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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1941

FROM JANUARY 6, 1942, TO AND INCLUDING MARCH 30, 1942

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NOTE.—An account of the proceedings of March 16, 1942, in memory of Mr. Justice Van Devanter will appear in Volume 316 U. S.

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

HARLAN FISKE STONE, Chief Justice.
OWEN J. ROBERTS, Associate Justice.
HUGO L. BLACK, Associate Justice.
STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
FRANK MURPHY, Associate Justice.
JAMES F. BYRNES, Associate Justice.
ROBERT H. JACKSON, Associate Justice.

RETIRED

CHARLES EVANS HUGHES, Chief Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.

FRANCIS BIDDLE, Attorney General.
CHARLES FAHY, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
THOMAS ENNALLS WAGGAMAN, Marshal.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

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

For the First Circuit, Felix Frankfurter, Associate Justice.

For the Second Circuit, 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 the next previous allotment, see 313 U. S. p. iv.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1941

DUNCAN *v.* THOMPSON, TRUSTEE.

CERTIORARI TO THE SPRINGFIELD COURT OF APPEALS OF MISSOURI.

No. 78. Argued December 16, 1941.—Decided January 12, 1942.

1. An agreement between an injured railway employee and the railway employer, made after the injury, whereby, in consideration of a payment "for living and other expenses pending further developments as to the extent and effect of said injuries and negotiations for settlement of [his] claim," the employee agrees that he will endeavor, in good faith, to adjust and settle any claim he may have for his injuries without resorting to litigation, but that if his claim is not so adjusted, and he elects to bring suit, he will first return the sum paid and such return shall be a prerequisite to the filing and maintenance of any such suit, is void under § 5 of the Federal Employers Liability Act. P. 6.
2. Such an agreement is not a compromise or conditional compromise. P. 7.

146 S. W. 2d 112, reversed.

CERTIORARI, 314 U. S. 589, to review a judgment of the Springfield Court of Appeals which reversed a recovery for personal injuries secured by the present petitioner in a court of first instance in Missouri. An application to the supreme court of the State for a writ of certiorari was declined.

Mr. Harry G. Waltner, Jr., with whom *Mr. John Moberly* was on the brief, for petitioner.

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Mr. John H. Flanigan, with whom *Messrs. Thos. J. Cole* and *Allen McReynolds* were on the brief, for respondent.

The contract was a covenant not to sue. A covenant not to sue is in the nature of a contract of release.

If the Federal Employers Liability Act does not prohibit an injured claimant from releasing his cause of action for a consideration, by parity of reasoning it ought to be held that the Act does not prohibit him from covenanting, for a consideration, not to sue on his cause of action.

Every court which has considered the question has come to the conclusion that the Congress, by § 5 of the Act, did not intend to prohibit an injured claimant from compromising his disputed claim and from releasing the same.

The courts and text writers are unanimous in saying that the purpose of Congress was to prohibit employer and employee, before injury of the latter, from contracting to exempt the employer from the liability created by the Act, and not to prevent the parties from contracting after injury.

Petitioner, having accepted the substantial sum of $600 in consideration of his covenant not to sue, can not disaffirm his covenant and sue in violation of it while clinging to the fruits of the contract which he affects to disaffirm.

Mr. Justice Black delivered the opinion of the Court.

April 10, 1936, petitioner Duncan, while performing duties as respondent's employee, fell from a locomotive and was injured. Since at the time he was working for a "common carrier by railroad" and in interstate commerce, the right to recover damages is governed by the

Federal Employers' Liability Act. 35 Stat. 65. Sixteen months later, August 13, 1937, Duncan was still suffering from his injuries, his wife was in the hospital, and he needed money. On that day, upon Duncan's signing an instrument presented to him by the company's claim agent, he was paid $600 "for living and other expenses pending further developments as to the extent and effect of said injuries and negotiations for settlement of [his] claim." The instrument also stated that:

"In consideration of said payment of $600.00, I agree with said Trustee that I will endeavor, in good faith, to adjust and settle any claim I may have for my injuries without resorting to litigation, but I agree that if my claim is not so adjusted, and I elect to bring suit, I will first return the said sum of $600.00 to said Trustee and said return shall be a prerequisite to the filing and maintenance of any such suit."

About eight months later, April 4, 1938, negotiations for settlement not having been successful, Duncan, without returning the $600, sued the respondent in a Missouri state court, charging that his injuries resulted from the negligence of the respondent's servants or agents. Among other pleadings, the respondent filed a plea in abatement alleging that "this suit and action have been begun and commenced by plaintiff without the pre-requisite return to defendant trustee of said sum of $600, . . . and this action is pre-mature and should be dismissed by the Court." Duncan replied that the agreement, so far as it purported to create a condition precedent to bringing suit, was void under § 5 of the Federal Employers' Liability Act, 35 Stat. 65, 66, which in part provides:

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void . . ."

The trial judge held the agreement did not bar Duncan's suit, but submitted the issues of negligence to the jury with instructions that if their verdict should be for him the railroad would be entitled to a credit of $600 and interest. The verdict was for Duncan and, after appropriate subtraction for the prior payment to him, judgment for $5,000 was entered in his favor. The Springfield Court of Appeals reversed, holding that the invalidating effect of § 5 does not extend to contracts made after an employee is injured, 146 S. W. 2d 112, and the Missouri Supreme Court declined to review its action.

In *Philadelphia, B. & W. R. Co.* v. *Schubert,* 224 U. S. 603, 611, this Court referred to § 5 as follows:

"The evident purpose of Congress was to enlarge the scope of the section and to make it more comprehensive by a generic, rather than a specific, description. It thus brings within its purview 'any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act.' It includes every variety of agreement or arrangement of this nature . . ."

While this interpretation is broad enough to bring within § 5 contracts made after as well as before the injury, the agreement at issue in the *Schubert* case was made prior to the injury, and the actual decision therefore does not control agreements which, like that now before us, are made after the injury has occurred. Moreover, several state courts have expressed the view that contracts made after the injury has occurred are not invalidated by § 5. See, *e. g., Ballenger* v. *Southern Ry. Co.,* 106 S. C. 200, 203, 90 S. E. 1019; *Patton* v. *Atchison, T. & S. F. Ry. Co.,* 59 Okla. 155, 156, 158 P. 576; *Lindsay* v. *Acme Cement Plaster Co.,* 220 Mich. 367, 377, 190 N. W. 275; *Carlson* v. *Northern Pacific Ry. Co.,* 82 Mont. 559, 568, 268 P. 549.

Because of this divergence of judicial opinion as to the interpretation of § 5, and because the scope of § 5 is of fundamental importance in the administration of the Federal Employers' Liability Act, we granted certiorari.

Section 3 of the first Federal Employers' Liability Act,[1] passed by Congress in 1906, provided that "no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee. . . ." The court below, taking the position that the word "contract" as used in § 3 referred only to contracts entered into before the injury occurred, concluded that § 5 of the present act is no broader in this respect, but merely includes contracts, rules, regulations, or devices in effect before the injury. In our opinion, the difference in the language of the two sections and the legislative history of the later one cannot be reconciled with this conclusion.

It is clear from the Congressional committee hearings and reports on the Federal Employers' Liability Act now in force, not only that close study was made of the entire 1906 Act and in particular of § 3, but also that considerable attention was given to state employers' liability acts and experience under them. Section 3 was incorporated verbatim in one of the two bills introduced in the Senate, but it was the bill containing the broader language of the present § 5 that survived consideration. See Hearings on S. 3080, February 20, 1908, p. 3, and compare Senate Report No. 460, 60th Cong., 1st Sess., p. 4. Without more, the change from "contract" to "any contract, rule,

[1] 34 Stat. 232. This act was declared unconstitutional in the *Employers' Liability Cases*, 207 U. S. 463.

regulation, or device whatsoever" would seem to be an enlargement ample to include agreements made after the event of injury.

But there is more. Under the state acts there had been widespread attempts by employers to contract themselves out of the liabilities the acts were intended to impose. State legislatures had responded to this practice by adopting provisions which proscribed employer-employee agreements intended to deprive employees of the statutory benefits. These provisions varied in scope and language. Some declared agreements attempting to exempt employers from liability void only when they were part of contracts of employment. One state, although not limiting the statutory invalidation to contracts of employment, specifically restricted it to agreements "entered into prior to the injury." Other states, presumably after experience had shown that narrower limitations were inadequate to stamp out ingenious evasions of the statutory responsibilities, adopted measures invalidating agreements of any type, regardless of when made, which attempted to exempt employers from liability. House Report No. 1386, 60th Cong., 1st Sess., pp. 30–75.

The report of the House Judiciary Committee on the second Federal Employers' Liability Act set out all of the state statutes then in effect. Because the various state measures directed against contractual arrangements intended to exempt employers from liability were thus laid before Congress, the rejection of the restrictive language of § 3 of the old act indicates a deliberate abandonment of the limitations of that section. And the adoption of § 5 of the present act, without adding any of the other limitations which some of the state statutes had embodied, argues persuasively that Congress wanted § 5 to have the full effect that its comprehensive phraseology implies.

Concluding that the phrase "any contract, rule, regulation, or device whatsoever" as used in § 5 comprehends the instrument signed by Duncan long after he had been injured, we turn to the remaining question: whether "the purpose or intent" of the instrument was to enable the respondent "to exempt itself from any liability created by [the] Act." The instrument prepared by the respondent for Duncan's signature purported to create a condition precedent to his bringing suit, the refunding of $600. By its terms, unless this condition were satisfied—and in view of Duncan's straitened circumstances the probability of satisfaction would seem negligible—Duncan's only means of enforcing such liabilities as should have been assumed by the respondent would be taken from him. Hence, the agreement, if valid, would effectively exempt the respondent from liability under the act, no matter what the merits of Duncan's claim.

The respondent contends, however, that § 5 does not invalidate compromises of disputed claims, and that the agreement here is in the nature of a conditional compromise. We need not here determine what limitations, if any, § 5 places upon the validity of agreements not to sue if made in consideration of a bona fide compromise and settlement of claims arising under the act, because the very language of the agreement indicates it is not a compromise and settlement. While the agreement does contemplate the possibility of future settlement, it expressly stated that the $600 was advanced "for living and other expenses pending further developments as to the extent and effect of . . . injuries and negotiations for settlement of [the] claim." And the claim agent of the respondent testified that the agreement was in a form regularly used by the respondent when its employees "had a long disability period like he [Duncan] had had . . . to tide

them over until they had their recovery before we negotiate final settlement." We are unpersuaded, therefore, by any argument which depends upon treating the agreement signed by Duncan as a compromise.

The judgment of the Springfield Court of Appeals is

Reversed.

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

EX PARTE TEXAS ET AL.

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

No. —, Original. Argued December 8, 9, 1941.—Decided January 12, 1942.

1. In *Lone Star Gas Co.* v. *Texas*, 304 U. S. 224, this Court decided that the company, in support of its claim that gas rates fixed by the Texas Railroad Commission were confiscatory, was entitled to make proof of confiscation on the basis of services rendered by an integrated system—the basis on which the Commission fixed the rates in question; but did not decide that the rates were confiscatory or in anywise foreclose a trial of that issue in the state courts. Pp. 12–13.
2. Leave to file a petition for a mandamus directed to the Justices of the Supreme Court of a State, requiring them to conform their judgment to a decision of this Court determining federal questions earlier in the case, will not be granted where, by their return to the order to show cause, they show that the judgment of the state court was based not upon a misconception of this Court's decision, as alleged and relied upon in the petition for mandamus, but upon a construction and application of state law. P. 14.

Motion denied.

MOTION for leave to file a petition for a writ of mandamus against the Chief Justice and the Associate Justices of the Supreme Court of Texas, to bring a judgment of

that court in conformity with a controlling mandate of this Court. The Lone Star Gas Company was here granted leave to intervene, 314 U. S. 582.

Mr. James P. Hart, with whom *Mr. Gerald C. Mann,* Attorney General of Texas, was on the brief, for petitioners.

Mr. Charles L. Black, with whom *Messrs. Roy C. Coffee, Marshall Newcomb, Ogden K. Shannon,* and *Ben H. Powell* were on the brief, for the Lone Star Gas Co., intervenor.

Messrs. James P. Alexander, John H. Sharp, and *Richard Critz* submitted, *pro se.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a motion by the Attorney General and Railroad Commission of the State of Texas for leave to file a petition for a writ of mandamus against the Chief Justice and Associate Justices of the Supreme Court of Texas to bring a judgment of that Court into conformity with the controlling mandate of this Court. The foundation of the motion is the claim that in the proceedings following the remand by this Court to the Texas courts of the litigation in *Lone Star Gas Co.* v. *Texas,* 304 U. S. 224, the Supreme Court of Texas has misconceived the scope of our decision. The history of the litigation must therefore be summarized.

In 1934 the Railroad Commission of Texas brought an action in the District Court of Travis County, under Article 6059 of the Revised Civil Statutes of Texas, to enforce its order of September 13, 1933, fixing the rate to be charged by the Lone Star Gas Company, a Texas corporation operating pipe lines located in Texas and Oklahoma,

for gas delivered to distributing companies in Texas. The Commission's order treated the Company's properties in both states as an "integrated" system. In its answer the Company attacked the order under the Commerce and Due Process Clauses. A trial was held before a jury, which found, from the evidence before it, that the Commission's order was "unreasonable and unjust." Accordingly, the District Court enjoined enforcement of the order. An appeal to the Court of Civil Appeals followed. That court sustained the Commission in treating the Company as an integrated enterprise and found against the Company upon the issue of confiscation. The burden was put upon the Company "to show by clear and satisfactory evidence a proper segregation of interstate and intrastate properties and business, and to show the value of the property employed in intrastate business or commerce and the compensation it would receive under the rate complained of upon such valuation. Having failed to make a proper segregation of interstate and intrastate properties, appellee [*i. e.,* the Company] did not adduce the quantum and character of proof necessary to establish the invalidity of the rate as being confiscatory, or unreasonable and unjust." 86 S. W. 2d 484, 502. The Court therefore dissolved the injunction of the District Court and declared the Commission's order to be "just, reasonable, and valid in every particular." 86 S. W. 2d 484, 506. The Supreme Court of Texas refused a writ of error and the case then came here.

We reversed the judgment of the Court of Civil Appeals, and remanded the cause "for further proceedings not inconsistent" with the opinion. 304 U. S. 224, 242. It was held: (1) The Commission's order did not offend the Commerce Clause. The Commission was entitled to take into consideration the Company's producing properties in Oklahoma and its transmission lines to Texas, because "the proved manner in which the gas from Okla-

homa was treated and handled in Texas made it an integral part of the gas supplied to the Texas communities in appellant's intrastate business." 304 U. S. at 239. (2) On the issue of confiscation the Court of Civil Appeals had erred. The Company "could not be denied the right to introduce evidence as to its property and business as an integrated system and to have the sufficiency of its evidence ascertained by the criterion which the Commission had properly used in the same manner in reaching its conclusion as to the Texas rate." 304 U. S. at 241–42.

When the case came back to the Court of Civil Appeals, it held that "when viewed in the light of the over-all or unsegregated basis and evidence the legislative rate order is valid as a matter of law," and that the validity of the order was established "factually from so overwhelming a weight and preponderance of the evidence as to require a reversal in the interest of justice." And so it again dissolved the injunction and reinstated the Commission's order. 129 S. W. 2d 1164. This time the Supreme Court of Texas granted a writ of error and sent the case back to the District Court for a new trial. 153 S. W. 2d 681.

In its extended opinion the Supreme Court of Texas reviewed these two rulings by the Court of Civil Appeals: (1) Since Article 6059 of the Revised Statutes of Texas,[1] governing judicial review of the Commission's orders,

[1] Article 6059 provides: "If any gas utility or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the Commission, such dissatisfied utility or party may file a petition setting forth the particular cause of objection thereto in a court of competent jurisdiction in Travis County against the Commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature and shall be tried and determined as other civil causes in said court. . . . In all trials under this article the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to it or them."

makes the Commission's findings of fact conclusive if supported by substantial evidence, and since the findings were supported by such evidence, the order was valid as a matter of law and left no question for the jury. (2) Even if Article 6059 required a trial *de novo* of all issues of fact, "the Gas Company failed, as a matter of law, to offer evidence sufficient to justify holding this gas rate order confiscatory, or unreasonable and unjust." 153 S. W. 2d at 687.

The Supreme Court of Texas held that Article 6059 does require a trial *de novo* in the District Court. It added that "there is no escape from the conclusion that the United States Supreme Court did consider and did pass upon the sufficiency of the Gas Company's evidence, when considered from the viewpoint of the Company's entire properties, and did hold such evidence legally sufficient to sustain the verdict of the jury finding this rate order confiscatory." 153 S. W. 2d at 689. Later in its opinion, the Texas Supreme Court stated "that such opinion [of the Supreme Court of the United States] decides that the evidence contained in this record is sufficient, in law, to invoke the fact finding jurisdiction of the district court. It follows that such matter has been foreclosed by the United States Supreme Court, and is not open for decision by this Court, and was not open for decision by the Court of Civil Appeals." 153 S. W. 2d at 695.

It agreed with the Court of Civil Appeals that the trial court, to the prejudice of the Commission, had erroneously permitted the testimony of a Company witness and refused to exclude various Company exhibits. Immediately following this part of its opinion the Supreme Court of Texas wrote: "It is evident from our holdings above that this case must be remanded to the district court for a new trial." 153 S. W. 2d at 699.

The petitioners read the opinion of the Supreme Court of Texas to mean that the claim of confiscation could no

longer be contested in the Texas courts because this Court adjudicated that claim in the Company's favor. Such was not the ruling of this Court. The merits of the claim of confiscation were not reviewed. All that was decided here was that the Company was entitled to make proof of confiscation on the same basis—namely, that of services rendered by an integrated system—as that on which the Commission fixed the rates. On their reading of the opinion of the Supreme Court of Texas, the petitioners were naturally eager for a prompt correction of the decision of that Court, even though it was not final, without waiting for this rate controversy, already eight years old, again to wind its measured way through the Texas courts and then to be brought here on an indubitably federal question, to wit, the proper construction of a mandate of this Court.

The petitioners claim that but for a misapplication of our mandate the Texas Supreme Court might have sustained the Court of Civil Appeals and the litigation could finally have come to an end. Since the opinion of the Texas Supreme Court, on its face, appeared to be susceptible of the construction given it by the petitioners, we issued a rule to show cause. 314 U. S. 579.

In their return, the Chief Justice and Associate Justices of the Supreme Court of Texas state that that court "would have rendered the same judgment if it had based the same solely upon its construction of the State statute and not at all upon its construction of the opinion of this Court." The return further showed that in remanding the cause to the District Court for a new trial the Supreme Court of Texas acted entirely pursuant to state law: "The Court of Civil Appeals in this State has full power to set aside findings based on conflicting evidence and believed by it to be against the overwhelming weight and preponderance of the evidence and to remand the case for another trial; but it is without power to set aside findings based on

conflicting evidence and then make its own findings and render judgment thereon."

We read this return as a disclaimer by the judges of the Supreme Court of Texas of the construction placed upon their opinion by the petitioners insofar as it touches the scope of this Court's ruling in 304 U. S. 224 and the effect of that decision upon the future course of this litigation. Specifically, we read the return as a disavowal by the Supreme Court of Texas that its action in reversing the Texas Court of Civil Appeals and ordering a new trial implied that our decision adjudicated the claim of confiscation or in any wise forecloses trial of that issue. Therefore, when the litigation goes back to the District Court, it will not be imprisoned within an adjudication to be attributed to this Court which this Court never made. We must accept the return of the Texas judges regarding the scope of judicial review of orders of the Texas Railroad Commission, as well as their showing regarding the distribution of judicial power within the Texas judicial system. These are matters of local law.

The rule will therefore be discharged and the motion denied.

So ordered.

MR. JUSTICE ROBERTS heard the argument and agreed to the above disposition of the case, but through absence was unable to join in the opinion.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY concur in the result.

ALTON RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.*

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

No. 110. Argued December 19, 22, 1941.—Decided January 12, 1942.

