES. November 10, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE REED and MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Messrs. H. J. Crawford, Frank Harrison,* and *Roger Hinds* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Mr. J. Louis Monarch* for the United States. Reported below: 119 F. 2d 235.

No. 643. SIMUS *v.* DONOGHUE, JUDGE. November 10, 1941. The motion to proceed on the typewritten record is granted. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Charles Liebman* and *Pearl M. Hart* for petitioner. *Mr. David Silbert* for respondent. Reported below: 377 Ill. 122, 35 N. E. 2d 371.

No. 654. WARRING *v.* HUFF, GENERAL SUPERINTENDENT; and

No. 655. WARRING *v.* COLPOYS, U. S. MARSHAL. November 10, 1941. The motion for bail is denied. Petition for writs of certiorari to the Court of Appeals for the District of Columbia denied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration and decision of these applications. *Mr. Myron G. Ehrlich* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *W. Marvin Smith* for respondents. Reported below: 122 F. 2d 641.

No. 536. HALLIDAY *v.* SQUIRE, SUPERINTENDENT OF BANKS. November 10, 1941. The motion to proceed on typewritten copies of the record is granted. Petition for writ of certiorari to the Supreme Court of Ohio denied.

Mr. Wm. T. Arnos for petitioner. *Mr. Thomas J. Herbert,* Attorney General of Ohio, for respondent.

No. 629. BUCKLEY *v.* CHRISTMAS. November 10, 1941. The motion to dispense with the printing of parts of the record is granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Harvey L. Rabbitt, Jacob H. Gilbert,* and *Miss Susan Brandeis* for petitioner. *Mr. E. Milton Altfeld* for respondent. Reported below: 121 F. 2d 323.

No. 669. HARDESTY, RECEIVER, *v.* FAIRMONT SUPPLY CO. November 10, 1941. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied for the want of a final judgment. *Mr. George P. Barse* for petitioner. *Mr. Eli Whitney Debevoise* for respondent. Reported below: 14 S. E. 2d 436.

No. 630. HOBART, DOING BUSINESS AS THE HOBART CABINET CO., *v.* NATIONAL LABOR RELATIONS BOARD. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Leonard H. Shipman* for petitioner. *Assistant Solicitor General Fahy* and *Messrs. Robert B. Watts* and *Laurence A. Knapp* for respondent.

No. 631. ABRAMS ET AL. *v.* SCANDRETT ET AL., TRUSTEES, ET AL. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Meyer Abrams* for petitioners. *Mr. A. N. Whitlock* for Henry A. Scandrett et al., Trustees; *Mr. Fred N. Oliver* for the Mutual Savings Bank Group; and *Messrs.*

Kenneth F. Burgess and *Douglas F. Smith* for the Life Insurance Group, respondents. Reported below: 121 F. 2d 371.

No. 632. MOSLEY ET AL. *v.* UNITED STATES APPLIANCE CORP. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Alan W. Davidson* for petitioners. *Mr. Philip Harper Allen* for respondent. Reported below: 121 F. 2d 149.

No. 633. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS *v.* STAENGEL. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Carleton S. Hadley* and *Walter N. Davis* for petitioner. *Messrs. Mark D. Eagleton* and *Roberts P. Elam* for respondent. Reported below: 122 F. 2d 271.

No. 634. COTROS ET AL. *v.* NASHVILLE TRUST CO., EXECUTOR. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Robert Lee Bartels* and *Felix Earl Hagler* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *William L. Cary* for respondent. Reported below: 122 F. 2d 326.

No. 637. RICE ET AL., TRUSTEES, *v.* GUTERMAN, TRUSTEE IN BANKRUPTCY. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Paul A. Dever* and *Edward O. Proctor* for petitioners. *Mr. Harry N. Guterman* for respondent. Reported below: 121 F. 2d 251.

No. 638. ARGUS HOSIERY MILLS, INC. *v.* ROBERTSON. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Russell R. Kramer* and *J. W. Baker* for petitioner. *Mr. W. O. Lowe* for respondent. Reported below: 121 F. 2d 285.

No. 640. GARTLAND STEAMSHIP CO. *v.* INTERLAKE IRON CORP. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frederick L. Leckie* for petitioner. *Mr. Henry N. Longley* for respondent. Reported below: 121 F. 2d 267.

No. 651. TOWN OF DAVENPORT ET AL. *v.* HUGHES ET AL. November 10, 1941. Petition for writ of certiorari to the Supreme Court of Florida denied. *Messrs. Stuart B. Warren, George W. Wylie, D. C. Hull, Francis P. Whitehair,* and *John L. Graham* for petitioners. *Messrs. Robt. R. Milam, A. Y. Milam,* and *E. T. McIlvaine* for respondents. Reported below: 147 Fla. 228, 2 So. 2d 851.

No. 652. TERNSTEDT MANUFACTURING CO. ET AL. *v.* MOTOR PRODUCTS CORP. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John H. Bruninga* for petitioners. *Mr. Sherwin A. Hill* for respondent. Reported below: 119 F. 2d 834.

No. 656. JOHNSON *v.* FULLER ET AL. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Arthur Garfield Hays* and *Alan S. Hays* for petitioner. *Mr. Francis H. Scheetz* for respondents. Reported below: 121 F. 2d 618.

Nos. 659 and 660. MOLONEY ELECTRIC CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. November 10, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Donald A. Callahan* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Edward First* for respondent. Reported below: 120 F. 2d 617.

No. 664. BOSTON & MAINE RAILROAD *v.* CUNNINGHAM. November 10, 1941. Petition for writ of certiorari to the Supreme Court for the County of Hampden, Massachusetts, denied. *Mr. Francis P. Garland* for petitioner. *James H. Cunningham, pro se.* Reported below: 309 Mass. 215, 34 N. E. 2d 697.

No. 672. SOUTHGATE NELSON CORP. *v.* QUINN. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Arthur M. Boal* for petitioner. *Mr. Simone N. Gazan* for respondent. Reported below: 121 F. 2d 190.

No. 674. WEST PRODUCTION CO. *v.* COMMISSIONER OF INTERNAL REVENUE. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Robert Ash* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Mr. J. Louis Monarch* for respondent. Reported below: 121 F. 2d 9.

No. 675. CITY INVESTING CO. *v.* 165 BROADWAY BUILDING, INC. ET AL. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Elmer O. Goodwin* for petitioner. *Messrs. Leonard G. Bisco* and *David Barnett* for respondents. Reported below: 120 F. 2d 813.

No. 671. FARMERS & GINNERS COTTON OIL CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William B. White* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Edward H. Hammond* for respondent. Reported below: 120 F. 2d 772.

No. 673. WINGREN, TRUSTEE, *v.* HANSSEN ET AL. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Miss Norma L. Comstock* for petitioner. *Mr. Albert J. Gould* for respondents. Reported below: 121 F. 2d 1011.