1. Section 205 (h) of the Motor Carrier Act of 1935 incorporates by reference the "party in interest" provision of § 1 (20) of the Interstate Commerce Act. P. 19.
2. A railroad company which is in competition with an individual engaged in the transportation of motor vehicles by the driveaway or caravaning method, is a "party in interest" entitled, under § 205 (h), to sue to set aside an order of the Interstate Commerce Commission granting to such individual a certificate of public convenience and necessity. P. 19.
3. Operations authorized under the "grandfather clause" of § 206 (a) of the Motor Carrier Act of 1935, in the territory to be served, need not be restricted to specified routes or between fixed termini. P. 20.
4. In the case of a transporter of motor vehicles by the driveaway or caravaning method, the Interstate Commerce Commission, under the "grandfather clause," may, considering the characteristics of the particular transportation service, authorize operation to all points within a State, although but a few points had previously been served. Such authorization in this case was not inappropriate, and must be sustained. P. 22.
5. There was evidence in this case that a transporter of motor vehicles by the driveaway or caravaning method was in *bona fide* operation in certain States on and since June 1, 1935, and the Commission's determination that he was, and that he was entitled in those States to rights under the "grandfather clause," may not be set aside. P. 23.
6. That a carrier's status under the law of a State is that of a contract carrier, does not necessarily bar his obtaining common carrier rights there under the "grandfather clause." P. 23.

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*Together with No. 267, *United States et al.* v. *Alton Railroad Co. et al.*, also on appeal from the District Court of the United States for the Eastern District of Michigan.

7. Whether a carrier's operation in a particular State was *bona fide*, within the meaning of the "grandfather clause," is a question of fact for the Commission to determine. P. 24.
8. Violation of state law by a carrier, though relevant to establishing an absence of "*bona fide* operation," does not necessarily bar rights under the "grandfather clause." P. 24.
9. There is evidence in this case to sustain the Commission's finding that the carrier's operation in a particular State was *bona fide*, notwithstanding violation of the state law, and the finding is sustained. P. 24.
10. Where the carrier's last shipment to a particular State was on May 12, 1935, and more than a year elapsed between June 1, 1935, and the time of the hearing on the application, *held* that a grant of "grandfather" rights under § 206 (a)—which requires that the carrier shall have been in *bona fide* operation on June 1, 1935, and "since that time"—was properly set aside. P. 24.

36 F. Supp. 898, affirmed.

Appeal and cross appeal from a decree of a District Court of three judges in a suit brought to set aside an order of the Interstate Commerce Commission, 8 M. C. C. 469.

Mr. Amos M. Mathews, with whom *Messrs. Henry P. Stacy, Frederick V. Slocum, Joseph H. Hays,* and *Richard W. Sharpless* were on the brief, for the Alton Railroad Co. et al.

Mr. Daniel W. Knowlton, with whom *Solicitor General Fahy, Assistant Attorney General Arnold,* and *Messrs. Frank Coleman, Nelson Thomas,* and *John C. Lehr* were on the brief, for the United States et al. *Mr. George S. Dixon,* with whom *Messrs. Carney D. Matheson* and *Edmund M. Brady* were on the brief, for John P. Fleming.

Mr. Justice Douglas delivered the opinion of the Court.

These cases are an appeal and a cross appeal under § 210 (28 U. S. C. § 47a) and § 238 of the Judicial Code

as amended (28 U. S. C. § 345) to review a final decree of a district court of three judges (28 U. S. C. § 47) which modified in part and sustained as modified (36 F. Supp. 898) an order of the Interstate Commerce Commission (8 M. C. C. 469) granting appellee Fleming a certificate of public convenience and necessity as a common carrier by motor vehicle under the so-called "grandfather clause" (§ 206 (a)) of the Motor Carrier Act of 1935.[1] 49 Stat. 543, 551, 49 U. S. C. § 306.

The findings of the Commission may be briefly summarized as follows: Fleming, on and since June 1, 1935, was engaged in *bona fide* operation as a common carrier by motor vehicle "in driveaway service of new automotive vehicles, finished and unfinished, and new automotive vehicle chassis." This driveaway or caravaning method of transportation is performed by individual driving of the vehicle under its own power, by driving one vehicle under its own power and towing a second vehicle attached to the first, or by driving under its own power a vehicle upon which another vehicle is partially or wholly mounted. Shipments by Fleming originated from the factories of automobile manufacturers in Detroit, Michigan, and were made to dealers and distributors in various States. Certain new cars were returned to Detroit in the same manner. Fleming commenced operations in 1933, and between January 1, 1934 and June 1, 1935 transported shipments to one point each in Arkansas and Alabama; to two points each in California, New York, Pennsylvania and Tennessee; to three points each in Washington, Oregon, Kentucky and North Carolina; to four points in Texas; to five points in South Carolina; and to seven points in Georgia. About 1200 vehicles were transported in this period and more than 2100 from 1933 to July,

[1] The Motor Carrier Act of 1935 is now designated as Part II of the Interstate Commerce Act. 54 Stat. 919.

1936, the time of the hearing. Shipments consisted of from one to sixteen vehicles, shipments of two and four being the most common. Fleming's service was confined to deliveries at very few points in several States, due to the fact that he was furnishing a highly specialized transportation service from manufacturers to dealers and distributors. Shipments to most of the States named were numerous. Shipments to other States were fewer in number. Thus the three shipments to Arkansas aggregated twenty-five vehicles, the four shipments each to Texas and Oregon aggregated fourteen vehicles and twenty-four vehicles respectively, and the five shipments to Washington aggregated twenty-eight vehicles. Operations in those four States started just prior to June 1, 1935; but they were sufficient in scope to establish that Fleming was in *bona fide* operation in them on the statutory date. Fleming held his services out to the public generally as a common carrier and operated as such; and he held himself out to transport by the driveaway method between any points in the States for which application was made.

Though his transportation of shipments was restricted to a few points in each of the enumerated States, the Commission held that he was entitled to transport to all points in all of the States served, with the exception of New York and Pennsylvania, as respects which the application was denied. The District Court sustained the order of the Commission in all respects except the operation in Arkansas. As to that it held that his service had been abandoned.

We are met at the outset with the question of the standing of the appellant railroad companies (seventy-one in number) to bring and maintain the suit in the District Court. All but a few intervened in the hearing before the Commission. Each is a common carrier and a competitor of Fleming in some portion of the territory which

Fleming is authorized to serve. They rest their right to sue on § 205 (h) of the Motor Carrier Act[2] (49 U. S. C. Supp. § 305 (h)) which provides that "Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under part I . . ." Sec. 1 (20) of Part I (49 U. S. C. § 1 (20)) authorizes "any party in interest" to sue to enjoin any construction, operation or abandonment of a railroad made contrary to § 1 (18) or (19). Such suits may be maintained not only where the railroad proceeds without authorization of the Commission but also where it proceeds under a certificate of the Commission whose validity is challenged. *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U. S. 382. Hence we conclude that § 205 (h) has incorporated by reference the "party in interest" provision of § 1 (20). We do not stop to inquire what effect, if any, the status of appellant railroad companies as intervenors before the Commission had on their right to bring and maintain this suit. Cf. *Chicago Junction Case,* 264 U. S. 258, with *Pittsburgh & West Virginia Ry. Co.* v. *United States,* 281 U. S. 479. They clearly have a stake as carriers in the transportation situation which the order of the Commission affected. They are competitors of Fleming for automobile traffic in territory served by him. They are transportation agencies directly affected by competition with the motor transport industry—competition which prior to the Motor Carrier Act of 1935 had proved destructive. S. Doc. No. 152, 73d Cong., 2d Sess., pp. 13–27. They are members of the national transportation system which that Act was designed to coördinate. S. Rep. No. 482, 74th Cong., 1st Sess.; H. Rep. No. 1645, 74th Cong., 1st Sess. Hence they are parties in interest within

[2] Now § 205 (g) of Part II of the Interstate Commerce Act. 54 Stat. 922; 49 U. S. C. § 305 (g).

the meaning of § 205 (h) under the tests announced in *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266; *Western Pacific California R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47; and *Claiborne-Annapolis Ferry Co.* v. *United States, supra.*

The appellant railroad companies earnestly contend that the Commission was without authority to authorize Fleming to serve a whole State where, as here, his services had been in fact limited to only a few points in the State. The argument is that any rights obtained under the "grandfather clause" should be delimited to the actual area in which the applicant was in *bona fide* operation during the period in question. Sec. 206 (a) provides for the issuance of a certificate of public convenience and necessity without proof beyond the fact that the applicant or his predecessor in interest "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time." Sec. 208 (a) provides that such certificate "shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate." The authority granted Fleming was to operate in the designated territory "over irregular routes" through specified States. It is plain from the statute that operations need not be restricted to specified routes or between fixed termini. But the question remains as to the power of the Commission to authorize operation in an entire State where only a few points in that State had been served.

"Territory" is not a word of art. The characteristics of the transportation service involved as well as the geographical area serviced are relevant to the territorial

scope of the operations which may be authorized under the "grandfather clause." While the test of "bona fide operation" within a specified "territory" includes "actual rather than potential or simulated service" (*McDonald* v. *Thompson,* 305 U. S. 263, 266), it does not necessarily restrict future operations to the precise points or areas already served. The characteristics of the transportation service rendered may of necessity have made trips to any specified locality irregular or sporadic. And they may likewise have restricted prior operations to but a few points in a wide area which the carrier held itself out as being willing and able to serve. The Commission has taken the characteristics of various transportation services into consideration in determining the scope of the territory covered by certificates under the "grandfather clause." Thus, operations on irregular routes within a wide territory have been authorized in case of common carriers of household goods. Bruce Transfer & Storage Co., 2 M. C. C. 150; William J. Wruck, 12 M. C. C. 150. Similar broad authority has been granted common carriers of oilfield equipment and supplies. Charles B. Greer, Jr., 3 M. C. C. 483; Union City Transfer, 7 M. C. C. 717; L. C. Jones Trucking Co., 9 M. C. C. 740. And a like result has been reached in case of automobile transporters such as the applicant in the instant case. George Cassens & Sons, 1 M. C. C. 771. And see Charles E. Danbury, 17 M. C. C. 243. The general theory underlying the household goods cases was expressed in W. J. Wruck, *supra,* pp. 151–152, as follows:

"Calls for service between the same points are seldom repeated. Traffic is not regular in any given direction. What may be infrequent but fairly regular business to or from a certain State for a small carrier may be only sporadic business for a large carrier; consequently, a frequency of service that might amount to 'grandfather' clause rights in the case of the former could conceivably

be inadequate in the case of the latter. It would be an impractical solution to carve out oddly shaped areas for service based solely on the frequency of service; consideration must also be given to the general territory served under the holding-out, even if the business in some States may not equal that in other States in the territory."

The Commission took a somewhat similar approach to the problem presented in the instant case. It noted that Fleming was restricted to shipments at points where the manufacturers had established distribution facilities; that those facilities were limited in any given area; that Fleming's opportunity for service was therefore confined to a very few distribution points and his operations were irregular; that less than an estimated seven per cent of all new automobiles sold during 1935 in twenty-four western States were transported by the driveaway method; that distribution points in the automobile industry are constantly shifted; that allowance must be made for frequent changes in points served by a carrier who depends for his traffic entirely upon this one industry; and that Fleming's future opportunity for obtaining traffic will doubtless be as limited as in the past. In view of the scope of his holding out and the nature and characteristics of the highly specialized transportation service rendered, the Commission authorized continuance of his service to all points in the enumerated States. That is a judgment which we should respect. Certainly we cannot say that it was a wholly inappropriate method for creating that substantial parity between future operations and prior *bona fide* operations which the statute contemplates. The special characteristics of this roving transportation service make tenable the conclusion that Fleming's prior limited opportunity for service could not be preserved unless statewide areas, within the scope of his holding out and partially covered by his previous operations, were kept open

for him. That judgment is for the administrative experts, not the courts.

Appellant railroad companies also urge that Fleming should not have been awarded any rights under the "grandfather clause" in Washington, Oregon, and California. Before June 1, 1935, Fleming had made five deliveries to three different points in Washington, four deliveries to three different points in Oregon, and at least two deliveries to two different points in California. After June 1, 1935, and prior to the hearing in July 1936, two deliveries were made in Washington, two in Oregon, and apparently several in California. These shipments did not appear to be merely nominal.[3] Thus there was evidence that on and since June 1, 1935, Fleming had been in *bona fide* operation in those States. The weighing of such evidence involves in part a judgment based on the characteristics of the highly specialized transportation service involved. Thus, as we have said, that function is peculiarly one for the Commission, not the courts.

Appellant railroad companies also insist that Fleming was not in "bona fide operation" in Oregon because in January, 1936 he obtained in that State a contract carrier permit. The argument is that he could not obtain under the "grandfather clause" common carrier rights in Oregon in the face of his contract carrier status there. Cf. *United States* v. *Maher*, 307 U. S. 148. They further urge that Fleming's operations in Nebraska (one of the States through which his irregular routes were authorized) were conducted in violation of state law. In that connection, reliance is placed on his testimony that in

[3] As to California the evidence was less specific than in the other States. Shipping bills showed three deliveries to California aggregating five vehicles, the latest being in December, 1935. In addition, there was testimony that shortly prior to the hearing in 1936 deliveries of taxicabs and trucks had been made in that State.

Nebraska he claimed to be the owner of the vehicles in order to reduce license fees. The expression "in bona fide operation" plainly "does not extend to one operating as a common carrier on public highways of a State in defiance of its laws." *McDonald* v. *Thompson, supra,* p. 266. Congress has not, however, conditioned rights under the "grandfather clause" on compliance with state laws. Their violation is material only insofar as it may be relevant to establishing an absence of "bona fide operation." Infractions of state law, however, may be innocent or wilful, minor or considerable. They may or may not concern the right to operate in the State. Furthermore, the status of a carrier under state law may or may not be identical with his status as a common or contract carrier under the Motor Carrier Act. The question whether his operation in a particular State was "bona fide" is a question of fact for the Commission to determine. Such operation might well be in good faith though state laws were infracted. And the fact that an applicant may have to make his peace with state authorities does not necessarily mean that his rights under the "grandfather clause" should be denied or withheld. See Earl W. Slagle, 2 M. C. C. 127. Occasional noncompliance with state laws does not *per se* establish a course of conduct which is preponderantly one of evasion. Certainly no such course of conduct can be fairly implied in this case. Our task is ended if there is evidence to support the Commission's finding of *bona fides.* There is such evidence here.

It is urged on the cross appeal that the court below should not have set aside the Commission's inclusion of Arkansas in the certificate. The evidence was that Fleming had served only one locality in Arkansas—the city of Texarkana. He had made three shipments there aggregating twenty-five vehicles. All of those shipments had been made prior to June 1, 1935, the latest being May 12,

1935. Though fourteen months expired between that date and the date of the hearing, there was no evidence that any shipments were made to any locality in Arkansas since June 1, 1935. No explanation of that long hiatus was proffered. But § 206 (a) requires a finding of "bona fide operation . . . within the territory" not only "on June 1, 1935" but also "since that time." We cannot say that an unexplained failure to make any shipments to Arkansas for over a year "since that time" satisfies the statutory command, even though the nature of the highly specialized transportation service involved be given the greatest weight. Cf. *United States* v. *Maher, supra.* A mere holding out will not alone suffice to bridge the long gap extending through and beyond one entire automobile production year, since applicant carries the burden of establishing his right to the statutory grant.

We have considered the other points raised by appellant railroad companies and find them without substance.

Affirmed.

MR. JUSTICE ROBERTS did not participate in the consideration or decision of this case.

TAYLOR *v.* GEORGIA.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 70. Argued December 15, 16, 1941.—Decided January 12, 1942.

1. Peonage is a form of involuntary servitude, within the meaning of the Thirteenth Amendment; and the Act of Congress of March 2, 1867 is an appropriate implementation of that Amendment. P. 29.
2. A state statute making it a crime for any person to contract with another to perform services of any kind, and thereupon obtain in advance money or other thing of value, with intent not to perform such service; and providing further that failure to perform the service or to return the money, without good and sufficient cause,

shall be deemed presumptive evidence of intent, at the time of making the contract, not to perform such service, *held* violative of the Thirteenth Amendment and the Act of 1867. P. 29.

The necessary consequence of such statute is that one who has received an advance on a contract for services which he is unable to repay is bound by the threat of penal sanction to remain at his employment until the debt has been discharged. Such coerced labor is peonage.

191 Ga. 682, 13 S. E. 2d 647, reversed.

APPEAL from a judgment affirming a conviction for violation of a state statute.

Messrs. Leonard Haas and *Thomas Taylor Purdom* for appellant.

Mr. C. S. Baldwin, Jr., with whom *Mr. Ellis Arnall*, Attorney General of Georgia, was on the brief, for appellee.

Solicitor General Fahy and *Assistant Attorney General Berge* filed a memorandum on behalf of the United States, as *amicus curiae*, urging reversal.

Opinion of the Court by MR. JUSTICE BYRNES, announced by the CHIEF JUSTICE.

Appellant was indicted in the Superior Court of Wilkinson County, Georgia, for violation of §§ 7408 and 7409, of Title 26 of the Georgia Code. Section 7408 provides:

"Any person who shall contract with another to perform for him services of any kind, with intent to procure money or other thing of value thereby, and not to perform the service contracted for, to the loss and damage of the hirer, or, after having so contracted, shall procure from the hirer money, or other thing of value, with intent not to perform such service, to the loss and damage of the hirer, shall be deemed a common cheat and swindler, and upon conviction shall be punished as for a misdemeanor."[1] And Section 7409 declares:

[1] Section 1065 of the Georgia Penal Code (Ga. Code (1933), Title 27, § 2506) provides: "Except where otherwise provided, every crime

"Satisfactory proof of the contract, the procuring thereon of money or other thing of value, the failure to perform the services so contracted for, or failure to return the money so advanced with interest thereon at the time said labor was to be performed, without good and sufficient cause, and loss or damage to the hirer, shall be deemed presumptive evidence of the intent referred to in the preceding section." [2]

The indictment alleged that appellant had entered into a contract with R. L. Hardie to perform manual labor for $1.25 a day until he had earned $19.50 at that rate, that he had done so with the intent not to perform the services, that he had thus obtained the $19.50 as an advance, that he had failed without good and sufficient cause to do the work, that he had failed and refused to repay the $19.50, and that loss and damage to Hardie had resulted. Appellant demurred to the indictment, asserting that §§ 7408 and 7409, upon which it was based, were repugnant both to the Thirteenth Amendment and the Act of Congress passed pursuant to it,[3] and to the due process clause of the Fourteenth Amendment. The demurrer was overruled, exception was taken, and the case went to trial.

Hardie was the only witness for the State. He testified that the agreement had been made, that he had advanced the $19.50, that appellant had neither done the work

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declared to be a misdemeanor shall be punishable by a fine not to exceed $1,000, imprisonment not to exceed six months, to work in the chain gang on the public roads, or on such other public works as the county or State authorities may employ the chain gang, not to exceed 12 months, any one or more of these punishments in the discretion of the judge . . ."

[2] These two sections were enacted as sections one and two of the Act of August 15, 1903. Ga. Laws (1903) 90.

[3] The Thirteenth Amendment reads: "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof

nor returned the money, and that although appellant had said something about being sick, he had given no visible sign of it and had not been confined to bed. Under the statutes of Georgia,[4] appellant could not testify under oath, but he was permitted to make an unsworn statement in which he generally denied that he and Hardie had made the agreement or that Hardie had paid him the $19.50. The trial judge charged the jury in the language of §§ 7408 and 7409. He refused to instruct the jury that these sections are repugnant to the Thirteenth and Fourteenth Amendments of the Constitution of the United States.

The jury returned a verdict of guilty and judgment of conviction was entered. Appellant moved for a new trial on the ground that §§ 7408 and 7409 violated provisions of both the federal and state Constitutions, and the motion was denied. On appeal, the conviction was affirmed by the Supreme Court of Georgia. 191 Ga. 682, 13 S. E. 2d 647.

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the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this Article by appropriate legislation."

U. S. C., Title 8, § 56, reads: "The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void."

U. S. C., Title 18, § 444, reads: "Whoever holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be fined not more than $5,000, or imprisoned not more than five years, or both."

[4] Georgia Code (1933), Title 38, §§ 415, 416.

We think the conviction must be reversed. There is no material distinction between the Georgia statutes challenged here and the Alabama statute which was held to violate the Thirteenth Amendment in *Bailey* v. *Alabama,* 219 U. S. 219.[5] It is argued here, just as it was in the *Bailey* case, that the purpose of § 7408 is nothing more than the punishment of a species of fraud, namely, the obtaining of money by a promise to perform services with intent never to perform them. And the presumption created by § 7409 is said to be merely a rule of evidence for the trial of cases arising under § 7408. Actually, however, § 7409 embodies a substantive prohibition which squarely contravenes the Thirteenth Amendment and the Act of Congress of March 2, 1867.[6] Its effect is to authorize the jury to convict upon proof that an agreement has been reached, that money has been advanced on the strength of it, that the money has not been returned, that the appellant has failed or refused to perform the services "without good and sufficient cause," and nothing more. The necessary consequence is that one who has received an advance on a contract for services which he is unable to repay is bound by the threat of penal sanction to remain at his employment until the debt has been discharged. Such coerced labor is peonage. And it is no less so because a presumed initial fraud rather than a subsequent breach of the employment contract is the asserted target of the statute. It is of course clear that peonage is a form of involuntary servitude within the meaning of the Thirteenth Amendment and that the Act of 1867 is an "appropriate" implementation of that Amendment. *Clyatt* v. *United States,* 197 U. S. 207.

We are told that the manner in which these sections have been interpreted by the courts of Georgia rescues

[5] And cf. *State* v. *Oliva,* 144 La. 51, 80 So. 195; *Ex parte Hollman,* 79 S. C. 9, 60 S. E. 19.

[6] See note 3, *supra.*

them from invalidity. It is urged that the phrase "without good and sufficient cause," which appears in § 7409, in effect requires proof of fraudulent intent at the time of making the contract and obtaining the money. But this argument is wide of the mark. The words "without good and sufficient cause" plainly refer to the failure to perform the services or to return the money advanced. Since the subsequent breach of the contract by the defendant, however capricious or reprehensible, does not establish a fraudulent intent at the initial stage of the transaction, the content which has been assigned to the phrase "without good and sufficient cause" by the Georgia courts is immaterial. See *Bailey* v. *Alabama,* 219 U. S. at 233–234.

Moreover, as the Court observed in the *Bailey* case, "the controlling construction of the statute is the affirmance of this judgment of conviction." 219 U. S. at 235. The most that the jury could have found in the evidence here was proof that the contract had been made, that $19.50 had been advanced, that the appellant had failed to do the work or to return the money, and perhaps that this failure had been "without good and sufficient cause." The presumption created by § 7409 was thus essential to the conviction.

It is true that it appears from the record that the Supreme Court of Georgia regarded it as unnecessary to determine the sufficiency of the evidence to support the verdict because "the defendant relies solely on constitutional grounds." And it is also true that it appears from the record that in his brief in that court the appellant stated: "Inasmuch as the defendant in seeking to set aside his conviction relies solely on constitutional grounds, the evidence set out in the record is material only in so far as it relates to these grounds." However, the only possible construction of this statement, in the light of appellant's consistent attack upon the presumption created by § 7409,

is that appellant agreed to waive any contention that the evidence was insufficient to establish the factors declared by that section to warrant the presumption of an initial intent to defraud. He cannot fairly be said to have conceded more. Consequently, the Georgia Supreme Court could not escape the necessity of passing upon the validity of the presumption raised by § 7409 in order to sustain the conviction.

We are aware that in *Wilson* v. *State,* 138 Ga. 489, 75 S. E. 619, the Supreme Court of Georgia held that *Bailey* v. *Alabama* does not require the invalidation of these sections. Its error in so doing arose from a misconception of the scope of the *Bailey* decision. To be sure, a judicially created rule in Alabama denied to a defendant the opportunity to make any kind of statement as to his uncommunicated motives, and this circumstance drew the notice of the Court. 219 U. S. at 228, 236. In Georgia, on the other hand, a defendant is permitted to make an unsworn statement if he chooses. But the opinion in the *Bailey* case leaves no doubt that this factor was far from controlling and that its effect was simply to accentuate the harshness of an otherwise invalid statute.

We think that the sections of the Georgia Code upon which this conviction rests are repugnant to the Thirteenth Amendment and to the Act of 1867, and that the conviction must therefore be reversed.

Reversed.

MR. JUSTICE ROBERTS took no part in the decision of this case.

WHITE ET AL., FORMER COLLECTORS OF INTERNAL REVENUE, *v.* WINCHESTER COUNTRY CLUB.

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

No. 63. Argued December 12, 1941.—Decided January 12, 1942.

1. In the case of a club to which amounts paid as "dues or membership fees" are taxable under § 501 of the Revenue Act of 1926, as amended by § 413 of the Revenue Act of 1928, payments made to it for the right to repeated and general use of a common club facility for an appreciable period of time, and not fixed by each occasion of actual use, are subject to the tax. So *held* of charges for certain golf and family privileges. P. 41.
2. A lone District Court decision construing an Act of Congress is not to be regarded as a well settled interpretation; and subsequent reënactments of the provision so construed are not necessarily to be taken as a legislative approval of such construction. P. 40.

117 F. 2d 146, reversed.

CERTIORARI, 313 U. S. 555, to review the affirmance, upon a consolidated appeal of judgments for the Club in three suits against three former Collectors of Internal Revenue to recover taxes alleged to have been wrongfully exacted. The Club sued as agent for the members who paid the taxes. The cases were tried to the District Court upon waivers of a jury. Opinion of District Court, 30 F. Supp. 192.

Mr. J. Louis Monarch, with whom *Assistant Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Edward First* and *Richard S. Salant* were on the brief, for petitioners.

Mr. Charles W. Mulcahy, with whom *Mr. John P. Carr* was on the brief, for respondent.

"Dues or membership fees" include only those payments which are requisite to membership in the club.

The payments for golf privileges were not required by virtue of membership. On the contrary, these privileges were acquired by members entirely at their option. They could be informally obtained and surrendered at will without affecting one's status as a member. In no way were they fixed and definite charges applicable to all members of a particular class of membership, nor did they represent a recurring obligation extending over an indefinite period of time. See *Foran* v. *McLaughlin,* 59 F. 2d 158, 160; *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 560; *Weld* v. *Nichols,* 9 F. 2d 977; *Baltimore Country Club* v. *United States,* 7 F. Supp. 607; *Williamson* v. *United States,* 12 F. Supp. 26; *Hardt* v. *McLaughlin,* 25 F. Supp. 684; *Philadelphia Cricket Club* v. *United States,* 30 F. Supp. 141; *Merion Cricket Club* v. *United States,* 119 F. 2d 578.

Mr. Justice Jackson delivered the opinion of the Court.

We must decide whether members' payments to the Winchester Country Club for certain "privileges" constituted "dues or membership fees" subject to the tax imposed by § 501 of the Revenue Act of 1926, 44 Stat. 9, 92, as amended by § 413 of the Revenue Act of 1928, 45 Stat. 791, 864, on amounts paid "as dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $25 per year."

Since 1929 and during the period here in question the Club's by-laws provided for "Annual Dues" of $50, which entitled a member to all the privileges of the Club except golf. By paying $35 more, for "Limited Privileges," a member became entitled to play golf during the year, except on specified days; by paying $50, for "Full Privileges," he got the privilege of playing at any time during the

year. All but a small portion of the members acquired golf privileges of one sort or the other.

Various forms of "Family Privileges," entitling one or more of a member's family to use the clubhouse and to play tennis and golf, could be had by a member upon payment of specified additional sums, which were less if he had golf privileges than if he did not.

The club year began January first and, according to the by-laws, "dues and fees" were payable on March first. The practice was to bill members during March for "dues" and "privileges" for the year. Privileges were acquired informally, the practice being to let the Club's officers know either orally or in writing what privileges were desired. A member was billed for the privileges he had previously held if he had not indicated that he no longer desired them, but if he later gave notice that he did not desire a given privilege, no attempt was made to collect the amount billed for it. If a member requested priviliges prior to August first, he was billed for the full year; for privileges thereafter requested he was billed for only half a year. Suitable adjustment was also made if privileges were dropped in the middle of the year.

During the period from November 27, 1931, to January 9, 1935, taxes in the amount of $9,211.25 were exacted on account of payments to the Club for the various "privileges" mentioned above. On November 16, 1935, the Club duly filed claims for refund on behalf of its members, and, after the Commissioner of Internal Revenue had rejected them, it instituted suits in the United States District Court for the District of Massachusetts against the three Collectors of Internal Revenue to whom the taxes had been paid. The District Court entered judgments for the Club, and the Circuit Court of Appeals for the First Circuit affirmed them upon consolidated appeal. 117 F. 2d 146. Certiorari was granted in this

case and in *Merion Cricket Club* v. *United States,* decided by the Court of Appeals for the Third Circuit, 119 F. 2d 578, because of an asserted conflict between the two decisions. 313 U. S. 555; 314 U. S. 589.

The generality of "dues or membership fees," the words by which the governing statute designates the payments upon which the tax is laid, necessitates consideration of their legislative background. Earlier Revenue Acts—those of 1917, 1918, 1921, and 1924—had laid a tax in the same terms upon payments to clubs such as the respondent.[1]

The Treasury construed these words on several occasions not long after they were first employed in these Revenue Acts. Treasury Regulations 43 (Part 2), Art. 12, issued under the Revenue Act of 1918, and approved March 28, 1919, gave as examples of their applicability the following: "(5) A certain golf club's dues are $15 per year. Of this amount $10 is expended in the purchase for the member of a season ticket to a municipal golf course. The whole $15 is, nevertheless, taxable as dues. (6) A certain golf club charges a 'green' fee of $1 for each guest that uses the course. Such a fee is not paid 'as dues or membership fees,' and is, therefore, not taxable as such. (7) The members of a certain curling club pay annual dues of $20. By the payment of $10 extra per year the privilege of skating on the club's rink can be secured for the member's family. A payment of this extra $10 is taxable as a membership fee." The same examples are given in this Article as revised on December 3, 1920, with the addition of the following example: "(13) A certain golf club, the dues and fees of which are taxable, issues to

[1] § 701 of the Revenue Act of 1917, 40 Stat. 300, 319; § 801 of the Revenue Act of 1918, 40 Stat. 1057, 1121; § 801 of the Revenue Act of 1921, 42 Stat. 227, 291; § 501 of the Revenue Act of 1924, 43 Stat. 253, 321.

wives of members cards entitling them to the use of the course for one year, making a charge of $10 therefor. The amounts paid for such cards are taxable."

These examples were retained in three subsequent editions of the Regulations, issued under the Revenue Acts of 1921 and 1924, which also added the generalized statements that subject to the tax "are extra charges which are imposed upon members for the privilege of using certain additional facilities for a period of time, as, for example, an additional charge of $60 per annum imposed upon members of a country club for the privilege of using the golf links. A 'greens fee' charged to a guest is not taxable, unless the right or privilege granted in return is for a period of time, such as a season." [2]

Further, albeit slight, evidence of the Treasury's view is found in S. T. 357, Cum. Bul. I–1, p. 434, as follows: "Where a payment for the use of golf links or similar privilege afforded by a club . . . covers a period of time, such as a season, it is subject to the tax on dues . . . This applies alike to payments made by members and non-members."

On December 30, 1925, the United States District Court for the District of Massachusetts held, however, that a charge to a member for the use of a club's golf course for a period of six months was not included within the words "dues or membership fees," on the ground that they "were meant to cover only fixed and definite charges applicable to all members of each particular class of membership." *Weld* v. *Nichols*, 9 F. 2d 977.

No appeal from this decision was perfected, a bill of exceptions being withdrawn by the Government on March 23, 1926. The Revenue Act of 1926 which, like its prede-

[2] Treasury Regulations 43 (Part 2), Art. 9, as issued January 11, 1922 under the Revenue Act of 1921, and as revised April 18, 1922; Treasury Regulations 43 (Part 2), Art. 9, under the Revenue Act of 1924.

cessors, contained the words "dues or membership fees" without any definition thereof, was approved on February 26, 1926. Thereafter, and on May 21, 1926, a revision of the Regulations was promulgated which omitted all the matter quoted above except examples (5) and (6).[3] The Revenue Act of 1928, containing an express definition of "dues and membership fees" in a respect not here material,[4] was enacted while the Regulation was in the same form,[5] and before any court had decided another case like the *Weld* case. Subsequent editions of the Treasury Regulations, issued after the enactment of the Revenue Act of 1928 and before any further statutory treatment of the subject, retained example (6), but substituted for example (5) the following: "A certain golf club has two classes of members. Class A members pay $40 per year dues and are entitled to the full privileges of the club, including the use of the golf course. Class B members pay $25 per year dues and are entitled to the privileges of the clubhouse, but do not enjoy the privilege of the golf course. The total dues of $40 paid by class A members are subject to tax, and, since the dues of such members are in excess of $25 per year, the dues of $25 paid by class B members are also subject to the tax." [6]

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[3] Treasury Regulations 43 (Part 2), Art. 9, under the Revenue Act of 1926.

[4] Section 413 of the Revenue Act of 1928, 45 Stat. 791, 864, provided:

"(d) As used in this section, the term 'dues' includes any assessment irrespective of the purpose for which made; and the term 'initiation fees', includes any payment, contribution, or loan required as a condition precedent to membership, whether or not any such payment, contribution, or loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed, or loaned."

[5] Treasury Regulations 43 (Part 2), Art. 9, under the Revenue Act of 1926, as revised May 27, 1927.

[6] Treasury Regulations 43, Art. 40 (1928 and 1932 Rev.); Treasury Regulations 43, § 101.41 (1940 Ed.).

During a period after the decision of the *Weld* case, the Treasury apparently sought to determine taxability under the doctrine of that case, rather than according to its own prior views. In 1930, and before the beginning of the period involved in this case, there issued, however, a General Counsel's Memorandum [7] which, while paying lip service to the doctrine of the *Weld* case, construed and applied it in such manner as to require the imposition of a tax on facts apparently substantially similar to those before us here. The Commissioner of Internal Revenue has consistently followed this decision since its promulgation. Efforts were made in cases subsequently litigated in the courts to obtain decisions fixing the meaning of "definite and fixed charge" and "particular class of membership" as used in the statement of the *Weld* doctrine, resulting in holdings of taxability in three instances,[8] and of nontaxability in three besides the present.[9] *Foran* v. *McLaughlin,* 59 F. 2d 158, certiorari denied, 287 U. S. 637, the first court decision rendered after the decision of the *Weld* case itself, held that the payments in question did constitute dues or membership fees. Since the decision of this case, the Commissioner has allowed no claims for refunds on the basis of the *Weld* case, as he had done in some previous instances.

Section 543 (b) of the Revenue Act of 1941, c. 412, 55 Stat. 687, 711, the first statutory treatment of the subject since the Revenue Act of 1928, explicitly defined "dues," and thereby clearly included the types of pay-

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[7] G. C. M. 7505, Cum. Bul. IX–2, p. 414.

[8] *Foran* v. *McLaughlin,* 59 F. 2d 158, certiorari denied, 287 U. S. 637; *Merion Cricket Club* v. *United States, supra; Hardt* v. *McLaughlin,* 25 F. Supp. 684.

[9] *Baltimore Country Club* v. *United States,* 7 F. Supp. 607; *Williamson* v. *United States,* 12 F. Supp. 26; *Philadelphia Cricket Club* v. *United States,* 30 F. Supp. 141.

ments here in question.[10] The legislative history of this redefinition is inconclusive in respect of the earlier intention of Congress.[11] The action of Congress in thus explicitly defining the existing statutory term is at least as consistent with dissatisfaction on its part with the course of judicial decision as to its meaning as with the existence of an intention to change the law. If any inference is to be drawn from this spelling out of the meaning of "dues," it is one supporting the validity of the construction set forth and adhered to by the Treasury before the *Weld* case, which was substantially adopted by the newly enacted definition. Compare *Mason* v. *Routzahn,* 275 U. S. 175, 178.

Nor do we find the reënactments of the words "fees or membership dues," while the *Weld* case was on the books, to be controlling, or even significant, as expressions of Congressional intent. Passage of the Revenue Act of 1926 so soon after the decision of the *Weld* case, and while the Treasury Regulation dealing in terms with the same problem was still in force on the books, of course avails the respondent nothing.

So far as we have been able to ascertain, the Treasury's revision of the Regulation was made in the belief that it was bound to follow the *Weld* case; we cannot assume that the Treasury did more than bow to the District Court. The revision of the Regulation is of ambiguous import, but in any event it signifies no voluntary change in the opinion of the Treasury as to the meaning of the statute. Even if we could assume that the Treasury made a complete and voluntary about face after the decision of the

[10] "The term 'dues' includes any assessment, irrespective of the purpose for which made, and any charges for social privileges or facilities, or for golf, tennis, polo, swimming, or other athletic or sporting privileges or facilities, for any period of more than six days . . ."

[11] See Sen. Rept. 673, 77th Cong., 1st Sess., p. 48; H. R. Rept. 1040, 77th Cong., 1st Sess., pp. 31–32, 54; Statement by the Chairman of the House Ways and Means Committee, 87 Cong. Rec. 7614.

Weld case and before the enactment of the 1928 Act, and that the new doctrine came within the scope of the cases applying the "reënactment rule," [12] this would be bootless to the petitioner, whose claim covers a period commencing after the 1930 decision of the General Counsel of the Bureau of Internal Revenue, *supra,* which favors the imposition of the tax here. If this decision marked a departure from doctrine espoused by the Treasury after the *Weld* case, it was a departure which was within the power of the Treasury to make for the period in question.[13]

Nor was the *Weld* case itself in any sense adopted by the enactment of the 1928 Act. It stood alone when that Act was passed, and "one decision construing an act does not approach the dignity of a well settled interpretation." [14] It was patently incomplete as an exposition of doctrine, and as a District Court decision it had quite restricted direct applicability.

Having tested respondent's proffered constructional crutches and found them unsound, we must decide the meaning of the statute without their aid. We reject the doctrine of the *Weld* case as being intrinsically unsound, and as having been demonstrated by subsequent cases to be unworkable in practice. We also reject as an aid to decision the inquiry made in several cases as to whether the payment in question was in consequence of a "recurring contractual obligation," [15] since whether such is the case depends merely upon the mechanics of the particular club's finances—a properly immaterial factor.

[12] But compare *United States* v. *Missouri Pacific R. Co.,* 278 U. S. 269, 280; *Burnet* v. *Chicago Portrait Co.,* 285 U. S. 1, 16.

[13] *Morrissey* v. *Commissioner,* 296 U. S. 344; *Helvering* v. *Wilshire Oil Co.,* 308 U. S. 90; *Helvering* v. *Reynolds,* 313 U. S. 428.

[14] *United States* v. *Raynor,* 302 U. S. 540, 552; cf. *Federal Communications Commission* v. *Broadcasting System,* 311 U. S. 132; *Helvering* v. *Reynolds, supra.*

[15] *Foran* v. *McLaughlin, supra; Hardt* v. *McLaughlin, supra; Philadelphia Cricket Club* v. *United States, supra.*

Consideration of the nature of club activity is a necessary preliminary to the formulation of a test of what constitutes a "due or membership fee." So far as finances go, the fundamental notion of club activity is that operating expenses are shared without insistence upon equivalence between the proportion of an individual's contributions and the proportion of the benefits he receives.[16] Thus, on the one hand, payment of the price of an individual dinner at the club dining room or of a single round of golf lacks the element of making common cause inherent in the idea of club activity. But, on the other hand, payment for the right to repeated and general use of a common club facility for an appreciable period of time has that element and amounts to a "due or membership fee" if the payment is not fixed by each occasion of actual use. Such was the case here, and we therefore hold that the payments in question were subject to the tax.

These are, in substance, the views expressed by the Treasury shortly after "dues or membership fees" was first employed in the Revenue Acts, and consistently pressed by the Treasury, except as it thought judicial authority dictated otherwise. Its substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute. As such, they are entitled to serious consideration, independently alike of reënactments of the statute while it was in force on the books and of any temporary abandonment in consequence of disregard by judicial decision.[17]

Reversed.

MR. JUSTICE ROBERTS took no part in the decision of this case.

[16] See *Merion Cricket Club* v. *United States,* 119 F. 2d 578–580.

[17] Compare Griswold, A Summary of the Regulations Problem, 54 Harvard Law Review 398.

MERION CRICKET CLUB *v.* UNITED STATES.

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

No. 83. Argued December 12, 1941.—Decided January 12, 1942.

Payments to a club by members for golf privileges, *held* taxable as "dues or membership fees" under § 501 of the Revenue Act of 1926, as amended by § 413 of the Revenue Act of 1928. *White* v. *Winchester Country Club, ante,* p. 32. P. 43.