No. 676. CARBO-FROST, INC. ET AL. *v.* STANLEY KNIGHT CORP. ET AL. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Paul R. Stinson, Arthur Mag,* and *Roy B. Thomson* for petitioners. *Messrs. Geo. H. Wallace* and *Charles B. Cannon* for respondents. Reported below: 121 F. 2d 576.

No. 682. HOAN *v.* JOURNAL COMPANY ET AL. November 10, 1941. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Messrs. Francis E. McGovern* and *Stephen J. McMahon* for petitioner. *Mr. J. Gilbert Hardgrove* for respondents. Reported below: 238 Wis. 311, 298 N. W. 228.

No. 685. WEST VIRGINIA POWER CO. ET AL. *v.* UNITED STATES. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Cir-

cuit denied. *Messrs. Raymond T. Jackson, Jesse Knight,* and *Joseph M. Sanders* for petitioners. *Assistant Solicitor General Fahy* and *Assistant Attorney General Littell* for the United States. Reported below: 122 F. 2d 733.

No. 686. WILLIS, EXECUTRIX, *v.* PENNSYLVANIA RAILROAD CO. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas J. O'Neill* for petitioner. *Messrs. Frederic D. McKenney, Ray Rood Allen,* and *G. Hunter Merritt* for respondent. Reported below: 122 F. 2d 248.

No. 687. UNITED NEW YORK SANDY HOOK PILOTS ASSN. ET AL. *v.* THE OSLOFJORD ET AL.; and

No. 688. UNITED NEW YORK SANDY HOOK PILOTS ASSN. ET AL. *v.* DEN NORSKE AMERIKALINJE A/S. November 10, 1941. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. W. H. McGrann* for petitioners. *Mr. John W. Griffin* for respondents. Reported below: 121 F. 2d 304.

No. 689. MOORE-MCCORMACK LINES, INC. *v.* HUME. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Geo. Whitefield Betts* for petitioner. *Mr. Simone N. Gazan* for respondent. Reported below: 121 F. 2d 336.

No. 692. RICHARDSON *v.* COMMISSIONER OF INTERNAL REVENUE. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles E. Hughes, Jr., Joseph M. Hartfield,* and *Holt S. McKinney* for petitioner. *Assist-*

ant Attorney General Clark and *Messrs. Warner W. Gardner, J. Louis Monarch, Richard H. Demuth,* and *Morton K. Rothschild* for respondent. Reported below: 121 F. 2d 1.

No. 698. GARLAND, TRUSTEE, ET AL. *v.* UNITED STATES. November 10, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. John B. Duval* and *Robert C. Duval, Jr.* for petitioners. *Messrs. Warner W. Gardner, Julius C. Martin, Wilbur C. Pickett, Fendall Marbury,* and *Richard S. Salant* for the United States. Reported below: 122 F. 2d 118.

No. 657. GEIGER *v.* CALIFORNIA. On petition for writ of certiorari to the Superior Court, Los Angeles County, California; and

No. 683. GEIGER *v.* CALIFORNIA. On petition for writ of certiorari to the Superior Court, Appellate Department, California. November 17, 1941. The motions for leave to proceed further *in forma pauperis,* and the petitions for writs of certiorari, are denied. *Mr. Morris Lavine* for petitioner. *Messrs. Ray L. Chesebro, John L. Bland* and *W. Jos. McFarland* for respondent.

No. 619. QUERY ET AL., CONSTITUTING THE SOUTH CAROLINA TAX COMM'N, *v.* UNITED STATES ET AL. November 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. John M. Daniel* and *Claude K. Wingate* for petitioners. *Solicitor General Fahy* for respondents. Reported below: 121 F. 2d 631.

No. 653. HOTEL MARKHAM, INC. ET AL. *v.* BALL ET AL. November 17, 1941. Petition for writ of certiorari to the

Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Albert S. Bozeman* and *Webb M. Mize* for petitioners. *Messrs. Giles J. Patterson* and *J. C. Floyd* for respondents. Reported below: 120 F. 2d 753.

Nos. 678 and 679. CRANDALL *v.* PENNSYLVANIA. November 17, 1941. Petition for writs of certiorari to the Superior Court of Pennsylvania denied. *Mr. H. Eugene Gardner* for petitioner. *Mr. Herbert B. Cohen* for respondent. Reported below: 145 Pa. Super. 353, 21 A. 2d 232.

No. 690. PATTERSON ET UX. *v.* PEEL. November 17, 1941. Petition for writ of certiorari to the Court of Civil Appeals, 9th Supreme Judicial District, of Texas, denied. *Mr. Dan Moody* for petitioners. Reported below: 149 S. W. 2d 284.

No. 691. BRIGHT BROOKS LUMBER CO. *v.* WEISS, TRUSTEE. November 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles Polis* for petitioner. Reported below: 122 F. 2d 336.

No. 696. GODFREY-KEELER CO., INC. *v.* WICKES BOILER CO., INC. November 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Jacob Levine* for petitioner. *Mr. Alfred B. Nathan* for respondent. Reported below: 121 F. 2d 415.

No. 699. THOMPSON ET AL., INDEPENDENT EXECUTORS, *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. November 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied.

Messrs. Harry C. Weeks and *Benjamin L. Bird* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Joseph M. Jones* for respondent. Reported below: 121 F. 2d 725.

No. 703. MAYTAG COMPANY ET AL. *v.* APEX ELECTRICAL MANUFACTURING CO. November 17, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Wallace R. Lane* and *Benton Baker* for petitioners. *Messrs. F. O. Richey* and *H. F. McNenny* for respondent. Reported below: 122 F. 2d 182.

No. 639. CORCORAN *v.* MONTGOMERY WARD & CO., INC. November 24, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, and motion to proceed further *in forma pauperis,* denied. *Mr. Fulton Brylawski* for petitioner. *Mr. Leonard S. Lyon* for respondent. Reported below: 121 F. 2d 572.

No. 697. WEISS *v.* UNITED STATES. November 24, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Messrs. Hugh M. Wilkinson* and *John D. Lambert* for petitioner. *Assistant Solicitor General Fahy* and *Assistant Attorney General Berge* for the United States. Reported below: 122 F. 2d 675.

No. 712. NICK ET AL. *v.* UNITED STATES. November 24, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and

decision of this application. *Messrs. Bryan Purteet* and *Warren E. Miller* for petitioners. *Assistant Solicitor General Fahy, Assistant Attorney General Arnold* and *Mr. Charles H. Weston* for the United States. Reported below: 122 F. 2d 660.

No. 718. GENERAL MOTORS CORP. *v.* COE, COMMISSIONER OF PATENTS. November 24, 1941. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. The CHIEF JUSTICE took no part in the consideration and decision of this application. *Messrs. Drury W. Cooper* and *Frank E. Liverance, Jr.* for petitioner. *Assistant Solicitor General Fahy, Assistant Attorney General Shea* and *Mr. Melvin H. Siegel* for respondent. *Messrs. William B. Kerkam* and *John J. Darby* filed a brief on behalf of the American Patent Law Association, as *amicus curiae,* in support of the petition. Reported below: 120 F. 2d 736.

No. 663. JONES *v.* CITY OF ARCADIA. November 24, 1941. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. W. D. Bell* for petitioner. *Mr. R. W. Shackleford* for respondent. Reported below: 147 Fla. 571, 3 So. 2d 338.

No. 700. HARWICK, ASSIGNEE, ET AL. *v.* O'HERN, RECEIVER, ET AL. November 24, 1941. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Frank T. Miller* for petitioners. *Messrs. Donald R. Richberg, D. I. Jarrett, George Z. Barnes, George W. Hunt, David J. Kadyk,* and *Howard White* for respondents. Reported below: 376 Ill. 517, 34 N. E. 2d 829.

No. 702. PHILLIPS ET AL., TRUSTEES, *v.* BAKER ET AL., A PARTNERSHIP. November 24, 1941. Petition for writ

of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Theodore H. Lassagne* and *James M. Naylor* for petitioners. *Mr. Percy S. Webster* for respondents. Reported below: 121 F. 2d 752.

No. 704. UNITED STATES EX REL. ENG FON SING *v.* UHL, DISTRICT DIRECTOR OF IMMIGRATION. November 24, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John Holley Clark, Jr.* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. W. Marvin Smith* for respondent. Reported below: 122 F. 2d 552.

No. 721. ISBRANDTSEN-MOLLER CO., INC. *v.* THE TOLEDO ET AL. November 24, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. James W. Ryan* for petitioner. *Messrs. John W. Griffin* and *Wharton Poor* for respondents. Reported below: 122 F. 2d 255.

No. 736. MORRIS, SPECIAL ADMINISTRATRIX, ET AL. *v.* CLARK ET AL. See *ante,* p. 584.

No. 668. FENNELL *v.* BACHE ET AL., TRADING AS J. S. BACHE & CO. December 8, 1941. 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. *Mr. James J. Laughlin* for petitioner. *Mr. Frank J. O'Connor* for respondents.

No. 719. VAN HORNE *v.* HINES, ADMINISTRATOR OF VETERANS AFFAIRS. December 8, 1941. 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. C. L. Dawson* and *Warren E. Miller* for petitioner. *Solicitor General Fahy* and *Messrs. Julius C. Martin, Wilbur C. Pickett, Fendall Marbury,* and *W. Marvin Smith* for respondent. Reported below: 122 F. 2d 207.

No. 785. MICKENS *v.* VIRGINIA. December 8, 1941. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia, and motion for leave to proceed further *in forma pauperis,* denied. The order heretofore entered staying execution of sentence is vacated. MR. JUSTICE MURPHY is of opinion that the petition for writ of certiorari should be granted. *Mr. Charles Curry* for petitioner. Reported below: 178 Va. 273, 16 S. E. 2d 641.

No. 715. WATERMAN ET AL. *v.* THE AAKRE ET AL. December 8, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. D. Roger Englar, T. Catesby Jones,* and *F. Herbert Prem* for petitioners. *Messrs. John W. Griffin* and *Wharton Poor* for Rederi A/S Henneseid; *Mr. George C. Sprague* for the Continental Grain Co.; and *Mr. Chauncey I. Clark* for the Lamport & Holt Line, Ltd., respondents. Reported below: 122 F. 2d 469.

No. 716. UNIVERSAL INSURANCE CO. *v.* HALL-SCOTT MOTOR CAR CO. December 8, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Robert B. Gaylord* for petitioner. *Mr. Chalmers G. Graham* for respondent. Reported below: 122 F. 2d 531.

No. 717. CORCORAN *v.* ROYAL DEVELOPMENT CO. December 8, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David M. Palley* for petitioner. *Mr. Harold E. Stonebraker* for respondent. Reported below: 121 F. 2d 957.

No. 730. A. B. *v.* C. D. December 8, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Samuel G. Wagner* and *David L. Ullman* for petitioner. *Mr. Thomas Raeburn White* for respondent. Reported below: 123 F. 2d 1017.

No. 722. DYESS *v.* MILLER. December 8, 1941. Petition for writ of certiorari to the Supreme Court of Texas denied. *Messrs. H. Russell Bishop* and *H. D. Driscoll* for petitioner. Reported below: 151 S. W. 2d 186.

No. 725. CONWAY, TRADING AS CONWAY NEGLIGEES, ET AL. *v.* STONE, TRUSTEE, ET AL. December 8, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *James Conway, pro se. Mr. Frank L. Weil* for respondents. Reported below: 121 F. 2d 972.

No. 726. COOK, TRUSTEE, *v.* HANNAH ET AL. December 8, 1941. Petition for writ of certiorari to the Supreme Court of Iowa denied. *Mr. L. W. Powers* for petitioner. *Mr. John E. Mulroney* for respondents. Reported below: 230 Iowa 249, 297 N. W. 262.

No. 727. BARBOUR *v.* COMMISSIONER OF INTERNAL REVENUE. December 8, 1941. Petition for writ of certiorari

to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George M. Wolfson* for petitioner. *Solicitor General Fahy* and *Messrs. J. Louis Monarch* and *Harry Marselli* for respondent. Reported below: 122 F. 2d 165.

No. 728. ELIAS *v.* COMMISSIONER OF INTERNAL REVENUE. December 8, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Edgar B. Bronson* and *Jeremiah T. Mahoney* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *L. W. Post* for respondent. Reported below: 122 F. 2d 171.

No. 737. WALGREEN COMPANY ET AL. *v.* GLADE. December 8, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. C. Paul Parker* for petitioners. *Messrs. George Bayard Jones, George A. Chritton,* and *Russell Wiles* for respondent. Reported below: 122 F. 2d 306.

No. 554. SPENCER ET AL. *v.* LUCKENBACH GULF STEAMSHIP CO. ET AL. On petition for writ of certiorari to the Supreme Court of Louisiana. December 15, 1941. Petitioners' motion to file a narrative form of testimony in lieu of questions and answers is denied for the reason that the Court, upon examination of all the papers submitted, finds no ground upon which a writ of certiorari should be issued. The petition for a writ of certiorari is therefore also denied. *J. B. Spencer, pro se.* Reported below: 197 La. 652, 2 So. 2d 53.

No. 713. TENNER *v.* DULLEA, CHIEF OF POLICE OF THE CITY AND COUNTY OF SAN FRANCISCO. On petition for writ

of certiorari to the Superior Court for the City and County of San Francisco, California. December 15, 1941. The petition for writ of certiorari is denied in the exercise of our discretion for the reason that petitioner has not presented his application for habeas corpus to the highest court of the state. The stay heretofore entered is continued until further order of this Court to afford petitioner a reasonable opportunity to present his application for habeas corpus to the highest court of the state, and in the event of its denial to renew in this Court an application for a writ of certiorari. *Messrs. William Klein* and *William F. Herron* for petitioner. *Messrs. Earl Warren,* Attorney General of California, and *Smith Troy,* Attorney General of the State of Washington, for respondent.