119 F. 2d 578, affirmed.

CERTIORARI, 314 U. S. 589, to review the affirmance of a judgment for the United States in a suit for a refund of taxes.

Mr. John Lewis Evans for petitioner.

Mr. J. Louis Monarch, with whom *Solicitor General Fahy* and *Messrs. Michael H. Cardozo, IV,* and *Richard S. Salant* were on the brief, for the United States.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The question in this case—whether amounts paid by members of the Merion Cricket Club during the period from July 1, 1931, to June 30, 1935, for golf privileges, constituted payments as "dues or membership fees" subject to the tax imposed by § 501 of the Revenue Act of 1926, 44 Stat. 9, 92, as amended by § 413 of the Revenue Act of 1928, 45 Stat. 791, 864—does not differ in substance from that decided this day in *White* v. *Winchester Country Club, ante,* p. 32.

With certain exceptions, a member of the Merion Cricket Club could obtain annual golf privileges only by payment of a fee, which varied in amount according to his age and status. The fee was payable in two equal installments, one on the first of January, and the other on

the first of July. A member admitted to golf privileges after the latter date was entitled to remission of one-half of the annual fees, but if one stopped using the golf facilities during the year there was no proportionate refund. If a member elected to play golf he continued to be liable for the succeeding year unless he gave notice of withdrawal before the end of the year. Members who paid the annual golf fees were entitled to use the golf facilities as often as they desired without further charge, and could on occasion obtain golf privileges for their wives and guests.

After a claim for refund of the amounts alleged to have been paid as taxes on the annual golf fees had been duly filed and rejected, the Club on its own behalf and on behalf of its members sued the United States in the United States District Court for the Eastern District of Pennsylvania to recover them. The District Court entered a judgment for the United States which was affirmed on appeal to the Circuit Court of Appeals for the Third Circuit. 119 F. 2d 578. Certiorari was granted in this case and in *White* v. *Winchester Country Club, ante,* p. 32, because of an asserted conflict between the decisions below. 313 U. S. 555; 314 U. S. 589.

In this case, as in *White* v. *Winchester Country Club, supra,* we hold that amounts paid were paid as "dues or membership fees," since they were for rights to the repeated and general use of a common club facility for an appreciable period of time, and were not fixed by each occasion of actual use.

The decision below is therefore

Affirmed.

MR. JUSTICE ROBERTS took no part in the decision of this case.

UNITED STATES *v.* JOLIET & CHICAGO RAILROAD CO.

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

No. 151. Argued January 8, 1942.—Decided January 19, 1942.

1. Sums paid as dividends by a transferee corporation to the stockholders of a transferor corporation, and amounts paid by the transferee corporation as income taxes on the sums so distributed as dividends, *held*, under the Revenue Act of 1928, taxable income of the transferor corporation, although the transfer was of all the transferor's property, by a "lease" in perpetuity without a defeasance clause, and although the dividends were paid, pursuant to the "lease," by the transferee directly to the stockholders of the transferor. Pp. 46, 49.
2. Article 70 of Treasury Regulations 74, promulgated under the Revenue Act of 1928, authorizing such construction of the Act, *held* valid. P. 47.

118 F. 2d 174, reversed.

CERTIORARI, 314 U. S. 591, to review the reversal of a judgment disallowing a claim for refund of income taxes.

Mr. Arnold Raum argued the cause, and *Solicitor General Fahy* and *Mr. J. Louis Monarch* were on a brief, for the United States.

Mr. Arthur D. Welton, Jr., with whom *Messrs. Silas H. Strawn, Frank H. Towner,* and *Edward G. Ince* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

By an indenture denominated a "lease," respondent in 1864 granted, demised and leased to Chicago & Alton Railroad Co. all of its railroad property, real and personal.

The "lease" was in perpetuity upon specified terms and conditions. The Chicago & Alton Railroad Co. covenanted and agreed, *inter alia,* to guarantee and pay quarterly to the holders of the fifteen thousand shares of capital stock of respondent an annual dividend of seven per cent on the par value of the shares; to deposit with a designated depository specified monthly sums to be placed to the credit of the stockholders and to be held as a fund for the purpose of paying the dividends; to pay the dividends without any deduction for any federal tax whatsoever; to pay all taxes which may be due to the United States "on account of said dividend so paid from time to time"; and to pledge to respondent thirty-seven parts out of two hundred and fifty-seven parts of the gross receipts of the line between the cities of Alton and Chicago for the purpose of securing the performance of its various covenants. The "lease" contained no defeasance clause.

The annual dividend is $7.00 per share and totals $105,000.00. This amount has been paid directly to respondent's stockholders every year since 1864—by Chicago & Alton Railroad Co. until acquisition of the property in 1931 by the Alton Railroad Co., and since then by the latter company. The dispute here is over federal income taxes for the years 1931, 1932, 1933 and 1934. Respondent, a corporation organized and existing under the laws of Illinois, filed its income tax return for each of those years reporting the $105,000.00 of dividends paid its shareholders as its income. The resulting tax was paid each year by the Alton Railroad Co. In addition the latter paid each year for respondent an additional tax on the amount of the income tax on $105,000.00, on the theory that the latter constituted additional taxable income to respondent. Respondent filed claims for refund for the additional tax paid in 1931, and for all the income taxes paid on its behalf for the other years in question,

on the theory that the income on which those taxes were paid was not realized by it. On rejection of those claims by the Commissioner, respondent instituted suit in the District Court. That court rendered judgment for the petitioner. The Circuit Court of Appeals reversed, one judge dissenting. 118 F. 2d 174. We granted the petition for certiorari because of the conflict between that decision and the governing principles of *Gold & Stock Telegraph Co.* v. *Commissioner,* 83 F. 2d 465, *United States* v. *Northwestern Telegraph Co.,* 83 F. 2d 468, and *Pacific & Atlantic Telegraph Co.* v. *Commissioner,* 83 F. 2d 469, decided by the Circuit Court of Appeals for the Second Circuit.

Respondent urges, and the court below held, that this so-called lease in perpetuity without a defeasance clause divested respondent of all right, title and interest in the property and vested a full and indefeasible title in the grantee. See *Huck* v. *Chicago & Alton R. Co.,* 86 Ill. 352, 354–355; *Chicago, B. & Q. R. Co.* v. *Boyd,* 118 Ill. 73, 7 N. E. 487. Respondent also argues that the indenture of 1864 vested all rights to payment of dividends in its stockholders and divested it of any right to, or control over, such payments. Respondent therefore contends that a corporation which does not own or control property and has no right to, or control over, any income from the property cannot be in receipt of income, constructively or otherwise.

Such considerations do not dispose of this controversy. In *Lucas* v. *Earl,* 281 U. S. 111, this Court held that a husband's salary was taxable to him though by contract with his wife half of it vested in her when paid. Mr. Justice Holmes said (pp. 114–115): "There is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skil-

fully devised to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew."

Precisely that approach was taken in Art. 70 of Treasury Regulations 74, promulgated under the Revenue Act of 1928. It provides in part:

"Where a corporation has leased its property in consideration that the lessee shall pay in lieu of other rental an amount equivalent to a certain rate of dividend on the lessor's capital stock or the interest on the lessor's outstanding indebtedness, together with taxes, insurance, or other fixed charges, such payments shall be considered rental payments and shall be returned by the lessor corporation as income, notwithstanding the fact that the dividends and interest are paid by the lessee directly to the shareholders and bondholders of the lessor. The fact that a corporation has conveyed or let its property and has parted with its management and control, or has ceased to engage in the business for which it was originally organized, will not relieve it from liability to the tax."

That long-standing regulation [1] is plainly applicable here. It covers various kinds of conveyances and leases, including those where the grantor or lessor has parted with all rights of management and control over the property. If valid, it governs this case whatever may be the legal incidents of the 1864 indenture under Illinois law. Its validity seems clear. It is a permissible definition of

[1] This regulation dates from Art. 80, Treasury Regulations 33 (1914 ed.). And see Art. 102, Treasury Regulations 33 (1918 ed.). Provisions similar to those quoted in the text are contained in Art. 70, Treasury Regulations 77, promulgated under the Revenue Act of 1932 and in Art. 22 (a)–20 of Treasury Regulations 86, promulgated under the Revenue Act of 1934.

one item of gross income [2] under § 22 (a) of the Revenue Act of 1928, 45 Stat. 791, 797. Payments made directly to shareholders by the lessee or transferee of corporate property are properly recognized as income to the corporation by reason of the relationship of a corporation to its shareholders. The fact that there is an anticipatory arrangement whereby the taxpayer is not even a conduit of the payments is no more significant in this type of case than it was in *Lucas* v. *Earl, supra.*

The relationship between respondent and its shareholders is an abiding one. They obtain the dividend payments because of their status as shareholders. All questions of the rights of creditors aside, there can be no doubt that a corporation may normally distribute its assets among its stockholders. When it undertakes to do so, its act is nonetheless a corporate act though its shareholders receive new contractual rights enforceable by them alone against the transferee. That is to say, their rights to receive the proceeds on the disposal of corporate assets are strictly derivative in origin. The fact that the consideration is made distributable to them directly over a long period of time rather than in one lump payment does not alter the character of those rights. In each case their claims to the proceeds flow from the corporation and are measured by the stake which they have in it. For the rental or purchase payments for the property conveyed by respondent could not lawfully be paid to another without its authority; and it could not lawfully dispose of them to others without the consent of its shareholders. Cf. *Raybestos-Manhattan, Inc.* v. *United States,* 296 U. S. 60. The fact that the cor-

[2] Like definitions of gross income are contained in § 22 (a) of the Revenue Act of 1932 (47 Stat. 169, 178) and in § 22 (a) of the Revenue Act of 1934. 48 Stat. 630, 686.

poration may remain in existence only to maintain a stock transfer book is immaterial. The umbilical cord between it and its shareholders has not been cut. The distribution made is in performance of the obligation owed by the corporation to them. For these reasons the regulation in question merely conforms to accepted legal theory. The conclusion that the dividend payments made to respondent's stockholders were income realized by it likewise marks no innovation in income tax law. That is indicated not only by *Lucas* v. *Earl, supra,* but also by those cases which hold that, "Income is not any the less taxable income of the taxpayer because by his command it is paid directly to another in performance of the taxpayer's obligation to that other." *Raybestos-Manhattan, Inc.* v. *United States, supra,* p. 64, and cases cited. The reach of the income tax law is not to be delimited by technical refinements or mere formalism. *Helvering* v. *Clifford,* 309 U. S. 331.

Since the dividend payments made to respondent's stockholders were income realized by it, the federal income tax on those sums which was paid by the Alton Railroad Co. was likewise income taxable to respondent. *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716; *United States* v. *Boston & Maine R. Co.,* 279 U. S. 732.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court affirmed.

Reversed.

MR. JUSTICE ROBERTS did not participate in the consideration or decision of this case.

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UNITED STATES ET AL. *v.* N. E. ROSENBLUM TRUCK LINES, INC.*

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

No. 52. Argued December 16, 17, 1941.—Decided January 19, 1942.

1. A truckman who, on July 1, 1935, and until February 1936, was engaged in hauling exclusively for common carriers under agreements with them, helping them to move their overflow freight, and who was not serving the public directly but only performing part of the complete common carrier service which those common carriers offered to the public, is not entitled to a permit as a contract carrier under the "grandfather" clause of § 209 (a) of the Motor Carrier Act of 1935. P. 54.
2. By the Act, Congress did not intend to grant multiple "grandfather" rights on the basis of a single transportation service. P. 54.
3. Where the literal meaning of words in a statute produces an unreasonable result plainly at variance with the policy of the legislation, the legislative purpose will be followed. P. 55.
4. The fact that "carriers" within the meaning of the Act need not deal directly with the public but may act through brokers, does not affect the conclusion in this case. P. 56.

36 F. Supp. 467, reversed.

APPEALS from decrees of a District Court of three judges which, in two cases heard and decided together, set aside orders of the Interstate Commerce Commission denying applications for permits under the Motor Carrier Act of 1935.

Mr. Frank Coleman, with whom *Solicitor General Biddle, Assistant Solicitor General Fahy, Assistant Attorney General Arnold,* and *Messrs. James C. Wilson, Daniel W. Knowlton, Nelson Thomas,* and *Harry C. Blanton* were on the brief, for appellants.

*Together with No. 53, *United States et al.* v. *Margolies, doing business as Manhattan Truck Lines,* also on appeal from the District Court of the United States for the Eastern District of Missouri.

Mr. Gus O. Nations, with whom *Mr. M. E. Aronoff* was on the brief, for appellees.

MR. JUSTICE MURPHY delivered the opinion of the Court.

These are direct appeals by the United States and the Interstate Commerce Commission from final decrees of a specially constituted three-judge district court,[1] which sustained appellees' separate petitions to annul, set aside and enjoin an order of the Commission entered July 1, 1940, denying appellees' separate applications under the so-called "grandfather clause" of § 209 (a) of the Motor Carrier Act of 1935[2] (49 Stat. 543, 552, 49 U. S. C. § 309 (a)), for a permit authorizing operations as a contract carrier by motor vehicle.

The evidentiary facts are not seriously disputed. Prior to the critical date, July 1, 1935, and until February 1936, appellees and their predecessors in interest[3] hauled only for common carriers by motor vehicle, and in each case principally for a single common carrier, between St. Louis and Chicago, for which they were paid a lump sum on dock to dock movements. Appellees protected their equipment by carrying fire, theft and collision insurance in their own names. They also paid the operating and maintenance costs. Cargo, public-liability, property-damage, and similar types of insurance for the protection

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[1] Convened pursuant to the Urgent Deficiencies Act of 1913 (38 Stat. 220, 28 U. S. C. §§ 47 and 47 (a)) and § 205 (h) of the Motor Carrier Act of 1935, rearranged by the Transportation Act of 1940, 54 Stat. 899, as § 205 (g) of Part II of the Interstate Commerce Act.

[2] The Motor Carrier Act of 1935 is now designated as Part II of the Interstate Commerce Act. 54 Stat. 919.

[3] In both of these cases it was the appellee's predecessor in interest who was operating on July 1, 1935. The predecessor of appellee in No. 52 was Rosenblum the individual, and the predecessor of appellee in No. 53 was an individual, Baulos.

of the general and the shipping public, were taken out by the common carriers and in some instances charged to the appellees. They occasionally paid small cargo damage claims not covered by insurance. The drivers of appellees' trucks were their employees. The specificity with which the common carriers directed the routes to be followed is in some doubt, but the drivers were requested to "sign in" at certain registration stations en route.

The greater portion of the traffic of the common carriers which appellees served was carried in the carriers' own vehicles. Appellees' equipment was secured on oral arrangements to handle overflow freight. The freight so handled was always solicited by the common carrier, accumulated at its terminal, loaded and unloaded by its employees, and moved from consignor to consignee on that carrier's way bills. The record is silent as to whether appellees' trucks bore the name of the common carrier on whose behalf they were operated.

After February 1936 appellees ceased hauling for common carriers by motor vehicle and began hauling for individual shippers in their own right.

The Commission found that appellees' equipment prior to February 1936 "was operated solely under the direction and control of the common carriers and under the latter's responsibility to the general public and to the shippers" and concluded that "as to such operations applicants [appellees] do not qualify as carriers by motor vehicle within the meaning of the Act and are consequently not entitled to a certificate or a permit under the 'grandfather' clause of Section 206 (a) or 209 (a) thereof." [4]

The court below set aside the Commission's order, concluding that appellees were in "bona fide operation as [a] contract carrier[s] in interstate commerce on July 1, 1935" and "in so operating assumed control, management

[4] 24 M. C. C. 121, 125–126.

and responsibility for the hauling of cargo" and that "there is no substantial evidence in the record to support the order entered." [5]

The point of divergence between the Commission and the court below seems to have been whether the evidentiary facts supported the Commission's ultimate conclusion that appellees operated solely under the control of the common carriers. Because of our views as to the proper construction of the Act, we need not determine whether substantial evidence supports that conclusion of the Commission. In any event the evidence clearly shows that on the critical date, and from then until February 1936, appellees helped the common carriers move their overflow freight and, as to each job, were an integral part of a single common carrier service offered to the public by the common carrier for whom they hauled.

The question here, as in any problem of statutory construction, is the intention of the enacting body. Congress has set that forth for us broadly in the declaration of policy [6]— in essence it is the regulation of transportation by motor carriers in the public interest so as to achieve adequate, efficient and economical service. To implement that policy Congress forbade common carriers by motor vehicle to operate in interstate commerce without securing a certificate of public convenience and necessity from the Commission,[7] and required contract carriers to secure a permit from that body.[8] Those carriers engaged in either of such operations on the respective critical dates and continuously thereafter were to be given the requisite certificate or permit as of right under the "grandfather" provisos of §§ 206 (a) and 209 (a). We think it clear that Congress did not intend to grant

[5] 36 F. Supp. 467.
[6] § 202 (a), 49 U. S. C. § 302 (a).
[7] § 206 (a), 49 U. S. C. § 306 (a).
[8] § 209 (a), 49 U. S. C. § 309 (a).

multiple "grandfather" rights on the basis of a single transportation service. Presumably the common carriers which appellees served were entitled to common carrier "grandfather" rights over the entire line. It was the common carriers who offered the complete transportation service to the general public and the shipper. To hold that appellees, who performed part of that complete transportation service for those common carriers under agreements with them, acquired contract carrier "grandfather" rights over the same line entitling them also to serve the public is to ascribe to Congress an intent incompatible with its purpose of regulation. The result would be to create in this case two services offering transportation to the public when there had been only one on the "grandfather" date, without allowing the Commission to determine if the additional service was in the public interest. And, instances can readily be imagined where a single common carrier might utilize the services of several operators such as appellees. Automatically to grant contract carrier rights to such operators might result in such a wholesale distribution of permits as would defeat the very purpose of federal regulation.

Also indicative of the Congressional intent not to confer contract carrier "grandfather" rights on operators, such as appellees, who, on the critical date, were not serving the public directly but were instruments performing part of a common carrier service, is the fact that there would seem to be no reason to apply to them the regulatory provisions of the Act generally applicable to contract carriers, such as the requirement that they should secure a permit only after a showing that their operations are "consistent with the public interest" (§ 209 (b)), or that they should file schedules of their minimum rates (§ 218 (a)), or that the Commission should prescribe the minimum rates (§ 218 (b)). The Act clearly contemplates that contract and common carriers will offer com-

peting types of service, for § 210 prohibits any person from simultaneously holding a certificate and a permit for the same route or territory unless the Commission finds that such is in the public interest, and § 218 (b) enjoins the Commission, in prescribing minimum rates for contract carriers, to "give no advantage or preference to any such carrier in competition with any common carrier by motor vehicle subject to this part." The declaration of policy in § 202 (a) which stresses the avoidance of destructive and unfair competition is referred to in the sections dealing with contract carriers.[9]

Appellees' contention that their activities on the critical date fall within the literal language of the definition of "contract carrier" in force on the date of the order [10] and that they are therefore entitled to contract carrier "grandfather" rights is without merit. A holding that the activities of appellees prior to February 1936 were those of contract carriers would not accord with the intent of Congress. Where the plain meaning of words used in a statute produces an unreasonable result, "plainly at variance with the policy of the legislation as a whole," we may follow the purpose of the statute rather than the literal words. *United States* v. *American Trucking Associa-*

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[9] § 209 (b), 49 U. S. C. § 309 (b). § 218 (b), 49 U. S. C. § 318 (b). The Commission has taken the position that while there may be destructive or unfair competition with common carriers when truck operators contract to do work in connection with transportation for common carriers which serve shippers directly, "it is not the truck operator who carries it on. Rather it is the carrier for which he works, . . ." Scott Bros. Inc., 4 M. C. C. 551, 559.

[10] § 203 (a) (15). The term "contract carrier by motor vehicle" means any person, not included under paragraph (14) of this section, who or which, under special and individual contracts or agreements, and whether directly or by a lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation. (The Transportation Act of 1940, 54 Stat. 899, amended this definition.)

tions, 310 U. S. 534, 543, and cases cited. We conclude that the Commission rightly determined that appellees were not contract carriers within the meaning of the Act prior to February 1936.