No. 307. NEWARK MORNING LEDGER CO. *v.* NATIONAL LABOR RELATIONS BOARD. December 15, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. Charles Goldman* for petitioner. *Solicitor General Biddle* and *Messrs. Robert B. Watts* and *Morris P. Glushien* for respondent. Reported below: 120 F. 2d 262.

No. 743. WOOLLEY *v.* COMMISSIONER OF INTERNAL REVENUE. December 15, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. Elden McFarland* for petitioner. *Solicitor General Fahy* and *Messrs. J. Louis Monarch* and *Harry Marselli* for respondent. Reported below: 122 F. 2d 167.

No. 724. SUBURBAN LUMBER CO. *v.* NATIONAL LABOR RELATIONS BOARD. December 15, 1941. Petition for writ

of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Floyd H. Bradley* for petitioner. *Solicitor General Fahy* and *Messrs. Robert B. Watts, Laurence A. Knapp* and *Morris P. Glushien* for respondent. Reported below: 121 F. 2d 829.

No. 735. AMERICAN PACKING & PROVISION CO. *v.* UNITED STATES. December 15, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. J. H. DeVine, J. A. Howell,* and *Neil R. Olmstead* for petitioner. *Solicitor General Fahy* for the United States. Reported below: 122 F. 2d 445.

No. 742. HAWKINSON *v.* JOHNSTON. December 15, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Maurice J. O'Sullivan, J. Francis O'Sullivan,* and *Leo T. Schwartz* for petitioner. *Mr. Inghram D. Hook* for respondent. Reported below: 122 F. 2d 724.

No. 327. HAMMOND-KNOWLTON, ADMINISTRATRIX, *v.* UNITED STATES ET AL. December 22, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. Rudolph L. von Bernuth* for petitioner. *Assistant Solicitor General Fahy* for respondents. Reported below: 121 F. 2d 192.

No. 734. SIMON *v.* UNITED STATES. December 22, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. Randolph Bias* for petitioner. *So-*

licitor General Fahy and *Assistant Attorney General Berge* for the United States. Reported below: 123 F. 2d 80.

Nos. 731 and 732. STARR, ATTORNEY GENERAL, *v.* SCHRAM, RECEIVER. December 22, 1941. Petition for writs 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. *Messrs. Herbert J. Rushton,* Attorney General of Michigan, *James F. Shepherd,* Chief Assistant Attorney General, and *Merlin Wiley* for petitioner. *Messrs. Robert S. Marx, Frank E. Wood,* and *George P. Barse* for respondent. Reported below: 118 F. 2d 541.

No. 729. HALVERSON, BENEFICIARY, *v.* UNITED STATES. December 22, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Joseph J. Witry* for petitioner. *Solicitor General Fahy* and *Messrs. Julius C. Martin, Wilbur C. Pickett, Keith L. Seegmiller* and *W. Marvin Smith* for the United States. Reported below: 121 F. 2d 420.

No. 661. AMERICAN TRI-ERGON CORP. ET AL. *v.* RADTKE PATENTS CORP. ET AL.;

No. 705. RADTKE PATENTS CORP. ET AL. *v.* COE, COMMISSIONER OF PATENTS, ET AL.; and

No. 740. WHITSON PHOTOPHONE CORP. ET AL. *v.* COE, COMMISSIONER OF PATENTS, ET AL. December 22, 1941. Petitions for writs of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Kenneth S. Neal* for petitioners in No. 661; *Mr. Leonard Day* for petitioners in No. 705; and *Mr. Joseph A. Shay* for petitioners in No. 740. *Assistant Solicitor General Fahy, Assistant Attor-*

ney General Shea, and *Messrs. Melvin H. Siegel* and *Paul A. Sweeney* for the Commissioner of Patents in No. 661. *Solicitor General Fahy* for the Commissioner of Patents in Nos. 705 and 740. Reported below: 122 F. 2d 937.

No. 739. KILLOREN, TRUSTEE, *v.* NATIONAL LABOR RELATIONS BOARD. December 22, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Lon O. Hocker* and *Harry S. Gleick* for petitioner. *Solicitor General Fahy* and *Messrs. Robert B. Watts, Laurence A. Knapp,* and *A. Norman Somers* for respondent. Reported below: 122 F. 2d 609.

No. 741. SKENANDOA RAYON CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. December 22, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Horace R. Lamb* for petitioner. *Solicitor General Fahy* and *Messrs. J. Louis Monarch* and *Newton K. Fox* for respondent. Reported below: 122 F. 2d 268.

No. 746. HUDSON MOTOR CAR CO. *v.* HERTZ, ADMINISTRATOR; and

No. 747. MOTOR WHEEL CORP. *v.* HERTZ, ADMINISTRATOR. December 22, 1941. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Ivin E. Kerr* for petitioners. *Messrs. Harold H. Emmons* and *Robert H. McNeill* for respondent. Reported below: 121 F. 2d 326.

No. 748. VEST *v.* FEDERAL DEPOSIT INSURANCE CORP., RECEIVER. December 22, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Ernest Woodward* for petitioner.

Messrs. Francis C. Brown, James M. Kane, and *Wilson W. Wyatt* for respondent. Reported below: 122 F. 2d 765.

No. 749. SWALL *v.* COMMISSIONER OF INTERNAL REVENUE. December 22, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Chas. B. McInnis* for petitioner. *Solicitor General Fahy* for respondent. Reported below: 122 F. 2d 324.

No. 753. PITCAIRN ET AL., RECEIVERS, *v.* PERRY. December 22, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Wayne Ely* for petitioners. *Mr. Samuel Cohen* for respondent. Reported below: 122 F. 2d 881.

No. 759. WILKERSON *v.* BAREFOOT ET AL., JUDGES OF THE CRIMINAL COURT OF APPEALS OF OKLAHOMA. January 5, 1942. Petition for writ of certiorari to the Criminal Court of Appeals of Oklahoma, and motion for leave to proceed further *in forma pauperis,* denied. *Messrs. W. N. Redwine, W. J. Hulsey* and *Mrs. Lena Hulsey* for petitioner. Reported below: 117 P. 2d 172.

No. 776. WOONER *v.* AMRINE, WARDEN. January 5, 1942. Petition for writ of certiorari to the Supreme Court of Kansas, and motion for leave to proceed further *in forma pauperis,* denied. *Bert Wooner, pro se.* Reported below: 154 Kan. 211, 117 P. 2d 608.

No. 784. FITZGERALD *v.* KANSAS ET AL. January 5, 1942. Petition for writ of certiorari to the Supreme Court of Kansas, and motion for leave to proceed further *in*

forma pauperis, denied. *E. R. Fitzgerald, pro se.* Reported below: 154 Kan. 209, 117 P. 2d 582.

No. 790. MUMMIANI *v.* NEW YORK; and

No. 791. NEW YORK EX REL. MUMMIANI *v.* HUNT, WARDEN, ET AL. January 5, 1942. Petition for writs of certiorari to the Court of Appeals of New York, and motion for leave to proceed further *in forma pauperis,* denied. *Vincent Mummiani, pro se.* Reported below: 286 N. Y. 693, 723; 37 N. E. 2d 136, 455.

No. 635. EVANS *v.* UNITED STATES. January 5, 1942. 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 JACKSON took no part in the consideration and decision of these applications. *Mr. Richard H. Wels* for petitioner. Reported below: 122 F. 2d 461.

Nos. 666 and 779. GATES *v.* UNITED STATES. January 5, 1942. Petitions for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit, and motions for leave to proceed further *in forma pauperis,* denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of these applications. *Eugene S. Gates, pro se. Solicitor General Fahy* and *Assistant Attorney General Berge* for the United States. Reported below: 122 F. 2d 571.

No. 750. MILBURN *v.* PROCTOR TRUST CO. ET AL. January 5, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John W. Harrell* for petitioner. Reported below: 122 F. 2d 569.

No. 751. TAYLOR *v.* COMMISSIONER OF INTERNAL REVENUE. January 5, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Robert T. McCracken* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Michael H. Cardozo, IV,* for respondent. Reported below: 122 F. 2d 714.

No. 752. GIRARD INVESTMENT CO. *v.* COMMISSIONER OF INTERNAL REVENUE. January 5, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Jackson R. Collins* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Mr. J. Louis Monarch* and *Miss Louise Foster* for respondent. Reported below: 122 F. 2d 843.

No. 760. ESTATE OF SAGE ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. January 5, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. T. Girard Wharton* for petitioners. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Archibald Cox* and *Miss Louise Foster* for respondent. Reported below: 122 F. 2d 480.

No. 761. ELECTRO METALLURGICAL CO. ET AL. *v.* KRUPP NIROSTA CO., INC. January 5, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Leonard A. Watson* for petitioners. *Mr. Roberts B. Larson* for respondent. Reported below: 122 F. 2d 314.

No. 773. DAROCA *v.* METROPOLITAN LIFE INSURANCE CO. ET AL. January 5, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Michael M. Irwin* for petitioner. Reported below: 121 F. 2d 917.

No. 762. LEAVER *v.* CITIZENS NATIONAL TRUST & SAVINGS BANK OF RIVERSIDE ET AL. January 5, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Charles E. Riordon* and *C. Russell Riordon* for petitioner. *Messrs. Herbert W. Clark, Roland C. Foerster, Allan P. Matthew, Edwin S. Pillsbury, Ross O. Hinkle,* and *Boice Gross* for respondents. Reported below: 121 F. 2d 738.

No. 777. MCLAUGHLIN LAND & LIVESTOCK CO. *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. January 5, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George Thomas Davis* for petitioner. *Mr. Herbert W. Erskine* for respondent. Reported below: 122 F. 2d 193.

No. 778. MCREYNOLDS *v.* NEW YORK LIFE INSURANCE CO. January 5, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Kendall B. Randolph* for petitioner. *Messrs. Richard S. Righter* and *Horace F. Blackwell, Jr.* for respondent. Reported below: 122 F. 2d 895.

No. 797. MISSOURI *v.* ST. LOUIS UNION TRUST CO. ET AL. January 5, 1942. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. Roy McKittrick,* Attorney General of Missouri, for petitioner. *Messrs. Daniel N. Kirby, Allen C. Orrick,* and *Harry W. Kroeger* for respondents. Reported below: 155 S. W. 2d 107.

No. 758. NORTH AMERICAN BOND TRUST, CITY BANK FARMERS TRUST CO., TRUSTEE, *v.* COMMISSIONER OF INTERNAL REVENUE. January 5, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Mr. Claude A. Hope* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Michael H. Cardozo, IV,* for respondent. Reported below: 122 F. 2d 545.

Nos. 763 and 764. FITZGERALD, TRUSTEE, *v.* GULF REFINING CO.;

No. 765. FITZGERALD, TRUSTEE, *v.* HUMBLE OIL & REFINING CO.;

No. 766. FITZGERALD, TRUSTEE, *v.* SHELL OIL CO., INC.;

No. 767. FITZGERALD, TRUSTEE, *v.* FREEPORT SULPHUR CO.;

No. 768. FITZGERALD, TRUSTEE, *v.* COCKRELL;

No. 769. FITZGERALD, TRUSTEE, *v.* GULF REFINING CO. OF LOUISIANA ET AL.; and

Nos. 770 and 771. FITZGERALD, TRUSTEE, *v.* COCKRELL ET AL. January 5, 1942. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Messrs. Robert S. Marx, Frank E. Wood, Eugene D. Saunders,* and *Eldon S. Lazarus* for petitioner. *Messrs. Monte M. Lemann, Victor W. Klein,* and *Walter J. Suthon, Jr.* for the Gulf Refining Co. et al., respondents. Reported below: 122 F. 2d 232.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, THROUGH JANUARY 5, 1942.

No. 308. KNOTT ET AL. *v.* GOVERNOR CLINTON CO., INC. On petition for writ of certiorari to the Circuit Court of

Appeals for the Second Circuit. September 3, 1941. Dismissed per stipulation pursuant to Rule 35. *Mr. George C. Levin* for petitioners. *Mr. Brison Howie* for respondent. Reported below: 120 F. 2d 149.

No. 309. CANTOR ET AL. *v.* GOVERNOR CLINTON CO., INC. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. September 3, 1941. Dismissed per stipulation pursuant to Rule 35. *Mr. George C. Levin* for petitioners. *Mr. Brison Howie* for respondent.

No. 262. WAGNER SIGN SERVICE, INC. *v.* MIDWEST NEWS REEL THEATRES, INC. On petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. September 13, 1941. Dismissed per stipulation pursuant to Rule 35. *Mr. A. G. McCaleb* for petitioner. *Mr. Arthur A. Olson* for respondent. Reported below: 119 F. 2d 929.

No. 27. CRENSHAW *v.* UNITED STATES. Certiorari, 313 U. S. 596, to the Circuit Court of Appeals for the Sixth Circuit. September 24, 1941. Dismissed per stipulation pursuant to Rule 35. *Messrs. L. E. Gwinn* and *Charles C. Grassham* for petitioner. *Assistant Solicitor General Fahy* for the United States. Reported below: 116 F. 2d 737.

No. 103. KANSAS CITY SOUTHERN RAILWAY CO. *v.* WILLIAMSON, ATTORNEY GENERAL. Appeal from the District Court of the United States for the Western District of Oklahoma. October 2, 1941. Dismissed per stipulation pursuant to Rule 35. *Messrs. F. H. Moore* and *Joseph*

R. Brown for appellant. *Messrs. Mac Q. Williamson,* Attorney General of Oklahoma, and *F. M. Dudley* for appellee.

No. 518. MORAN, RECEIVER, *v.* COBB. On petition for writ of certiorari to the Court of Appeals for the District of Columbia. October 27, 1941. Dismissed per stipulation of counsel. *Mr. George P. Barse* for petitioner. *Mr. James A. Cobb, pro se.* Reported below: 73 App. D. C. 200, 120 F. 2d 16.