Appellees make no contention that they were common carriers during the period in question, and we are clear that they were not, for the Congressional intent to avoid multiple "grandfather" rights on the basis of a single transportation service is equally applicable to prevent appellees from being considered either as contract or as common carriers within the meaning of the Act. The reasonableness of this interpretation of the Act is apparent. Since appellees' operations, namely, serving the common carriers, on the critical date did not make them "carriers" within the meaning of the Act, and thus subject to regulation under it, it follows that they are free to engage in such operations without securing the authorization of the Commission.[11] But those operations cannot be the basis for appellees' automatically securing permits to serve the public in their own right, a service which they were not performing on the "grandfather" date.

The fact that carriers within the meaning of the Act need not deal directly with the public but may act through brokers [12] in no wise affects our conclusion. As we have seen, Congress did not intend to confer multiple "grandfather" rights on the basis of a single transportation service to the public. That difficulty arises only when an operator undertakes to serve a carrier who is serving the

[11] The Commission has so held. Dixon, 21 M. C. C. 617; Smythe, 22 M. C. C. 726.

[12] Section 203 (18), 49 U. S. C. § 303 (18), defines "broker" substantially as one who sells or offers for sale any transportation. Section 211 (a), 49 U. S. C. § 311 (a), requires that brokers be licensed and that the carriers they employ have either a certificate or a permit issued under the Act.

public. It is not present when a carrier deals through a broker.

Reversed.

MR. JUSTICE ROBERTS took no part in the consideration or decision of these cases.

LUBETICH, DOING BUSINESS AS PACIFIC REFRIGERATED MOTOR LINE, *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 322. Argued December 17, 1941.—Decided January 19, 1942.

1. Decided upon the authority of *United States* v. *Rosenblum Truck Lines* and *United States* v. *Margolies, ante,* p. 50. P. 59.
2. That the application was for either a common carrier certificate or a contract carrier permit, rather than for only a contract carrier permit, does not distinguish this case from the *Rosenblum* and *Margolies* cases. P. 59.
3. The Commission's order denying "grandfather" rights to the applicant in this case, is not vitiated by absence of findings as to whether the common carrier with whom the applicant's arrangements for hauling were made was acting as a broker during the period in question and as to whether the applicant's name was carried on his equipment. Findings on these two points were not "quasi jurisdictional." P. 59.

39 F. Supp. 780, affirmed.

APPEAL from a decree of a District Court of three judges dismissing a petition to set aside an order of the Interstate Commerce Commission under the Motor Carrier Act of 1935.

Mr. Albert E. Stephan for appellant.

Mr. Frank Coleman, with whom *Solicitor General Fahy, Assistant Attorney General Arnold,* and *Messrs. James C. Wilson, Archibald Cox, Daniel W. Knowlton,* and *Nelson Thomas* were on the brief, for appellees.

MR. JUSTICE MURPHY delivered the opinion of the Court.

This is a companion case to *United States* v. *N. E. Rosenblum Truck Lines, Inc.*, and *United States* v. *Margolies, ante,* p. 50. It is a direct appeal from the final decree of a specially constituted three-judge district court [1] dismissing appellant's petition to set aside an order of the Interstate Commerce Commission denying appellant's application under the "grandfather" clauses of §§ 206 (a) and 209 (a) of the Motor Carrier Act of 1935 [2] for operating authority as a "common" or "contract" carrier by motor vehicle.

The Commission's findings [3] show that appellant's method of operations was substantially the same as that of appellees in the *Rosenblum* and the *Margolies* cases. Appellant operated between Los Angeles and Seattle and held permits from the States of California, Oregon, and Washington. Between June 1935 and January 1938 most, if not all, of the traffic handled by appellant was solicited and billed by other motor carriers and moved in appellant's vehicles only between the terminals of those other carriers. From April 1937 until January 1938 appellant hauled exclusively for a single common carrier, Hendricks Refrigerated Truck Lines, Inc. The goods moved on Hendricks' bills of lading and its tariff rates were applied. Appellant requested loading instructions from, and re-

[1] Convened pursuant to the Urgent Deficiencies Act of 1913 (38 Stat. 220, 28 U. S. C. §§ 47 and 47 (a)) and § 205 (h) of the Motor Carrier Act of 1935, rearranged by the Transportation Act of 1940, 54 Stat. 899, as § 205 (g) of Part II of the Interstate Commerce Act.

[2] The Motor Carrier Act of 1935 is now designated as Part II of the Interstate Commerce Act. 54 Stat. 919.

[3] Since the evidence upon which these findings were made is not included in the record before us, appellant may not here attack them. *Mississippi Valley Barge Co.* v. *United States,* 292 U. S. 282, 286, and cases cited.

ported loadings to, Hendricks. Appellant received the total revenue less ten percent on southbound loads and the total revenue on northbound loads. On "express" traffic he received a flat rate of eighty cents per hundred pounds. Shippers' claims generally were paid in the first instance by Hendricks and then charged back to appellant.

In January 1938 appellant engaged a solicitor of his own, established terminals and apparently discontinued the operations previously conducted in connection with other carriers.

On the basis of its findings the Commission concluded that the service performed "was not the fulfillment of engagements in consequence of a holding out to the general public but was primarily the hauling of traffic for motor common carriers." [4]

While the application in the instant case is for a common carrier certificate, or, in the alternative, for a contract carrier permit, rather than for a contract carrier permit as in *United States* v. *N. E. Rosenblum Truck Lines, Inc.* and *United States* v. *Margolies,* that difference is without legal significance. The question in both situations is whether the applicant was a carrier, either common or contract, within the meaning of the Act, prior to June 1935 and continuously thereafter to the date of the hearing. For the reasons set forth in the *Rosenblum* and *Margolies* cases, the decision below must be affirmed.

We have considered and found without substance appellant's argument that findings as to whether Hendricks was acting as a broker during the period in question and as to whether appellant's name was carried on his equipment were "quasi jurisdictional" and that the absence of findings on those points renders the order void. Neither finding was here essential to the existence of authority

[4] 24 M. C. C. 141 at 147, 150.

to enter the order, and hence was not "quasi jurisdictional." Cf. *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 462–463; *Florida* v. *United States*, 282 U. S. 194, 214–215. One of the findings of the Commission, which appellant may not attack,[5] was that appellant hauled "for Hendricks, a common carrier by motor vehicle," and the Commission was satisfied from the evidence before it that Hendricks, and not the appellant, was the carrier in respect to the operations in which appellant was engaged. It was therefore immaterial whether Hendricks acted as a broker in connection with some other operations. Whether appellant's name was on his equipment can only be a factor bearing on the ultimate issue. It is in no sense "quasi jurisdictional."

Affirmed.

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

GLASSER *v.* UNITED STATES.*

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

No. 30. Argued November 13, 14, 1941.—Decided January 19, 1942.

1. Jud. Code § 275 provides that jurors in a federal court shall have the qualifications of jurors in the highest court of the State. Acts of the State of Illinois providing for jury service by women became effective before a grand jury in a federal court in that State was drawn from a box from which the names of women had been excluded. Under the state legislation, the making of state lists including women could be delayed for some time later. *Held* that the jury was not illegally constituted, in view of the short time

[5] See Note 3, *ante*.

* Together with No. 31, *Kretske* v. *United States*, and No. 32, *Roth* v. *United States*, also on writs of certiorari, 313 U. S. 551, to the Circuit Court of Appeals for the Seventh Circuit.

elapsed since the state law came in force, and the absence of any showing that women's names had appeared on the state jury lists in the counties comprising the federal district. P. 64.

2. The record in this case shows adequately, though informally, that the indictment was returned by the grand jury in open court. P. 65.
3. An indictment which is sufficiently definite to inform the defendants of the charges against them and shows certainty to a common intent, is good against demurrer. P. 66.
4. Depriving the United States of lawful governmental functions by dishonest means is a "defrauding" within the meaning of § 37 of the Criminal Code. P. 66.
5. A charge of conspiracy to defraud the United States of lawful governmental functions by bribery of a Government officer is distinct from a charge of bribery or of conspiracy to commit bribery. P. 66.
6. Error which might be overlooked as harmless where the case is strong against the accused may be ground for reversal where the question of guilt or innocence is close. P. 67.
7. A defendant in a conspiracy case is deprived of the assistance of counsel, contrary to the Sixth Amendment, where, over his objection, the court appoints his counsel to represent also a co-defendant, where this is done with notice to the judge that their interests may be inconsistent, and where the counsel's defense of the first defendant is less effective than it might have been if he had represented that defendant alone. P. 76.
8. Every reasonable presumption is indulged against a waiver of fundamental rights such as the right of the accused to have the full and untrammeled assistance of counsel in the trial of a criminal case. P. 70.
9. The fact that a defendant in a criminal case is an experienced lawyer may be a factor in determining whether he waived his right to assistance of counsel; but it is not conclusive. P. 70.
10. The trial judge should protect the right of an accused to have the assistance of counsel. P. 71.
11. The right to have the assistance of counsel is too fundamental to be made to depend upon nice calculations by courts of the degree of prejudice arising from its denial. P. 76.
12. The declarations of a conspirator are not admissible against an alleged co-conspirator, who was not present when they were made, unless there is proof *aliunde* connecting the latter with the conspiracy. P. 74.

13. Persons convicted as conspirators can not have a new trial because of error prejudicial to a co-defendant but not to themselves. P. 76.
14. A verdict of conviction must be sustained if, taking the view most favorable to the Government, there is substantial evidence to support it. P. 80.
15. Participation in a criminal conspiracy may be inferred from circumstances. P. 80.
16. Defendants in a criminal case can not complain of error in the introduction of reports as to which, when they were admitted in evidence, the trial judge informed the jury that they were admitted against another defendant only. P. 81.
17. A district judge conducting a jury trial in a criminal case has a sound discretion to interrogate witnesses and to limit their cross-examination. P. 82.
18. Acts of the trial judge, complained of as lacking impartiality, were not such as to prejudice substantial rights of defendants. P. 83.
19. Acts of alleged misconduct of the prosecuting attorney,—*held* not such as to call for reversal of convictions. P. 83.
20. A motion for a new trial in a criminal case upon the ground that the jury was illegally constituted must be supported by the introduction or offer of distinct evidence; a formal affidavit, in the absence of a stipulation that it may be accepted as proof, is not enough, although it be uncontroverted. P. 87.

116 F. 2d 690, reversed in part; affirmed in part.

CERTIORARI, 313 U. S. 551, in three cases, to review a judgment sustaining convictions for conspiracy.

Messrs. Homer Cummings and *Ralph M. Snyder* argued the cause, and *Mr. William D. Donnelly* was on the brief with *Mr. Cummings,* for petitioner in No. 30. *Mr. Edward M. Keating,* with whom *Mr. Joseph R. Roach* was on the brief, submitted for petitioner in No. 31. *Mr. Alfred E. Roth* submitted, *pro se,* in No. 32.

Mr. Edwin D. Dickinson, with whom *Assistant Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Richard S. Salant* were on the brief, for the United States.

Messrs. Ralph M. Snyder and *John Elliott Byrne* filed a brief, as *amici curiae,* on behalf of petitioner in No. 30, urging reversal.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Petitioners, together with Anthony Horton and Louis Kaplan, were found guilty upon an indictment charging them with a conspiracy to defraud the United States, under § 37 of the Criminal Code (R. S. § 5440; 18 U. S. C. § 88).[1] Judgment was entered on the verdict and Glasser, Kretske and Kaplan were sentenced to imprisonment for a term of 14 months. Roth was ordered to pay a fine of $500, and Horton was placed on probation. On appeal the convictions of Glasser, Kretske and Roth were affirmed.[2] We brought the case here because of the important constitutional issues involved. 313 U. S. 551.

Glasser was the assistant United States attorney in charge of liquor cases in the Northern District of Illinois from about March 1935 to April 1939. Kretske was an assistant United States attorney in the same district from October 1934 until April 1937. He assisted Glasser in the prosecution of liquor cases. After his resignation he entered private practice in Chicago. Roth was an attorney in private practice. Kaplan was an automobile dealer reputed to be engaged in the illicit alcohol traffic around Chicago. Horton was a professional bondsman.

The indictment was originally in two counts, but only the second survives here, as the Government elected to

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[1] "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

[2] 116 F. 2d 690.

proceed on that count alone at the close of its case. That count, after alleging that during certain periods Glasser and Kretske were assistant United States attorneys for the Northern District of Illinois, employed to prosecute all delinquents for crimes and offenses cognizable under the authority of the United States, and more particularly violations of the federal internal revenue laws relating to liquor, charged in substance that the defendants conspired to "defraud the United States of and concerning its governmental function to be honestly, faithfully and dutifully represented in the courts of the United States" in such matters "free from corruption, improper influence, dishonesty, or fraud." The means by which the conspiracy was to be accomplished was alleged to be by the defendants' soliciting certain persons charged, or about to be charged, with violating the laws of the United States, to promise or cause to be promised certain sums to be paid or pledged to the defendants, to be used to corrupt and influence the defendants Glasser and Kretske, and the defendant Glasser alone, in the performance of their and his official duties.

All the defendants filed a motion to quash the indictment on the ground (a) that the grand jury was illegally constituted because women were excluded therefrom and (b) that the indictment was not properly returned in open court. Glasser, Kretske and Roth also filed demurrers to the indictment. The motion to quash and the demurrers were overruled, and petitioners here renew their objections.

On July 1, 1939, two Acts of the State of Illinois providing for women jurors became effective.[3] Section 275 of the Judicial Code (28 U. S. C. § 411) provides in substance that jurors in a federal court are to have the qualifications of jurors in the highest court of the State. Petitioners

[3] Ill. Rev. Stat., 1939, c. 78, §§ 1 and 25.

contend that the grand jury, composed entirely of men, and summoned on August 25, 1939, was illegally constituted because, at the time it was drawn, Illinois law required state jury lists to contain the names of women. However, in 17 of the 18 counties comprising the Northern District of Illinois the county boards could wait until September, 1939, to include women on their jury lists.[4] Of course, for women to serve as federal jurors in Illinois it is not necessary that their names appear on a county list, but we are of opinion that, in view of the short time elapsing between the effective date of the Illinois Acts and the summoning of the grand jury, it was not error to omit the names of women from federal jury lists, where it was not shown that women's names had yet appeared on the state jury lists.

The record here adequately disposes of petitioners' contention that there is no showing that the indictment was returned in open court by the grand jury. It contains a placitum in regular form which recites the convening of a regular term of the District Court for the Eastern Division of the Northern District of Illinois, "on the first Monday of September [1939] (it being the twenty-ninth day of September the indictment was filed)," and discloses the presence of the judges of that court, the marshal and the clerk. The indictment bears the notation: "A true bill, George A. Hancock, Foreman", and the endorsement: "Filed in open court this 29th day of Sept.,

[4] Section 1 of Chapter 78 of the Illinois Revised Statutes, 1939, applies to counties not having jury commissioners (into which class the 17 counties fall) and provides:

"The county board of each county shall, at or before the time of its meeting, in September, in each year, or at any time thereafter, when necessary for the purpose of this Act, make a list of sufficient number, not less than one-tenth of the legal voters of each sex of each town or precinct of the county, giving the place of residence of each name on the list, to be known as a jury list."

A. D. 1939, Hoyt King, Clerk." Immediately following the indictment in the record is the motion-slip discharging the September grand jury, dated September 29, 1939, initialled by Judge Wilkerson and containing: "The Grand Jury return 4 Indictments in open Court. Added 10/30/39." The presence of this notation in the record is meaningless unless the indictment in this case is one of the four mentioned. The addition was obviously made to clarify the indorsement of the clerk so as to show clearly the return by the grand jury and thus avert the technical argument here advanced. While a formal *nunc pro tunc* order would have been the more correct procedure, especially since a new term of court had begun, we do not think that this informal clarification of the record amounts to such error as requires reversal. Cf. *Breese* v. *United States,* 226 U. S. 1.

The demurrers to the indictment were properly overruled. The indictment is sufficiently definite to inform petitioners of the charges against them. It shows "certainty, to a common intent." *Williamson* v. *United States,* 207 U. S. 425, 447. The particularity of time, place, circumstances, causes, etc., in stating the manner and means of effecting the object of a conspiracy, for which petitioners contend, is not essential to an indictment. *Crawford* v. *United States,* 212 U. S. 183; *Dealy* v. *United States,* 152 U. S. 539. Such specificity of detail falls rather within the scope of a bill of particulars, which petitioners requested and received.

The indictment charges that the United States was defrauded by depriving it of its lawful governmental functions by dishonest means; it is settled that this is a "defrauding" within the meaning of § 37 of the Criminal Code. *Hammerschmidt* v. *United States,* 265 U. S. 182.

It is unnecessary to explore the merits of the argument that the indictment is defective on the ground that it

charges a conspiracy to commit a substantive offense requiring concerted action, namely, bribery, because, "The indictment does not charge as a substantive offense the giving or receiving of bribes; nor does it charge a conspiracy to give or accept bribes. It charges a conspiracy to . . . defraud the United States, the scheme of resorting to bribery being averred only to be a way of consummating the conspiracy and which, like the use of a gun to effect a conspiracy to murder, is purely ancillary to the substantive offense." *United States* v. *Manton,* 107 F. 2d 834, 839.

Petitioners Glasser and Roth claim that the evidence was insufficient to support the verdict. Kretske makes no such argument but merely contends that the Government's testimony was largely that of accomplices "to emphasize the inescapable conclusion that the evidence against petitioner (Kretske) was of a borderline character." Since we are of opinion that a new trial must be ordered as to Glasser, we do not at this time feel that it is proper to comment on the sufficiency of the evidence against Glasser.

Admittedly, the case against Glasser is not a strong one. The Government frankly concedes that the case with respect to Glasser "depends in large part . . . upon a development and collocation of circumstances tending to sustain the inferences necessary to support the verdict." This is significant in relation to Glasser's contention that he was deprived of the assistance of counsel contrary to the Sixth Amendment. In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt.

On November 1, 1939, George Callaghan entered the appearance of himself and Glasser as attorneys for Glasser. On January 29, 1940, William Scott Stewart entered his appearance as associate counsel for Glasser. "Harrington & McDonnell" had entered an appearance for Kretske. On February 5, 1940, the day set for trial, Harrington asked for a continuance. The motion was overruled and McDonnell was appointed Kretske's attorney. On February 6, McDonnell informed the court that Kretske did not wish to be represented by him. The court then asked if Stewart could act as Kretske's attorney. The following discussion then took place:

"Mr. Stewart: May I make this statement about that, judge? We were talking about it—we were all trying to get along together. I filed an affidavit, or I did on the behalf of Mr. Glasser pointing out some little inconsistency in the defense, and the main part of it is this: There will be conversations here where Mr. Glasser wasn't present, where people have seen Mr. Kretske and they have talked about, that they gave money to take care of Glasser, that is not binding on Mr. Glasser, and there is a divergency there, and Mr. Glasser feels that if I would represent Mr. Kretske the jury would get an idea that they are together, and all the evidence—

"The Court: How would it be if I appointed you as attorney for Kretske?

"Mr. Stewart: That would be for your Honor to decide.

"The Court: I know you are looking out for every possible legitimate defense there is. Now, if the jury understood that while you were retained by Mr. Glasser the Court appointed you at this late hour to represent Kretske, what would be the effect of the jury on that?

"Mr. Stewart: Your Honor could judge that as well as I could.

"The Court: I think it would be favorable to the defendant Kretske.

"Mr. Glasser: I think it would be too, if he had Mr. Stewart. That's the reason I got Mr. Stewart, but if a defendant who has a lawyer representing him is allowed to enter an objection, I would like to enter my objection. I would like to have my own lawyer representing me.

"The Court: Mr. McDonnell, you will have to stay in it until Mr. Kretske gets another lawyer, if he isn't satisfied with you.

"(To Mr. Kretske) Mr. Kretske, if you are not satisfied with Mr. McDonnell, you will have to hire another lawyer. We will proceed with the selection of the jury now."

A colloquy then ensued between the court, McDonnell and Kretske when the following occurred:

"Mr. Kretske: I can end this. I just spoke to Mr. Stewart and he said if your Honor wishes to appoint him I think we can accept the appointment.

"Mr. Stewart: As long as the Court knows the situation. I think there is something to the fact that the jury knows we can't control that.

"Mr. McDonnell: Then the order is vacated?

"The Court: The order appointing Mr. McDonnell is vacated and Mr. Stewart is appointed attorney for Mr. Kretske."

Glasser remained silent. Stewart thereafter represented Glasser and Kretske throughout the trial and was the most active of the array of defense counsel.

The guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power. Among those guarantees is the right granted by the Sixth Amendment to an accused in a criminal proceeding in a federal court "to have the assistance of counsel for his defense." "This is one of the safeguards deemed necessary to insure fundamental human rights of life and liberty," and a

federal court cannot constitutionally deprive an accused, whose life or liberty is at stake, of the assistance of counsel. *Johnson* v. *Zerbst,* 304 U. S. 458, 462, 463. Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment, *Powell* v. *Alabama,* 287 U. S. 45, so are we clear that the "assistance of counsel" guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.

To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights. *Aetna Insurance Co.* v. *Kennedy,* 301 U. S. 389; *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292. Glasser never affirmatively waived the objection which he initially advanced when the trial court suggested the appointment of Stewart. We are told that, since Glasser was an experienced attorney, he tacitly acquiesced in Stewart's appointment because he failed to renew vigorously his objection at the instant the appointment was made. The fact that Glasser is an attorney is, of course, immaterial to a consideration of his right to the protection of the Sixth Amendment. His professional experience may be a factor in determining whether he actually waived his right to the assistance of counsel. *Johnson* v. *Zerbst,* 304 U. S. 458, 464. But it is by no means conclusive.

Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. Speaking of the obligation of the trial court to preserve the right to jury trial for an accused, Mr. Justice Sutherland said that such duty "is not to be discharged as a matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity." *Patton* v. *United States,* 281 U. S. 276, 312–313. The trial court should protect the right of an accused to have the assistance of counsel. "This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." *Johnson* v. *Zerbst,* 304 U. S. 458, 465.

No such concern on the part of the trial court for the basic rights of Glasser is disclosed by the record before us. The possibility of the inconsistent interests of Glasser and Kretske was brought home to the court, but instead of jealously guarding Glasser's rights, the court may fairly be said to be responsible for creating a situation which resulted in the impairment of those rights. For the manner in which the parties accepted the appointment indicates that they thought they were acceding to the wishes of the court. Kretske said the appointment could be accepted "if your Honor wishes to appoint him [Stewart]," and Stewart immediately replied: "As long as the Court knows the situation. I think there is something in the fact that the jury knows we can't control that." The court made no effort to reascertain Glasser's attitude or

wishes. Under these circumstances, to hold that Glasser freely, albeit tacitly, acquiesced in the appointment of Stewart is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused.

Glasser urges that the court's appointment of Stewart as counsel for Kretske embarrassed and inhibited Stewart's conduct of his defense, in that it prevented Stewart from adequately safeguarding Glasser's right to have incompetent evidence excluded and from fully cross-examining the witnesses for the prosecution.

One Brantman, an accountant known to Kretske and recommended professionally by him to a client, testified that he gave Kretske $3000 on behalf of one Abosketes. He further testified that he did not know Glasser. Stewart secured a postponement of cross-examination for "In view of the fact that your Honor appointed me for Mr. Kretske, I am not prepared to cross-examine."

Abosketes took the stand immediately after Brantman and testified that Brantman told him that he was about to be indicted and offered to "fix" the case with someone in the Federal Building for $5000. About the time of this meeting, Glasser and investigator Bailey were questioning one Brown, who had been convicted for operating a still, to determine whether Abosketes was connected with that still. Abosketes referred frequently to Glasser in his testimony and indicated that Glasser and Brantman were linked together. Thus he testified that Brantman told him "They have got the goods on you, Mr. Glasser has got it out of Brown." When questioned as to his knowledge of Brantman's connections, Abosketes replied: "There was more than a fix, if indictment was stopped. He [Brantman] knows Mr. Glasser and that was all there was to it." And, later: "He had connections to stop things like that, he had connections in the Federal Build-

ing." And, again: "I could not be sure that this man [Brantman] was not putting a shake on me and be honest about it. I could not go over and ask Mr. Glasser if Mr. Brantman was able to fix him. I thought Brantman could, though. I was kind of hoping he could. If I did not think he could, I would not have given him the money."

Brantman was re-called three days later. Stewart declined cross-examination. That this decision was influenced by a desire to protect Kretske can reasonably be inferred from the colloquy between the court and Stewart before sentence was imposed. At that time Stewart told the court that, lest his failure to cross-examine Brantman reflect on Kretske, the reason for his forbearance was that he feared that Brantman would tell worse lies. But, especially after the intervening testimony of Abosketes, a thorough cross-examination was indicated in Glasser's interest to fully develop Brantman's lack of reference to, or knowledge of Glasser. Stewart's failure to undertake such a cross-examination luminates the cross-purposes under which he was laboring.

Glasser also argues that certain testimony, inadmissible as to him, was allowed without objection by Stewart on his behalf because of Stewart's desire to avoid prejudice to Kretske. The testimony complained of is that of Elmer Swanson, Frank Hodorowicz, Edward Dewes, and Stanley Wasielewski as to statements made by Kretske, not in the presence of Glasser, and heard by them which implicated Glasser. Glasser has red hair, and the statements made by Kretske were that he would have to see "Red," or send the money over to the "red-head," etc., in connection with "fixing" cases.[5]

Glasser contends that such statements constituted inadmissible hearsay as to him and that Stewart forewent

[5] Elmer Swanson testified that when money was paid to Kretske in connection with the Stony Island still case Kretske said that part

this obvious objection lest an objection on behalf of Glasser alone leave with the jury the impression that the testimony was true as to Kretske. The Government attacks this argument as unsound, and, relying on the doctrine that the declarations of one conspirator in furtherance of the objects of the conspiracy made to a third party are admissible against his co-conspirators, *Logan* v. *United States,* 144 U. S. 263, contends that the declarations of Kretske were admissible against Glasser and hence no prejudice could arise from Stewart's failure to object. However, such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy. *Minner* v. *United States,* 57 F. 2d 506; and see *Nudd* v. *Burrows,* 91 U. S. 426.

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of it would go to "Red or Dan." The witness understood this to refer to Glasser.

Frank Hodorowicz testified that he gave $800 in currency to Kretske to secure favorable action with regard to a still at 124 East 118th Place. Kretske told Frank he "had to deliver the money to Red." Hodorowicz knew this meant Glasser. Frank attempted to "fix" a case for Albina Zarrattini through Kretske, who declined after "he talked to Red" because Zarrattini talked too much.

After Frank Hodorowicz was himself indicted he went to Kretske to "fix" his case. Kretske told him there was "a lot of heat" on the case and "They got Glasser over a barrel, he can't do anything. He has to put you in jail."

When Edward Dewes gave Kretske $100 so that he would not be indicted in connection with a still at Spring Grove, Kretske told him "he would send it over to the red-head in the Federal Building." The witness knew this meant Glasser. Dewes also testified that Kretske told him that he, Kretske, had resigned from the United States attorney's office under pressure, and that, "for holding the bag," he was to receive favors from the "red-head."

Stanley Wasielewski testified that he heard Kretske tell Stanley Slesur that "I will take care of everything between me and the red-head." Both Wasielewski and Slesur were involved in a still at Downers Grove.

Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence.

Glasser urges that, independently of the statements complained of, there is no proof connecting him with the conspiracy. Clearly the statements were damaging. Other evidence tending to connect Glasser with the conspiracy is rather meagre by comparison. Frank Hodorowicz testified that Glasser apologized to him after his indictment because he, Glasser, could do nothing for Hodorowicz. Hodorowicz also testified that he sent a case of whiskey to Glasser for Christmas, 1937. Victor Raubunas testified that he saw Glasser, Kretske and Kaplan meet on three occasions. An alcohol agent, Dowd, testified that Glasser expelled him from the court-room during the trial of a libel case in which Roth represented the successful claimant. Glasser released Raubunas and one Joppek, who were picked up on different occasions for suspected liquor violations, without extensive questioning. Whether testimony such as this was sufficient to establish the participation of Glasser in the conspiracy we need not decide. That is beside the point. The important fact is that no objection was offered by Stewart on Glasser's behalf to the statements complained of, and this despite the fact that, when the court broached the possibility of Stewart's appointment, Stewart told the court that statements of this nature were not binding on Glasser. That this is indicative of Stewart's struggle to serve two masters cannot seriously be doubted.

There is yet another consideration. Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness.

To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of

Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. Cf. *Snyder* v. *Massachusetts,* 291 U. S. 97, 116; *Tumey* v. *Ohio,* 273 U. S. 510, 535; *Patton* v. *United States,* 281 U. S. 276, 292. And see *McCandless* v. *United States,* 298 U. S. 342, 347. Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court. In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, it is especially important that he be given the benefit of the undivided assistance of his counsel without the court's becoming a party to encumbering that assistance. Here the court was advised of the possibility that conflicting interests might arise which would diminish Stewart's usefulness to Glasser. Nevertheless Stewart was appointed as Kretske's counsel. Our examination of the record leads to the conclusion that Stewart's representation of Glasser was not as effective as it might have been if the appointment had not been made. We hold that the court thereby denied Glasser his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment. This error requires that the verdict be set aside and a new trial ordered as to Glasser.

But this error does not require that the convictions of the other petitioners be set aside. To secure a new trial they must show that the denial of Glasser's constitutional rights prejudiced them in some manner, for where error

as to one defendant in a conspiracy case requires that a new trial be granted him, the rights of his co-defendants to a new trial depend upon whether that error prejudiced them. *Agnello* v. *United States,* 269 U. S. 20; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150; *Rossi* v. *United States,* 278 F. 349; *Belfi* v. *United States,* 259 F. 822; *Browne* v. *United States,* 145 F. 1; *Dufour* v. *United States,* 37 App. D. C. 497. Kretske does not contend that he was prejudiced by the appointment, and we are clear from the record that no prejudice is disclosed as to him. Roth argues the point, but he was represented throughout the case by his own attorney. We fail to see that the denial of Glasser's right to have the assistance of counsel affected Roth.

Turning now to the contentions of Kretske and Roth, we are clear that substantial evidence supports the verdict against both. As noted before, Kretske does not raise the point other than to mention that the testimony against him was largely that of accomplices and unsavory characters. The short answer to this is that the credibility of a witness is a question for the jury.

The evidence against Roth discloses the following salient facts. Elmer Swanson, Clem Dowiat and Anthony Hodorowicz were arrested in connection with a still on Stony Island Avenue. Frank Hodorowicz, the head of the Hodorowicz crowd, arranged a meeting with Kretske at his hardware store to "take care" of the case. Horton was present and Kretske told the group that there "was a lot of heat" on the case but that it could be arranged so that nobody "would go to jail" for $1200, part of which "Red" was to get. A down payment of $500 was made. When a lawyer was sought, Kretske referred the prospective defendants to Roth. He represented them at the hearing before the Commissioner, which was continued at the request of Glasser. After an indictment was returned, Roth appeared for trial to find that the case had

been stricken from the docket with leave to reinstate it. The defendants were never brought to trial. None of the Hodorowiczes or their associates paid Roth for his services. Roth testified that he received his fee from Kretske.

In June 1938, Glasser secured two indictments, one against Frank, Mike, and Peter Hodorowicz and Clem Dowiat, and the other against Frank and Peter Hodorowicz and Dowiat, for the sale of illicit alcohol. Frank paid Kretske $250 after the indictments. Kretske later told him that nothing could be done, as investigator Bailey was pressing Glasser. Frank then went to see Roth, who with Kretske went to see Glasser. Roth later told Frank that nothing could be done and suggested that he get an attorney and prepare to defend himself. Roth's explanation of this was that he went to Glasser to learn the latter's attitude toward clemency for Frank, and that he suggested the retention of two lawyers, one to defend Frank, and the other to represent the remaining defendants. Frank dispensed with Roth's services and was represented at the trial by one Hess. Frank paid Roth $50, but this was in connection with substituting some securities on his bond.

Edward Dewes had been associated with the defendant Kaplan in a still at Spring Grove. That case was twice presented to a grand jury by Glasser but withdrawn on each occasion. Two days before it was presented a third time, the defendant Horton told Dewes that Kretske wished to see him. Dewes went to Kretske's office and paid him $100 so that he would not be indicted. Dewes was no-billed in that case. Dewes was also involved in a still on the farm of one Beisner. It was raided and several were arrested. Dewes, Victor Raubunas and Edward Farber asked Horton to "fix" that case, but when his price was thought too high, Farber, who had known Kretske for some time, took Dewes and Raubunas to Kretske's

office. Kretske offered to take care of the case for $1200. Raubunas paid $300 and they were told they would need no lawyer at the preliminary hearing. Eventually Raubunas, Dewes and Beisner were indicted. Dewes thereafter paid Kretske $275 to "fix" his case. Kretske referred the matter to Roth, who represented Dewes throughout his trial. Dewes testified that he neither retained nor paid Roth.

Paul Svec, an associate of one Yarrio, was arrested in 1937 for a liquor violation. Horton arranged his bond. In Svec's presence Horton picked up Kretske and Yarrio. They told Svec not to worry. He was thereafter indicted and convicted. While at liberty pending an appeal, he was again arrested. This time he called Glasser, and according to the latter, offered him money. The following morning Glasser interrogated Svec in the hearing of a secreted agent of the Federal Bureau of Investigation and secured admissions that Svec had never paid Glasser money or received any promises from him, and that the call had been at the instigation of the arresting investigators. Svec testified that Roth told him that he "stood up o. k." under Glasser's questioning. Svec was discharged at the Commissioner's hearing.

Glasser prosecuted Leo Vitale for the operation of a still. He was convicted and received a sentence of one hour in the custody of the marshal. Vitale's wife, Rose, was the claimant in a subsequent libel action against a car allegedly used to transport illicit liquor. The case was referred to Roth by Kretske. Roth informed the court that Vitale was "o. k." and that the car was not used for illegal purposes. As was the custom, the case was tried on the agent's report. It was dismissed. Investigator Dowd later informed Glasser that he had heard that Vitale had boasted that "he got out of this for nine hundred dollars."

In April 1938, Edward and William Wroblewski were indicted in the Northern District of Indiana. They en-

gaged Roth as their counsel. They did not remember how they met Roth. When asked by the court if anyone recommended Roth to him, Edward answered: "No, sir, I don't remember whether it was a rumor about his name." According to Alexander Campbell, an assistant United States attorney in that district, Roth appeared in his office in September 1938 and asked if the Wroblewskis had been indicted. Campbell replied that he did not know off-hand but would check the files. Roth then asked, if the files showed no indictment, whether some arrangement could be made so that no indictment would be returned. He offered Campbell $500 or $1000. When Campbell refused, Roth said: "Well, that is the way we handle cases in Chicago sometimes." The Wroblewskis were convicted. Subsequently, Roth asked Campbell to use his influence to stop the investigation in Chicago by Bailey which resulted in the instant case.

It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. *United States* v. *Manton,* 107 F. 2d 834, 839, and cases cited. Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a "development and a collocation of circumstances." *United States* v. *Manton, supra.* We are clear that, from the circumstances outlined above, the jury could infer the existence of a conspiracy and the participation of Roth in it. Roth's statements to Campbell in the Wroblewski matter, his suggestion to Frank Hodorowicz that he should get a lawyer and prepare to defend himself when the case could not be "fixed," the fact that he received no fees from the Hodorowiczes with the exception of $50 in connection with Frank's bond, Dewes' testimony that he neither retained nor paid Roth, Roth's commendation of Svec's bearing under Glasser's

interrogation, all furnish the necessary support for the jury's verdict.

The objections of Kretske and Roth with regard to the admission of certain evidence are without merit. The reports of investigators of the Alcohol Tax Unit on stills at Western Avenue and at Spring Grove, operated by the defendant Kaplan and his associates, were admitted as Government exhibits 81A and 113. Each contained statements taken from prospective witnesses by the investigators, and each gave a description of the prospective defendants. Kaplan was referred to as of Jewish descent, a bootlegger by reputation, and mention was made of the arrest of Kaplan and Edward Dewes in connection with the killing of one Pinna. At the time each report was admitted the trial judge informed the jury that it was admitted only against Glasser and continued: "At some further stage of the proceedings I may advise you with reference to its competency as to the other defendants, but for the time being it will be admissible only against the defendant Glasser." The record before us contains no indication that the jury was later informed that the exhibits were evidence against the defendants other than Glasser. The claim of Kretske and Roth, that the admission of these reports was prejudicial to Kaplan and that they are entitled to take advantage of that error, ignores the fact that they were admitted against Glasser alone.

No reversible error was committed by overruling objections to the testimony of Alexander Campbell with relation to his dealings with Roth. Trial judges have a measure of discretion in allowing testimony which discloses the purpose, knowledge, or design of a particular person. *Butler* v. *United States,* 53 F. 2d 800; *Simpkins* v. *United States,* 78 F. 2d 594, 598. We do not think the bounds of that discretion were exceeded here. The statements of Roth were not in furtherance of the conspiracy, but they

did tend to connect Roth with it by explaining his state of mind.

The judge conducting a jury trial in a federal court is "not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct." *Quercia* v. *United States,* 289 U. S. 466, 469. Upon him rests the responsibility of striving for that atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding. Petitioners contend that the trial judge made remarks prejudicial to them, committed acts of advocacy, questioned them in a hostile manner, unduly limited cross-examination, and in general failed to maintain an impartial attitude. Various incidents in support of those contentions are brought to our attention.

The court did interrogate several witnesses, but in the main such interrogation was within its power to elicit the truth by an examination of the witnesses. *United States* v. *Gross,* 103 F. 2d 11; *United States* v. *Breen,* 96 F. 2d 782. In asking Anthony Hodorowicz whether there had been a full disclosure of his connection with the Stony Island still when he appeared before Judge Woodward, the court obviously was under a misapprehension of the nature of the appearance. It was simply for the purpose of arraignment, and of course no testimony was offered. Much is made of this, but at the time no one attempted to explain to the court the nature of the appearance. Stewart later brought out on cross-examination that it was only an arraignment and that there was no necessity for testimony on that day.

After the testimony of Abosketes, the court read into the record the fact that Abosketes was indicted in Wisconsin in 1936 and 1938, and that he pleaded guilty to one indictment and that the other was dismissed. It is, of course, improper for a judge to assume the role of a witness, but we cannot here conclude that prejudicial error

resulted. Abosketes had briefly referred to his troubles in Wisconsin in his testimony.

The alleged undue limitation of cross-examination merits scant attention. The extent of such examination rests in the sound discretion of the trial court. *Alford* v. *United States,* 282 U. S. 687. We find no abuse of that discretion.

Perhaps the court did not attain at all times that thoroughgoing impartiality which is the ideal, but our examination of the record as a whole leads to the conclusion that the substantial rights of the petitioners were not affected. The trial was long and the incidents relied on by petitioners few. We must guard against the magnification on appeal of instances which were of little importance in their setting. Cf. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 240; *Goldstein* v. *United States,* 63 F. 2d 609; *United States* v. *Warren,* 120 F. 2d 211.

Separate consideration of the numerous instances of alleged prejudicial misconduct on the part of the prosecuting attorney would unduly extend this opinion. Suffice it to say, that after due consideration we conclude that no one instance, nor the combination of them all, constitutes reversible error.

All the petitioners contend that they were denied an impartial trial because of the alleged exclusion from the petit jury panel of all women not members of the Illinois League of Women Voters. In support of their motions for a new trial, Glasser and Roth filed affidavits which are the basis of petitioners' present contentions. Kretske did not file an affidavit, but he urges the point here.

Glasser swore on information and belief that all the names of women placed in the box from which the panel was drawn were taken from a list furnished the clerk of the court by the Illinois League of Women Voters, and pre-

pared exclusively from its membership, that the women on that list had attended "jury classes whose lecturers presented the views of the prosecution," and that women not members of the League, but otherwise qualified, were systematically excluded, by reason of which affiant "did not have a trial by a jury free from bias, prejudice, and prior instructions, and as a result thereof the jury was disqualified and this affiant's rights were prejudiced in that he was deprived of a trial by jury guaranteed to him by the laws and the constitution of the United States of America, and particularly the 5th and 6th amendment, all of which he offers to prove." The source of Glasser's information was stated to be a then current article, "Women and the Law," in the American Bar Association Journal for April 1940 (Vol. 26, No. 4). Roth's affidavit merely gave Glasser as his source of information and made no offer of proof. The court overruled the motions for a new trial. The record discloses that the jury was composed of six men and six women.