No. 22. MASSACHUSETTS BONDING & INSURANCE CO. *v.* WEBBER ET AL. Certiorari, 313 U. S. 555, to the Supreme Court of Ohio. November 10, 1941. Dismissed on motion of counsel for the petitioner. *Mr. Frank Harrison* for petitioner. *Mr. Charles A. Rogers* for respondents. Reported below: 137 Ohio St. 324, 29 N. E. 2d 565.

No. 667. MCALLISTER *v.* WOODSON ET AL. November 17, 1941. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. Dismissed per stipulation of counsel. *Messrs. S. J. Brooks, W. L. Matthews, J. D. Wheeler, Samuel Herrick,* and *Albert E. Conradis* for petitioner. *Mr. H. Grady Chandler* for respondents. Reported below: 121 F. 2d 126.

No. 281. NATIONAL LABOR RELATIONS BOARD *v.* SPARKS-WITHINGTON CO. ET AL. January 5, 1942. Certiorari, *ante,* p. 597, to the Circuit Court of Appeals for the Sixth Circuit. Dismissed on motion of counsel for the petitioner. *Assistant Solicitor General Fahy* and *Messrs. Robert B. Watts* and *Laurence E. Knapp* for petitioner. *Mr. John T. Scott* for the Sparks-Withington Co., and

Mr. Benjamin Kleinstiver for the United Cooperative Society of Jackson, Inc., respondents. Reported below: 119 F. 2d 78.

REHEARINGS GRANTED FROM OCTOBER 6, 1941, THROUGH JANUARY 5, 1942.

No. 1023, October Term, 1940. PICKETT, GENERAL CHAIRMAN OF THE BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, *v.* UNION TERMINAL CO. October 13, 1941. The petition for rehearing is granted. The order denying certiorari, 313 U. S. 591, is vacated and the petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit is granted. *Messrs. Chas. M. Hay* and *S. D. Flanagan* for petitioner. Reported below: 118 F. 2d 328.

No. 901, October Term, 1940. BAKERY & PASTRY DRIVERS & HELPERS LOCAL 802 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS ET AL. *v.* WOHL ET AL. October 20, 1941. The petition for rehearing is granted. The judgment entered June 2, 1941, 313 U. S. 548, is vacated and the mandate is recalled. *Mr. Edward C. Maguire* for petitioners. *Hyman Wohl* and *Louis Platzman, pro se.* Reported below: 284 N. Y. 788, 31 N. E. 2d 765; 285 N. Y. 843, 35 N. E. 2d 506.

No. 962, October Term, 1940. MARTIN M. GOLDMAN *v.* UNITED STATES;

No. 963, October Term, 1940. SHULMAN *v.* UNITED STATES; and

No. 980, October Term, 1940. THEODORE GOLDMAN *v.* UNITED STATES. October 20, 1941. The motion to defer consideration of the petition for rehearing is denied. The petition for rehearing is granted. The order denying cer-

tiorari, 313 U. S. 588, is vacated, and the petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit is granted. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Messrs. Jeremiah T. Mahoney, Jacob W. Friedman,* and *Osmond K. Fraenkel* for petitioners. *Solicitor General Biddle, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *Louis B. Schwartz* for the United States. Reported below: 118 F. 2d 310.

No. —, original. LOUISIANA *v.* CUMMINS ET AL. See *ante,* p. 580.

No. 154. EXHIBIT SUPPLY CO. *v.* ACE PATENTS CORP.;
No. 155. GENCO, INC. *v.* ACE PATENTS CORP.; and
No. 156. CHICAGO COIN MACHINE CO. *v.* ACE PATENTS CORP. November 10, 1941. The petition for rehearing is granted. The orders denying certiorari, *ante,* p. 637, are vacated and the petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit is granted. *Messrs. Clarence E. Threedy* and *John H. Sutherland* for petitioners. *Messrs. Casper W. Ooms* and *John A. Russell* for respondent. Reported below: 119 F. 2d 349.

No. 990, October Term, 1940. UNITED STATES *v.* NUNNALLY INVESTMENT CO. December 22, 1941. The petition for rehearing is granted. The order denying certiorari, 313 U. S. 584, is vacated and the petition for writ of certiorari to the Court of Claims is granted. MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Solicitor General Biddle* for the United States. *Mr. W. A. Sutherland* for respondent. Reported below: 92 Ct. Cls. 358, 36 F. Supp. 332.

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REHEARINGS DENIED, FROM OCTOBER 6, 1941, THROUGH JANUARY 5, 1942.*

No. 666, October Term, 1940. DETROLA RADIO & TELEVISION CORP. *v.* HAZELTINE CORPORATION. See *ante*, p. 576.

No. 90, October Term, 1940. CARLOTA BENITEZ SAMPAYO *v.* BANK OF NOVA SCOTIA. October 13, 1941. The motion for an extension of time to file a supplement to the petition for rehearing and the motion to recall the mandate are denied. The petition for rehearing is denied. The CHIEF JUSTICE took no part in the consideration and decision of these applications. 313 U. S. 270.

No. 910, October Term, 1940. SHUSHAN *v.* UNITED STATES;

No. 911, October Term, 1940. NEWMAN ET AL. *v.* UNITED STATES;

No. 912, October Term, 1940. MILLER *v.* UNITED STATES; and

No. 913, October Term, 1940. WAGUESPACK *v.* UNITED STATES. October 13, 1941. The petitions for rehearing are denied. MR. JUSTICE MURPHY took no part in the consideration and decision of these applications. 313 U. S. 574.

No. 938, October Term, 1940. ORWITZ *v.* BOARD OF DENTAL EXAMINERS OF CALIFORNIA. October 13, 1941. The motion for a writ of certiorari to correct a diminution of the record is granted. Treating the paragraph which

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*See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

the appellant seeks to include in the record as duly certified, the petition for rehearing is denied. 313 U. S. 546.

No. 954, October Term, 1940. SPRUILL *v.* BALLARD ET AL. October 13, 1941. The motion to consider new evidence is denied. The petition for rehearing is also denied. 313 U. S. 576.

No. 1063, October Term, 1940. PEARL ASSURANCE CO., LTD., ET AL. *v.* HARRINGTON, COMMISSIONER OF INSURANCE OF MASSACHUSETTS. October 13, 1941. The petition for rehearing is denied. MR. JUSTICE FRANKFURTER took no part in the consideration and decision of this application. 313 U. S. 549.

No. —, original, October Term, 1940. CALIFORNIA *v.* UNITED STATES. October 13, 1941. 313 U. S. 546.

No. —, October Term, 1940. EX PARTE ELLERT L. MCGRATH. October 13, 1941. 313 U. S. 543.