Since it was first recognized in Magna Carta, trial by jury has been a prized shield against oppression, but, while proclaiming trial by jury as "the glory of the English law," Blackstone was careful to note that it was but a "privilege." *Commentaries,* Book 3, p. 379. Our Constitution transforms that privilege into a right in criminal proceedings in a federal court. This was recognized by Justice Story: "When our more immediate ancestors removed to America, they brought this great privilege [trial by jury in criminal cases] with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our State constitutions as a fundamental right, and the Constitution of the United States would have been justly obnoxious to the most conclusive

objection if it had not recognized and confirmed it on the most solemn terms." 2 Story, Const. § 1779.

Lest the right of trial by jury be nullified by the improper constitution of juries, the notion of what a proper jury is has become inextricably intertwined with the idea of jury trial. When the original Constitution provided only that "The trial of all crimes, except in cases of impeachment, shall be by jury," [6] the people and their representatives, leaving nothing to chance, were quick to implement that guarantee by the adoption of the Sixth Amendment which provides that the jury must be impartial.

For the mechanics of trial by jury we revert to the common law as it existed in this country and in England when the Constitution was adopted. *Patton* v. *United States,* 281 U. S. 276. But even as jury trial, which was a privilege at common law, has become a right with us, so also, whatever limitations were inherent in the historical common law concept of the jury as a body of one's peers do not prevail in this country. Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. For "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith* v. *Texas,* 311 U. S. 128, 130.

Jurors in a federal court are to have the qualifications of those in the highest court of the State, and they are to be selected by the clerk of the court and a jury commissioner. §§ 275, 276 Jud. Code; 28 U. S. C. §§ 411, 412. This duty of selection may not be delegated. *United States* v. *Murphy,* 224 F. 554; *In re Petition For Special Grand Jury,* 50 F. 2d 973. And, its exercise must always

[6] Const., Art. III, § 2, cl. 3.

accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a "body truly representative of the community," and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties.

The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial. No matter how high-principled and imbued with a desire to inculcate public virtue such organizations may be, the dangers inherent in such a method of selection are the more real when the members of those organizations, from training or otherwise, acquire a bias in favor of the prosecution. The jury selected from the membership of such an organization is then not only the organ of a special class, but, in addition, it is also openly partisan. If such practices are to be countenanced, the hard-won right of trial by jury becomes a thing of doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions.

So, if the picture in this case actually is as alleged in Glasser's affidavit, we would be compelled to set aside the trial court's denial of the motion for a new trial as a clear abuse of discretion, and order a new trial for all the petitioners. But from the record before us we must conclude that petitioners' showing is insufficient. The Government did not controvert the affidavits by counter-affidavits or formal denial, and it does not appear from the record that any argument was heard on them. From this, petitioners argue that the allegations of the affidavits are to be taken as true for the purpose of the motion. However, this is not a case where the prosecution has impliedly, *Neal* v. *Delaware,* 103 U. S. 370, or actually, *Hale* v. *Kentucky,* 303 U. S. 613, stipulated that affidavits in support of a motion alleging the improper constitution of a jury may be accepted as proof. In the absence of such a stipulation, it is incumbent on the moving party to introduce, or to offer, distinct evidence in support of the motion; the formal affidavit alone, even though uncontroverted, is not enough. *Smith* v. *Mississippi,* 162 U. S. 592; *Tarrance* v. *Florida,* 188 U. S. 519; cf. *Brownfield* v. *South Carolina,* 189 U. S. 426. Glasser, in his affidavit, offered to prove the allegations contained therein, but the record is barren of any actual tender of proof on his part. Furthermore, there is no indication that the court refused to entertain such an offer, if it were in fact made. Roth did not even make an offer of proof in his affidavit, and Kretske did not file one. While it is error to refuse to hear evidence offered in support of allegations that a jury was improperly constituted, *Carter* v. *Texas,* 177 U. S. 442, there is, and, on the state of this record, can be, no assertion that such error was here committed. The failure of petitioners to prove their contention is fatal.

We conclude that the conviction of Glasser must be set aside and the cause as to him remanded to the District

Court for the Eastern Division of the Northern District of Illinois for a new trial. The convictions of petitioners Kretske and Roth are in all respects upheld.

No. 30, reversed.
Nos. 31 and 32, affirmed.

MR. JUSTICE JACKSON took no part in the consideration or decision of these cases.

MR. JUSTICE FRANKFURTER:

The CHIEF JUSTICE and I are of opinion that the conviction of Glasser, as well as that of his co-defendants, should stand.

It is a commonplace in the administration of criminal justice that the actualities of a long trial are too often given a meretricious appearance on appeal; the perspective of the living trial is lost in the search for error in a dead record. To set aside the conviction of Glasser (a lawyer who served as an Assistant United States Attorney for more than four years) after a trial lasting longer than a month, on the ground that he was denied the basic constitutional right "to have the assistance of counsel for his defence," is to give fresh point to this regrettably familiar phenomenon. For Glasser himself made no such claim at any of the critical occasions throughout the proceedings. Neither when the judge appointed Stewart to act as counsel for both Kretske and Glasser, nor at any time during the long trial, nor in his motions to set aside the verdict and to arrest judgment, nor in his plea to the court before sentence was passed, nor in setting forth his grounds for appeal, did Glasser assert, or manifest in any way a belief, that he was denied the effective assistance of counsel. Not until twenty weeks after Stewart had become counsel for the co-defendant Kretske, and fifteen weeks after the trial had ended, did Glasser discover that he had been

deprived of his constitutional rights. This was obviously a lawyer's afterthought. It does not promote respect for the Bill of Rights to turn such an afterthought into an imaginary injury that is reflected nowhere in the contemporaneous record of the trial, and make it the basis for reversal.

The guarantees of the Bill of Rights are not abstractions. Whether their safeguards of liberty and dignity have been infringed in a particular case depends upon the particular circumstances. The fact that Glasser is an attorney, of course, does not mean that he is not entitled to the protection which is afforded all persons by the Sixth Amendment. But the fact that he is an attorney with special experience in criminal cases, and not a helpless illiterate, may be—as we believe it to be here—extremely relevant in determining whether he was denied such protection.

In this light, what does the record show? Before the trial got under way the trial judge was presented with a problem created by the inability of one of Kretske's lawyers to try the case in his behalf. Kretske was dissatisfied with his other lawyer, who professed to be unfamiliar with the many details of the case. Upon Kretske's motion for a continuance, the judge was faced with the difficulty of avoiding either delay of the trial or an undesirable severance as to Kretske. All the defendants, including Glasser, and their counsel were present in court. The judge asked whether Stewart, who had been retained by Glasser, would be prepared to act also for Kretske. The record gives no possible ground for any inference other than that this suggestion came from the judge as a fair and disinterested proposal to solve a not unfamiliar trial problem. It is not, and indeed could not be, contended that the judge's suggestion, addressed to the consideration of the defendants, was not wholly proper. And so,

when Stewart raised the question of a possible conflict of interest, and Glasser himself objected, saying "I would like to have my own lawyer representing me," the judge neither remonstrated nor argued. He promptly dropped his suggestion and directed Kretske's other lawyer, who was present but with whom Kretske was dissatisfied, to stay in the case until Kretske could hire someone to his satisfaction. The footnote sets forth the full text of this episode.[1]

There ensued a long discussion relating to the representation of Kretske. During this discussion the judge never

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[1] "Mr. Stewart: May I make this statement about that, judge? We were talking about it—we were all trying to get along together. I filed an affidavit, or I did on the behalf of Mr. Glasser, pointing out some little inconsistency in the defense, and the main part of it is this: There will be conversations here where Mr. Glasser wasn't present, where people have seen Mr. Kretske and they have talked about, that they gave money to take care of Glasser, that is not binding on Mr. Glasser, and there is a divergency there, and Mr. Glasser feels that if I would represent Mr. Kretske the jury would get an idea that they are together, and all the evidence—

The Court: How would it be if I appointed you as attorney for Mr. Kretske?

Mr. Stewart: That would be for your Honor to decide.

The Court: I know you are looking out for every possible legitimate defense there is. Now, if the jury understood that while you were retained by Mr. Glasser the Court appointed you at this late hour to represent Kretske, what would be the effect of the jury on that?

Mr. Stewart: Your Honor could judge that as well as I could.

The Court: I think it would be favorable to the defendant Kretske.

Mr. Glasser: I think it would be too, if he had Mr. Stewart. That's the reason I got Mr. Stewart, but if a defendant who has a lawyer representing him is allowed to enter an objection, I would like to enter my objection. I would like to have my own lawyer representing me.

The Court: Mr. McDonnell, you will have to stay in it until Mr. Kretske gets another lawyer, if he isn't satisfied with you. (To Mr. Kretske) Mr. Kretske, if you are not satisfied with Mr. McDonnell, you will have to hire another lawyer. We will proceed with the selection of the jury now."

again adverted to his original suggestion that Stewart also represent Kretske. Kretske interrupted, and there then occurred in Glasser's presence what is now made the basis for reversal:

"Mr. Kretske: I can end this. I just spoke to Mr. Stewart and he said if your Honor wishes to appoint him I think we can accept the appointment.

"Mr. Stewart: As long as the Court knows the situation. I think there is something to the fact that the jury knows we can't control that.

"Mr. McDonnell: Then the order is vacated?

"The Court: The order appointing Mr. McDonnell is vacated and Mr. Stewart is appointed attorney for Mr. Kretske."

It is clear, therefore, that this arrangement was voluntarily assumed by the parties, and was not pressed upon them by the judge. Glasser, who was present, raised no objection and made no comment.

The requirement that timely objections be made to prejudicial rulings of a trial judge often has the semblance of traps for the unwary and uninformed. But Glasser was neither unwary nor uninformed. His experience in the prosecution of criminal cases makes his silence here most significant. Nor was this the last opportunity he had to indicate that embarrassment was being caused him by Stewart's representation of Kretske, let alone that he deemed it a denial of his constitutional rights. If he were laboring under a handicap, he would have made it known at the times when he felt it most—during the long course of the trial, in his motions for new trial and in arrest of judgment, in his extended plea to the court before sentence was passed, and finally when, on April 26, 1940, over his own signature he gave twenty grounds for appeal but did not mention this one. The long period of uninterrupted silence concerning his after-discovered injury negatives its existence. We find it difficult to know what acquies-

cence in a judge's ruling could be, if this record does not show it.[2]

A fair reading of the record thus precludes the inference that the judge forced upon Glasser a situation which hobbled him in his defense. To be sure, he did say at first that he would like his lawyer to represent him alone. But he plainly acquiesced in the arrangement which, after consultation at the defense table, was proposed to the trial judge and which the judge accepted. A conspiracy trial presents complicated questions of strategy for the defense. There are advantages and disadvantages in having separate counsel for each defendant or a single counsel for more than one. Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack. These considerations could not have escaped a lawyer of Glasser's experience. His thorough acquiescence in the proceedings cannot be reconciled with a denial of his constitutional rights.

A belated showing that Glasser was actually prejudiced by the judge's action is now attempted. This has two aspects: (1) Stewart's failure to cross-examine the witness Brantman, and (2) his failure to make objections on behalf of Glasser to the admission of certain evidence.

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[2] Stewart was designated to represent Kretske on February 6, 1940, when the trial began. The jury brought in its verdict on March 8. The motions for new trial and in arrest of judgment were denied on April 23, and on the same day the defendants were sentenced. On April 26, Glasser filed a notice setting forth twenty grounds of appeal without suggesting that he had been denied his right to the assistance of counsel. On June 27, Glasser and the two other petitioners filed a "joint and several assignment of errors," for the first time asserting that: "The court erred in appointing the employed counsel of defendant Daniel D. Glasser to represent defendant Norton I. Kretske, to the prejudice of the defendants."

(1) The Brantman episode evaporates upon examination. His only testimony relating to Glasser was that he did not know him. This was brought out fully and distinctly on direct examination.[3] That it had been amply established, Glasser himself recognized in his address to the court before sentence. It is difficult to understand how cross-examination would have been of any further benefit to Glasser. In any event, the record shows that Stewart abstained from cross-examining Brantman not because he felt himself inhibited by any conflict of interest but because, as he told the judge after verdict, he thought that on cross-examination Brantman "would be telling worse lies."

(2) It is said that Stewart's failure to object, on behalf of Glasser, to certain evidence in itself proves that Stewart felt himself restricted—wholly regardless of the admissibility of such evidence. No evidence inadmissible against Glasser is avouched. Indeed we are told that it is "beside the point" that the evidence is admissible. Can it be that a lawyer who fails to make frivolous objections to admissible evidence is thereby denying his client the constitutional right to the assistance of counsel?

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[3] "Q. Do you know Mr. Glasser?

A. No, sir.

Q. Did you ever see him before the time you got this money?

A. I have seen him, I think I might have been introduced to the man once, but I don't think it was before I got that money.

Q. You never had any conversation with him in any event?

A. No, sir.

Q. What?

A. No, sir."

HALLIDAY *v.* UNITED STATES.

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

No. 101. Argued January 5, 1942.—Decided January 19, 1942.

1. Evidence *held* sufficient to go to the jury on the question whether petitioner, holder of a War Risk Insurance policy expiring October 31, 1920, was totally and permanently disabled on or before that day, and thereafter. P. 96.
2. In proving that the insured became totally and permanently disabled before the expiration of his War Risk contract, evidence of his conduct and condition during ensuing years is relevant. P. 98.
3. In an action on a War Risk Insurance policy inferences may be drawn unfavorable to a claim of total and permanent injury from the failure of the insured to secure medical treatment which he might have had. P. 99.
4. In an action on a War Risk Insurance policy wherein it was claimed that the insured became totally and permanently disabled before October 31, 1920, the date of the expiration of the policy, and remained so, it was error for the District Court to exclude evidence of his condition subsequently to December 9, 1935, when he was adjudged incompetent by a county probate court. Refusal to admit evidence of his condition after that date, though erroneous, was not prejudicial to the Government's case. P. 100.

116 F. 2d 812, reversed.

CERTIORARI, 314 U. S. 588, to review a judgment which reversed a judgment of the District Court in favor of the plaintiff Halliday in an action on a War Risk Insurance policy.

Messrs. R. K. Wise and *Warren E. Miller* for petitioner.

Mr. Wilbur C. Pickett, with whom *Solicitor General Fahy* and *Messrs. Julius C. Martin, Fendall Marbury*, and *W. Marvin Smith* were on the brief, for the United States.

MR. JUSTICE BYRNES delivered the opinion of the Court.

This is a suit brought by the petitioner, through his Committee, on a $10,000 War Risk Insurance policy. The complaint alleged that petitioner had become permanently and totally disabled by April 2, 1919, the date on which he was honorably discharged by the Army. The insurance contract was in effect on that date and remained in effect until October 31, 1920. At the close of all the evidence, the Government's motion for a directed verdict was denied. The jury returned a verdict for petitioner and found that he had become permanently and totally disabled by April 2, 1919. The Government moved for a new trial, the motion was denied, and judgment was entered on the verdict. On appeal the Circuit Court of Appeals reversed. 116 F. 2d 812. It held that there was insufficient evidence to go to the jury and it remanded the case to the District Court with directions to set aside the verdict and to enter judgment in favor of the Government.

Petitioner sought certiorari on two grounds: that the Circuit Court of Appeals had erred in holding that there was insufficient evidence for the jury; and that, even if the evidence was insufficient, under Rule 50 (b) of the Rules of Civil Procedure [1] the Circuit Court was without

[1] "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new

power to direct entry of judgment for the Government without a new trial. We granted certiorari, as we had in *Berry* v. *United States* [2] and *Conway* v. *O'Brien*,[3] because of the importance of the question concerning Rule 50 (b). However, as in those cases, we do not reach that problem, since we are of the opinion that the evidence was sufficient to support the verdict.

The insurance contract, the Act of Congress which authorized it,[4] and the regulations issued pursuant to that Act [5] obliged petitioner to prove that he was permanently and totally disabled on or before October 31, 1920, the date of expiration of the contract. We think there was evidence from which, if believed, the jury could have drawn this conclusion.

Period prior to October 31, 1920. Petitioner appeared to his friends and neighbors as a normal and healthy young man before his induction into the Army on June 23, 1918. In August he sailed for France, and in September he injured his back and was admitted to a camp hospital. From that time until his discharge, he was examined on several occasions by Army physicians. Their reports reveal that he was "very nervous" and that he gave "impressions of neurasthenia."

While much of the testimony was not specific as to time, several of the witnesses described the appearance and

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trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

[2] 312 U. S. 450.

[3] 312 U. S. 492.

[4] War Risk Insurance Act of October 6, 1917, c. 105, § 402, 40 Stat. 409.

[5] Bulletin No. 1, Treasury Department, Regulations & Procedure, United States Veterans' Bureau, Volume II, pp. 1233–1237.

behavior of the petitioner immediately following his discharge in April, 1919. The jury was clearly warranted in regarding their testimony as applicable to the period during which the insurance policy remained in force.

Dr. J. N. Land, a general practitioner who had been "the family physician of the Halliday family" and who had known petitioner from infancy, testified that, from 1919 on, petitioner was the victim of psychoneurosis and hypochondria. These ills caused him to talk about himself constantly, to imagine the existence of symptoms, and to become very unfriendly and suspicious. The witness "would not have advised him to do any work since he has been out of the Army," and was of the opinion that work "would have been harmful to him" and would have resulted in "a complete collapse." At the time of his discharge from the Army, the doctor "didn't hold any hope for his recovery." The Circuit Court of Appeals considered this testimony of "little probative force," chiefly because of Dr. Land's admission that he had not examined petitioner professionally until about 1932. But the doctor testified that he had seen petitioner "on the streets or in a drugstore" "at least two or three times a year, possibly more . . . all the way from 1919." Petitioner talked to him "every chance he has got since 1919." In the course of these conversations petitioner would describe his condition at length and ask the witness to do something for him. While the Circuit Court may have regarded the probative force of this evidence as "little," it was clearly proper for the jury to conclude from it and from their understanding of small town life that these encounters and his earlier intimacy with the Halliday family afforded Dr. Land an opportunity to form a reliable estimate of petitioner's condition.

Other witnesses, including his wife and brothers and neighbors, testified that when he returned from the war petitioner "was suspicious of everybody," "didn't seem to

be the same man," "seemed to be a man that didn't have a grip on himself," "didn't have the best control of himself." They described him as "a physical wreck," "nervous," "not right," "a complete physical and mental wreck, very badly torn up physically and mentally." And one brother testified that petitioner's condition upon his return was "practically the same as it is today."

Period following October 31, 1920. While it is true that total and permanent disability prior to the expiration of the insurance contract must be established, evidence as to petitioner's conduct and condition during the ensuing years is certainly relevant. It is a commonplace that one's state of mind is not always discernible in immediate events and appearances, and that its measurement must often await a slow unfolding. This difficulty of diagnosis and the essential charity of ordinary men may frequently combine to delay the frank recognition of a diseased mind. Moreover, the totality and particularly the permanence of the disability as of 1920 are susceptible of no better proof than that to be found in petitioner's personal history for the ensuing 15 years.[6]

Petitioner's wife testified that during this period he was unable to do a full day's work, that he threatened to commit suicide and to kill her and their children, and that he feared attempts to poison him. She stated that, although they rented one farm and later bought but never paid for another, they hadn't "done any farming much" and had "just had little patches," and that she and hired hands had been responsible even for this limited enterprise. Dr. Land testified that the mental disorder had gradually progressed since the war.

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[6] The trial judge instructed the jury: "All of this evidence as to his condition in later years, however, is to be considered by you for the purpose of determining whether the insured became in fact permanently and totally disabled on or before April 2, 1919, or before August, September, or October, 1920."

The reports of government medical examiners and the records of government hospitals reveal a diagnosis of hypochondria on February 14, 1921. And on November 24, 1925 petitioner was found to be psychoneurotic and neurasthenic. On that date, he informed the medical examiner that he was unable to work, that he lacked confidence, and that he was often depressed and seized by fear. He complained of "a great many things which physical examination fails to reveal." Reports of subsequent examinations up to and including April 11, 1935, contain similar information and diagnoses. Finally on December 9, 1935, at the instance of Dr. Land, petitioner was adjudged incompetent by a county probate court and his wife was appointed as a committee to handle his affairs.