No. 594, October Term, 1940. UNION PACIFIC RAILROAD CO. ET AL. *v.* UNITED STATES ET AL. October 13, 1941. 313 U. S. 450.

No. 618, October Term, 1940. UNITED STATES *v.* CLASSIC ET AL. October 13, 1941. 313 U. S. 299.

No. 640, October Term, 1940. UNITED STATES ET AL. *v.* MORGAN, ADMINISTRATRIX, ET AL. October 13, 1941. 313 U. S. 409.

No. 738, October Term, 1940. GENERAL MOTORS CORP. *v.* UNITED STATES. October 13, 1941. 312 U. S. 708.

No. 739, October Term, 1940. UNITED MOTOR SERVICE, INC. *v.* UNITED STATES. October 13, 1941. 312 U. S. 708.

No. 817, October Term, 1940. ROYAL INDEMNITY CO. *v.* UNITED STATES. October 13, 1941. 313 U. S. 289.

No. 917, October Term, 1940. FARNSWORTH *v.* SANFORD, WARDEN. October 13, 1941. 313 U. S. 586.

No. 924, October Term, 1940. TOM WING ART *v.* CARMICHAEL, DISTRICT DIRECTOR U. S. IMMIGRATION AND NATURALIZATION SERVICE. October 13, 1941. 313 U. S. 595.

No. 966, October Term, 1940. BELAND *v.* UNITED STATES. October 13, 1941. 313 U. S. 585.

No. 969, October Term, 1940. SOUTH ATLANTIC STEAMSHIP CO. OF DELAWARE *v.* NATIONAL LABOR RELATIONS BOARD. October 13, 1941. 313 U. S. 582.

No. 1045, October Term, 1940. NICHOLS ET AL. *v.* TODD, TRUSTEE, ET AL. October 13, 1941. 313 U. S. 577.

No. 1056, October Term, 1940. SINGER MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 13, 1941. 313 U. S. 595.

No. 1058, October Term, 1940. RAND *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 13, 1941. 313 U. S. 594.

No. 32, October Term, 1940. FIDELITY UNION TRUST CO. ET AL. *v.* FIELD. October 20, 1941. 313 U. S. 550.

Nos. 287 and 288. KEEFE ET AL. *v.* BLOOMFIELD VILLAGE DRAIN DISTRICT ET AL.;

No. 289. KEEFE ET AL. *v.* MARTIN DRAIN AND BRANCHES DRAIN DISTRICT ET AL.;

No. 290. KEEFE ET AL. *v.* CENTER LINE RELIEF DRAIN DISTRICT ET AL.; and

No. 291. KEEFE ET AL. *v.* NINE-MILE-HALFWAY DRAIN DISTRICT ET AL. October 27, 1941. The motions to extend time within which to file petitions for rehearing are denied.

No. 212. BARNETT ET AL. *v.* RECONSTRUCTION FINANCE CORP. October 27, 1941.

No. 296. ENGELS *v.* AMRINE, WARDEN. October 27, 1941.

No. 507. PYLE *v.* KANSAS ET AL. October 27, 1941.

No. 74. MOORE *v.* UNITED STATES;

No. 196. FERGUSON *v.* UNITED STATES;

No. 200. DUPONT *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 201. RASKOB *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 278. NATIONAL LIFE & ACCIDENT INSURANCE CO. *v.* BREWER, FORMER COLLECTOR OF INTERNAL REVENUE;

No. 285. PIKE ET AL. *v.* WALKER (SUBSTITUTED FOR JAMES A. FARLEY), POSTMASTER GENERAL, ET AL.; and

No. 501. DOLLOFF *v.* UNITED STATES. November 10, 1941. The petitions for rehearing are denied. MR. JUSTICE JACKSON took no part in the consideration and decision of these applications.

No. 352. GENERAL MOTORS CORP. ET AL. *v.* UNITED STATES. November 10, 1941. Petition for rehearing denied. The CHIEF JUSTICE, MR. JUSTICE MURPHY, and MR. JUSTICE JACKSON took no part in the consideration and decision of this application.

No. —, original. EX PARTE EDWARD CASEBEER. November 10, 1941.

No. 108. IDENTIFICATION DEVICES, INC. *v.* UNITED STATES. November 10, 1941.

Nos. 121 and 122. WALLACE *v.* FISKE ET AL. November 10, 1941.

No. 133. KROUSE *v.* LOWDEN ET AL., TRUSTEES. November 10, 1941.

No. 140. BIRCKNER *v.* TILCH ET AL. November 10, 1941.

No. 175. CHEWNING *v.* DISTRICT OF COLUMBIA. November 10, 1941.

No. 190. E. E. MORGAN CO., INC. *v.* ARKANSAS FOR USE AND BENEFIT OF PHILLIPS COUNTY. November 10, 1941.

No. 191. ROESER & PENDLETON, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. November 10, 1941.

No. 227. TWIN PORTS OIL CO. *v.* PURE OIL CO. November 10, 1941.

No. 264. NIELSEN *v.* JOHNSON. November 10, 1941.

No. 346. LOUISIANA DELTA CATTLE CO., INC. *v.* UNITED STATES. November 10, 1941.

No. 354. MORTON, TRUSTEE, ET AL. *v.* DARDANELLE SPECIAL SCHOOL DISTRICT No. 15. November 10, 1941.

No. 358. STEIN *v.* DELANO, COMPTROLLER OF THE CURRENCY, ET AL. November 10, 1941.

No. 513. OUTBOARD, MARINE & MANUFACTURING CO. *v.* MUNCIE GEAR WORKS, INC., ET AL. November 10, 1941.

No. 517. SIROCCO COMPANY *v.* MIAMI. November 10, 1941.

No. 533. STANDARD OIL CO. OF LOUISIANA *v.* TENNESSEE EX REL. MCCANLESS, COMMISSIONER OF FINANCE & TAXATION, ET AL. November 10, 1941.

No. 237. WHEAT *v.* FORD MOTOR CO. November 17, 1941. Motion for leave to file petition for rehearing granted. Petition for rehearing denied.

No. 136. BADGER OIL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. November 17, 1941.

No. 148. DUGAN *v.* ASHE, WARDEN. November 17, 1941.

No. 276. BROWN ET AL. *v.* FEDERAL LAND BANK OF LOUISVILLE. November 17, 1941.

No. 345. FENZEL, TRUSTEE, *v.* FENSTERWALD ET AL. November 17, 1941.

No. 169. LECHE *v.* UNITED STATES. November 17, 1941. The petition for rehearing is denied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration and decision of this application.

No. 123, October Term, 1940. MOON *v.* HOME LIFE INSURANCE CO. OF NEW YORK; and

No. 124, October Term, 1940. MOON *v.* MUTUAL HEALTH & ACCIDENT ASSN. November 24, 1941. The motion for leave to file a third petition for rehearing is denied. 311 U. S. 728.

No. —, original. EX PARTE J. L. STEWART. November 24, 1941.

No. —, original. LOUISIANA *v.* CUMMINS ET AL. November 24, 1941.

No. 82. DULAC CYPRESS CO., LTD., ET AL. *v.* LOVELL ET AL. November 24, 1941.

No. 584. POPE *v.* CURRAN ET AL. November 24, 1941.

No. 624. MCLEAN *v.* COMMISSIONER OF INTERNAL REVENUE. November 24, 1941. The petition for rehearing is denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application.

No. 180. WAGNER *v.* UNITED STATES. December 8, 1941. The motion for leave to file petition for rehearing is granted, and the petition for rehearing is denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application.

No. 315. UNITED STATES EX REL. ROBINSON *v.* JOHNSTON, WARDEN. December 8, 1941. Petition for rehearing denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application.

No. 354. MORTON, TRUSTEE, ET AL. *v.* DARDANELLE SPECIAL SCHOOL DISTRICT No. 15. December 8, 1941. The motion for leave to file a second petition for rehearing is granted, and the second petition for rehearing is denied.

No. 358. STEIN *v.* DELANO, COMPTROLLER OF THE CURRENCY, ET AL. December 8, 1941. The motion for leave to file a second petition for rehearing is granted, and the second petition for rehearing is denied.

No. —, original. Ex parte William H. Padgett. December 8, 1941.

Nos. 10 and 11. Indianapolis et al. *v.* Chase National Bank, Trustee, et al.;

No. 12. Chase National Bank, Trustee, *v.* Citizens Gas Co. et al.; and

No. 13. Chase National Bank, Trustee, *v.* Indianapolis Gas Co. et al. December 8, 1941. *Ante*, p. 63.

No. 302. De Marcos *v.* Overholser, Superintendent of St. Elizabeths Hospital. December 8, 1941.

No. 631. Abrams et al. *v.* Scandrett et al., Trustees. December 8, 1941.

No. 681. Steffler *v.* Johnston, Warden. December 8, 1941.

No. 692. Richardson *v.* Commissioner of Internal Revenue. December 8, 1941.

No. 108. Identification Devices, Inc. *v.* United States; and

No. 584. Pope *v.* Curran et al. December 8, 1941. Second petitions for rehearing denied.

No. 10, original. Ex Parte Raymond Oswald DeMaurez. December 15, 1941. The motion for leave to file petition for rehearing is granted, and the petition for rehearing is denied.

No. 244. READY TRUCK LINES, INC. *v.* UNITED STATES ET AL. December 15, 1941. Petition for rehearing denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 1053, October Term 1940. PEARSON *v.* CALIFORNIA. December 15, 1941. 313 U. S. 587.

No. 682. HOAN *v.* JOURNAL COMPANY ET AL. December 15, 1941.

No. —, original. EX PARTE BEN SIMS. December 22, 1941.

Nos. 657 and 683. GEIGER *v.* CALIFORNIA. December 22, 1941.

No. 663. JONES *v.* CITY OF ARCADIA. December 22, 1941.

No. 690. PATTERSON ET UX. *v.* PEEL. December 22, 1941.

No. 712. NICK ET AL. *v.* UNITED STATES. December 22, 1941. Petition for rehearing denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application.

No. 718. GENERAL MOTORS CORP. *v.* COE, COMMISSIONER OF PATENTS. December 22, 1941. Petition for rehearing denied. The CHIEF JUSTICE took no part in the consideration and decision of this application.

No. 663. JONES *v.* CITY OF ARCADIA. January 5, 1942. The motion to reconsider the petition for rehearing is granted, and the petition for rehearing is denied.

No. 40. CHRYSLER CORPORATION ET AL. *v.* UNITED STATES. January 5, 1942. On consideration of the suggestion of a diminution of the record and motion for a writ of certiorari in that relation, the motion for a writ of certiorari is denied. The petition for rehearing and the motion for stay of issuance of the mandate are also denied.

No. 697. WEISS *v.* UNITED STATES. January 5, 1942. The petition for rehearing is denied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration and decision of this application.

No. 23. UNITED STATES, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI, *v.* SANTA FE PACIFIC RAILROAD CO. January 5, 1942.

No. 46. PARKER, DEPUTY COMMISSIONER, U. S. EMPLOYEES' COMPENSATION COMM'N, *v.* MOTOR BOAT SALES, INC. January 5, 1942.

No. 48. PINK, SUPERINTENDENT OF INSURANCE, *v.* A. A. A. HIGHWAY EXPRESS, INC. ET AL. January 5, 1942.

No. 295. WEBER, PRESIDENT OF THE AMERICAN FEDERATION OF MUSICIANS, ET AL. *v.* OPERA ON TOUR, INC. January 5, 1942.

No. 719. VAN HORNE *v.* HINES, ADMINISTRATOR OF VETERANS AFFAIRS. January 5, 1942.

No. 785. MICKENS *v.* VIRGINIA. January 5, 1942.

APPOINTMENT OF MEMBER OF ADVISORY COMMITTEE.

It is ordered by this Court that Hugh D. McLellan, of Boston, Massachusetts, be, and he hereby is, appointed a member of the Advisory Committee appointed February 3, 1941 (312 U. S. 717), to assist the Court in the preparation of rules of pleading, practice, and procedure with respect to proceedings prior to and including verdict, or finding of guilty or not guilty, in criminal cases in district courts of the United States, in place of Newman F. Baker, deceased.

OCTOBER 27, 1941.

AUTHORITY OF ADVISORY COMMITTEE.

The Advisory Committee appointed February 3, 1941 (312 U. S. 717), to assist the Court in the preparation of rules of pleading, practice, and procedure with respect to proceedings prior to and including verdict, or finding of guilty or not guilty, in criminal cases in district courts of the United States, is authorized and directed to make such recommendations as may be deemed advisable respecting amendments to the rules promulgated by this Court (292 U. S. 659) pursuant to the provisions of the Act of Congress, approved March 8, 1934, c. 49, 48 Stat. 339, amending an Act entitled "An Act to give the Supreme Court of the United States authority to prescribe Rules of Practice and Procedure with respect to proceedings in criminal cases after verdict," Act of February 24, 1933, c. 119, 47 Stat. 904; U. S. C., Title 28, § 723 (a).

NOVEMBER 17, 1941.

CONTINUANCE OF ADVISORY COMMITTEE.

It is ordered by this Court that the surviving members, or so many of them as are willing to serve, of the Advisory Committee appointed by the orders of the Court dated June 3, 1935 (295 U. S. 774) and February 17, 1936 (297 U. S. 731), pursuant to § 2 of the Act of June 19, 1934, c. 651, 48 Stat. 1064, are designated as a continuing Advisory Committee to advise the Court with respect to proposed amendments or additions to the Rules of Civil Procedure for the District Courts of the United States (308 U. S. 645).

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8. *Federal Question.* Dismissal where record does not show that the federal question presented was necessarily passed on by state supreme court. *Templeton* v. *California,* 581.

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