In support of its conclusion, the Circuit Court of Appeals observed that "insured's failure to secure adequate hospitalization" leaves it "highly speculative whether insured's ailments, whatever these may have been, would not have been cured by the medical treatment which was in his potential grasp." There can be no doubt that evidence of the failure of attempted treatment would have been highly persuasive of the permanence of petitioner's disability. And the jury was entitled to draw inferences unfavorable to his claim from the absence of such evidence. However, this was but one of the many factors which the jury was free to consider in reaching its verdict. In the face of evidence of a mental disorder of more than 15 years duration, it can hardly be said that the absence of this single element of proof was fatal to petitioner's claim. Moreover, inferences from failure to seek hospitalization and treatment must be drawn with the utmost caution in cases of mental disorder, where, as here, there is reason to believe that one of the manifestations of the very sickness itself is fear and suspicion of hospitals and institutions.

Although it was unnecessary to its disposition of the case, the Circuit Court of Appeals considered and noted

its agreement with the Government's objection to the District Court's refusal to admit evidence of petitioner's condition subsequent to December 9, 1935, the date on which petitioner was adjudged incompetent by the county probate court.[7] We think that the District Court's ruling was erroneous, but there is nothing to show that it was seriously prejudicial to the Government. Neither in the District Court nor in this Court has the Government suggested its ability to produce evidence from the period subsequent to 1935 which would substantially alter the state of the record.

The case is remanded to permit the reinstatement of the judgment of the District Court.

Reversed.

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

SOUTHPORT PETROLEUM CO. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 67. Argued January 5, 1942.—Decided January 19, 1942.

1. An application to the Circuit Court of Appeals, under § 10 (e) of the National Labor Relations Act, for leave to adduce additional evidence before the Board, is addressed to the sound discretion of the Court. P. 104.
2. A Labor Board order required a Texas corporation, its officers, agents, successors and assigns, to desist from certain unfair labor practices; to offer reinstatement to employees found to have been discriminatorily discharged; to grant them back pay; to post certain notices at its Texas refinery, etc. Pending a petition of the Board to enforce the order, the corporation applied to the court under § 10 (e) of the Act for leave to adduce additional

[7] The same ruling was embodied in the instructions to the jury.

evidence before the Board, averring that it had distributed all of its assets to its four stockholders as a liquidating dividend, and that two of them, who had received the Texas refinery in which the unfair labor practices were employed, had conveyed it to a newly organized Delaware corporation whose stockholders were at no time stockholders of the employer corporation; and later, in its answer, it alleged that it had very recently been dissolved pursuant to the statutes of Texas and prayed a dismissal of the Board's petition upon that ground. *Held,* under these circumstances and others disclosed by the record, that denial of the application to adduce additional evidence was not error. P. 104.

117 F. 2d 90, affirmed.

CERTIORARI, 313 U. S. 558, to review a decree directing the enforcement of an order of the National Labor Relations Board, and therein denying a motion for leave to adduce additional evidence.

Mr. Harry Dow, with whom *Mr. Morris D. Meyer* was on the brief, for petitioner.

Mr. Robert B. Watts, with whom *Solicitor General Fahy* and *Messrs. Laurence A. Knapp* and *Morris P. Glushien* were on the brief, for respondent.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The petitioner, a Texas corporation, was ordered by the National Labor Relations Board in August of 1938 to cease and desist from unfair labor practices; [1] to offer to

[1] Section 1 of the Board's order required that the petitioner cease and desist from:

"(a) Discouraging membership in Oil Workers International Union, Local No. 227, or in any other labor organization of its employees, by discharging its employees or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment;

"(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through repre-

reinstate three employees found to have been discriminatorily discharged, and to pay them back pay for the period from the time of discharge to the date of the offer of reinstatement, less earnings during such period; and to post certain notices at its Texas City refinery, where the unfair labor practices had been employed.

The petitioner has never obeyed any of the affirmative directions of the order. In June of 1939 it entered into a written stipulation with the Board that it would obey the order except as it related to back pay, and the Board stipulated on its part that it would accept the performance so promised as sufficient compliance with its order. But the petitioner no more regarded its own promise than it had the Board's command. It finally ceased even to answer communications from the Board, and the latter, in April of 1940, filed its petition with the Circuit Court of Appeals for the Fifth Circuit for enforcement of its order.

The petitioner then began the pleas to that court, denial of which it says are errors. Nearly four months after the Board had filed its petition, the present petitioner filed an application, under § 10 (e) of the National Labor Relations Act,[2] to adduce additional evidence before the Board.

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sentatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act."

We do not consider the question whether, in the rather unusual circumstances of this case, the order should be modified as being unduly broad in this respect, see *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, since this question was not considered or raised in the court below or in the petition for certiorari. *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240, 242; *Gunning* v. *Cooley*, 281 U. S. 90, 98; *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, 182.

[2] This provides in pertinent part as follows: "If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to

The application stated on the oath of petitioner's president that in June of 1939, three days after petitioner had executed the stipulation of obedience to the Board's order, it distributed all of its assets to its four stockholders as a liquidating dividend; and that the two stockholders who received the Texas City refinery conveyed it to a newly organized Delaware corporation whose stockholders were at no time stockholders of the Texas corporation. It asked that the court order that proof of these facts be taken before the Board or its agent and added to the transcript, and that the court thereupon dismiss the enforcement proceeding. In November of 1940, while this application was pending, it filed an answer to the petition for enforcement, attacking the findings and order of the Board on evidentiary grounds, and also praying that the petition be dismissed because petitioner had been formally dissolved on October 16, 1940, as evidenced by an attached copy of a certificate by the Texas Assistant Secretary of State.[3]

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adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript." 49 Stat. 449, 454; 29 U. S. C. (Supp. V) § 160 (e).

[3] Texas provides by statute that:

"*Art. 1388. Liquidation by officers.*—Upon the dissolution of a corporation, unless a receiver is appointed by some court of competent jurisdiction, the president and directors or managers of the affairs of the corporation at the time of its dissolution shall be trustees of the creditors and stockholders of such corporation, with power to settle the affairs, collect the outstanding debts, and divide the moneys and other property among the stockholders after paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them after paying all just and reasonable expenses; and for this purpose they may in the name of such corporation, sell, convey and transfer all real and personal property belonging to such company, collect all debts, compromise controversies, maintain or defend judicial proceedings, and exercise full power and authority of said company over such assets and property. Said

The Circuit Court of Appeals sustained the Board's order and entered a decree directing that it be enforced, thus in effect denying the motion to dismiss and the application for leave to adduce additional evidence. 117 F. 2d 90. We granted certiorari limited to the question of the propriety of the denial of the latter because of the general importance of the question.

We hold that the application for leave to adduce additional evidence pursuant to § 10 (e) of the National Labor Relations Act was addressed to the sound judicial discretion of the court, and that the denial of petitioner's application under the circumstances disclosed by the record in this case was not error.

To ensure that the applicable part of § 10 (e) would be used only for proper purposes, and not abused by resort to it as a mere instrument of delay, Congress provided that before the court might grant relief thereunder it must be satisfied of the materiality of the additional evidence, and that there were reasonable grounds for failure to adduce it at the hearing before the Board. The decision below under § 10 (e) apparently resulted solely from a belief that

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trustees shall be severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall have come into their hands.

"*Art. 1389. Extension of existence.*—The existence of every corporation may be continued for three years after its dissolution from whatever cause, for the purpose of enabling those charged with the duty, to settle up its affairs. In case a receiver is appointed by a court for this purpose, the existence of such corporation may be continued by the court so long as in its discretion it is necessary to suitably settle the affairs of such corporation.

"*Art. 1390. Effect of dissolution.*—The dissolution of a corporation shall not operate to abate, nor be construed as abating any pending suit in which such corporation is a defendant, but such suit shall continue against such corporation and judgment shall be rendered as though the same were not dissolved." 3 Vernon's Annotated Texas Statutes (Civil Statutes).

the proffered evidence was not "material." Accordingly, we have no occasion to decide whether a Circuit Court of Appeals may in its discretion deny an application under § 10 (e) even though it be satisfied that the additional evidence is material and that there were reasonable grounds for failure to adduce it in the hearing before the Board. For the same reason we do not consider the question of the credibility of petitioner's allegations, viewed in the light of its conduct.

The petitioner's conduct does, however, give point to omissions of pertinent facts from its allegations. The record makes it certain that it would gain delay by all honorable means and leaves it doubtful whether it has even stopped at that. The liquidation relied upon took place three days after it had entered into the stipulation of obedience. The purpose to liquidate was not communicated to the Board, nor was the Board advised of the action when taken, nor until nearly four months after the petition for enforcement was filed in the Circuit Court of Appeals.

The statements that the Texas corporation has discontinued operations and that the Delaware corporation has taken over the refinery did not call for recommitment by the Circuit Court of Appeals to the Board for reconsideration of that part of its order which required that the three employees be offered reinstatement. The allegation in the application that the "owners of the stock of Southport Petroleum Company of Delaware, were never the owners of any of the stock of the respondent herein," does not negative either the possibility that the stock in the Delaware corporation represents but an insubstantial part of its total capitalization, with the balance and real control being held by the Texas corporation or its stockholders, or that its stock was held by straw men. A sworn statement in the answer to the Board's petition that the Delaware corporation "is a separate and distinct entity and the

stockholders in respondent have no interest, and never had any interest, directly or indirectly, in the stock ownership of the said Delaware corporation, all as set out in respondent's motion heretofore filed herein," if it adds anything, does not add enough to negative these possibilities, for the court was not required to be satisfied with such conclusions of the petitioner.

Implicit in the reinstatement provision of the Board's order was a condition of the continued operation by the offending employer of the refinery to the employment of which the illegally discharged employees were to be restored.[4] Such operation might have continued under the old business form or under a disguise intended to evade this provision. If there was merely a change in name or in apparent control there is no reason to grant the petitioner relief from the Board's order of reinstatement; instead there is added ground for compelling obedience. Whether there was a *bona fide* discontinuance and a true change of ownership—which would terminate the duty of reinstatement created by the Board's order—or merely a disguised continuance of the old employer, does not clearly appear, and accordingly is a question of fact properly to be resolved by the Board on direct resort to it, or by the court if contempt proceedings are instituted.[5]

The additional evidence was immaterial for the further reason that the Board's order ran not only to the petitioner, but also to its "officers, agents, successors, and assigns."[6]

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[4] The order required that the employees be reinstated "to their former positions, without prejudice to their seniority and other rights and privileges."

[5] Such proceedings may be instituted only by the Board. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261.

[6] This is the usual form of order, and has frequently been employed in cases where this Court has sustained Board orders. *E. g., Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S.

Granting the truth of every one of petitioner's allegations, it still is possible that the Board's order may yet be the basis—and the indispensable basis—of liability on the part of any of these persons, regardless of any present incapacity of petitioner to perform, or liability on its part for failure to perform, its duty of reinstatement. Of course, we do not pass on the question whether any such liability actually exists; all we hold is that there has not been a sufficient showing by the petitioner to negative the possibility which we note.

The petitioner's allegations are immaterial with respect to the back pay provision in the Board's order for like reasons and because some liability in this respect unquestionably exists, although for a disputed period of time. And, from what we have said, it is apparent that the petitioner has not shown that there has been any change in its relations to the refinery such as to indicate any alteration of the Board's order in respect of its requirements that petitioner post notices at "its Texas City, Texas, refinery," and that it desist from unfair labor practices.

Affirmed.

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

197, enforcing, as modified, 4 N. L. R. B. 71, 108; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, enforcing 8 N. L. R. B. 866, 877; *National Labor Relations Board* v. *Falk Corporation*, 308 U. S. 453, enforcing 6 N. L. R. B. 654, 666; *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, enforcing 7 N. L. R. B. 237, 252; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, enforcing 12 N. L. R. B. 854, 883; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, enforcing, as modified, and remanding 19 N. L. R. B. 547, 603.

[Over.]

MR. JUSTICE REED, dissenting:

The record does not lead me to the conclusion that petitioner has taken any improper steps to secure leave to adduce additional evidence, the matter to which the certiorari was limited by our grant. It is plain that the Circuit Court of Appeals did not act on any such ground. Neither the record on that issue nor the Government's brief or argument make any such contention. Only after evidence before the Board would it seem proper for a court to form its opinion of that question.

So far as we now know, the petitioner sold its facilities in good faith, after the entry of the Board's order and prior to its motion to remand, thus divesting itself of all interest or control over its former properties. In that situation it asked a remand to the Board to present before the Board the change of conditions because of which it asked a dismissal of the proceedings. § 10 (e), 49 Stat. 453. There were two literally unconditional provisions of the order which petitioner, if its allegations are true, could not meet, 2 (a) and (c):

"2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to William Cornish, E. D. Richey, and Earl Gooch immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges;

. . . . . .

(c) Post immediately notices in conspicuous places at its Texas City, Texas, refinery stating that the respondent will cease and desist in the manner aforesaid, and maintain said notices for a period of thirty (30) consecutive days from the date of posting;"

In its brief, respondent, it seems to me, admits the correctness of petitioner's view. It says:

"In its application to adduce evidence petitioner alleged that by reason of its distribution of assets and discontinuation of business it could not reinstate any employees. Thereafter in its petition for rehearing in the court below and petition for certiorari in this Court, petitioner maintained that it could not do so unless, as it suggested, the order required it to purchase and operate another refinery or otherwise resume business. Properly construed (cf. *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 112, 117–118), the order contains no such requirement. Its purpose was to remedy petitioner's violations of the Act by restoring the status quo as it existed prior to the violations, but only to the extent possible under the circumstances existing at the time of compliance, assuming that the circumstances were not changed through any bad faith on petitioner's part. See *National Labor Relations Board* v. *Remington Rand, Inc.,* 97 F. 2d 195, 196–197 (C. C. A. 2). That the men were to be offered reinstatement 'to their former positions' is express indication that the reinstatement provision was contingent upon continued operation of the Texas City refinery. This likewise appears to have been true of paragraph 2 (c) of the order requiring the posting of notices 'at its Texas City, Texas, refinery.' "

We cannot treat this suggestion as relieving this petitioner of the threat of contempt proceedings. The statement does not consent to the amendment of the order. Bad faith may still be claimed to exist. This should be determined by the Board. Consequently, I am of the opinion that the decree below should be reversed with directions to sustain the motion for a remand unless the Board agrees to eliminate §§ 2 (a) and (c) of the order, in line with the Board's apparent concession in its brief.

The CHIEF JUSTICE concurs in this dissent.

UNITED STATES *v.* WRIGHTWOOD DAIRY CO.*

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

No. 744. Argued January 14, 1942.—Decided February 2, 1942.

1. The national power to regulate the price of milk moving interstate into a marketing area, extends to such control over intrastate transactions there as is necessary and appropriate to make the regulation of the interstate commerce effective; it includes authority to regulate the price of intrastate milk, the sale of which, in competition with the interstate milk, affects adversely the price structure and federal regulation of the latter. P. 121.
2. The federal power to regulate intrastate transactions is not limited to persons who are engaged also in interstate transactions. P. 121.
3. Viewed in the light of its legislative history, § 8c (1) of the Agricultural Marketing Agreement Act of June 3, 1937, which authorizes the Secretary of Agriculture to issue marketing orders fixing minimum prices to be paid to producers of milk, limiting the regulation to such handling of the commodity as is in the current of interstate or foreign commerce or as "directly affects" such commerce, was intended, by a full exercise of the commerce power, to confer upon the Secretary authority to regulate the handling of milk produced and marketed intrastate, which by reason of its competition with the handling of interstate milk so affects the interstate commerce as substantially to interfere with its regulation under the Act. P. 125.
4. Opinions of individual members of Congress on the meaning of a bill, which conflict with committee reports concerning it and explanations of it made on the floor by Committee members having it in charge, are not persuasive of the Congressional purpose. P. 125.

123 F. 2d 100, reversed.

CERTIORARI, 314 U. S. 605, to review the affirmance of a decree dismissing a bill brought by the Government to en-

* Together with No. 783, *Wrightwood Dairy Co.* v. *United States*, also on writ of certiorari, 314 U. S. 605, to the Circuit Court of Appeals for the Seventh Circuit.

force an order of the Secretary of Agriculture, and granting an injunction to the defendant against the execution of the order.

Mr. Alvin E. Stein for Wrightwood Dairy Company, respondent in No. 744 and cross-petitioner in No. 783.

The intrastate distribution of products in competition with interstate commerce is not subject to federal regulation.

Respondent purchased its total daily milk requirements from producers located entirely within Illinois and processed the milk in its Chicago plant without intermingling it with any milk which had crossed the state lines, and sold and distributed the processed product solely within Illinois. Respondent thus was engaged in an intrastate business and was not in the current of interstate commerce.

Petitioner's contention that respondent is a "handler," on the ground that the product handled was in competition with interstate commerce and therefore subject to federal regulation, requires a construction of the Commerce Clause which would enable the Federal Government to control every enterprise, every occupation and every activity of the people merely by showing that the product thereof is in competition with similar products which cross state lines. Such a restriction would reach all enterprises and transactions which were in competition with those of other States. The authority of the Federal Government would embrace all activities of the people, and the authority of the State over its domestic affairs would exist only by sufferance of the Federal Government. There would be no limit to federal power, and the States and the people would be effectively deprived of rights reserved under the Tenth Amendment. *Schechter Corp.* v. *United States,* 295 U. S. 495, 546; *Carter* v. *Carter Coal Co.,* 298 U. S. 238.

In *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, it appears from the opinion, unlike the present case, that the intrastate milk referred to was inextricably intermingled with milk which moved across state lines. Moreover, the order there promulgated by the Secretary recognized that there was some milk entirely in intrastate commerce over which the Federal Government had no control and which was regulated under state laws, and such intrastate handling of milk was expressly excepted from the order.

Congress may not under the Commerce Clause regulate purely intrastate transactions where the point of impingement of the intrastate transactions upon interstate transactions is one of competition only. Discussing *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540, 544; *Citizens' Light Co.* v. *Montgomery Light Co.*, 171 F. 553, 560; *United States* v. *Butler*, 297 U. S. 1, 68; *Schechter Corp.* v. *United States*, 295 U. S. 495, 546. Distinguishing the *Shreveport Case*, 234 U. S. 342; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 41; *National Labor Relations Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1; *Stafford* v. *Wallace*, 258 U. S. 495; *Currin* v. *Wallace*, 306 U. S. 1; *Mulford* v. *Smith*, 307 U. S. 38; *United States* v. *Darby*, 312 U. S. 100.

Competitive discrimination against interstate rates, as illustrated in the *Shreveport* case, by a railroad engaged both in interstate and intrastate transportation, has no application whatsoever to a situation where a handler of milk buys all of his milk within a State and sells it within a State, and where none of his activities partake of an interstate character other than that his milk might be in competition with milk which crossed state lines. There is hardly an article in common use which can be said not to be in competition with a similar article produced or manufactured across state lines.

The fact that Congress can not under the Constitution control purely local activities, like that of respondent

herein, does not mean that there is a hiatus where neither State nor Nation could effectively function. See *United States* v. *Rock Royal Co-op.*, 307 U. S. 533; *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346.

Congress did not intend in passing the Act of 1937, and prior Acts, to assume control of purely intrastate transactions, and the Act itself contains no such provision. The brief history of the prior Acts, and their construction by the courts, clearly sustain this position.

The finding of the Secretary that all milk which was produced for sale in the marketing area is handled in the current of interstate commerce, or so as directly to burden, obstruct or affect interstate commerce, is not authorized by law, is contrary to the fact, and of no legal effect.

Mr. John S. L. Yost, with whom *Solicitor General Fahy*, *Assistant Attorney General Arnold*, and *Messrs. Robert L. Stern*, *James C. Wilson*, and *Miss Margaret H. Brass* were on the brief, for the United States.

The intrastate distribution of milk in competition with interstate commerce is subject to federal regulation.

In *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 568, which involved the marketing order for the New York area, this Court stated: "Nor is any question raised as to the power of the Congress to regulate the distribution in the area of the wholly intrastate milk. It is recognized that the federal authority covers the sales of this milk, as its marketing is inextricably intermingled with and directly affects the marketing in the area of the milk which moves across state lines."

It is true that other expressions in the *Rock Royal* opinion show that this Court assumed that all of the milk involved moved through the channels of interstate commerce. 307 U. S. at pp. 540, 541, 568. The record in the case shows, however, that, although the issue was not pressed in this Court, one of the defendants did challenge

the power of Congress to regulate it, on the ground that its activities were entirely intrastate and that its milk was usually handled entirely intrastate.

Whether or not this Court's remark in the *Rock Royal* case was dictum, it was not erroneous. *United States* v. *Adler's Creamery,* 107 F. 2d 987, 110 F. 2d 482, cert. den., 311 U. S. 657.

Every District Court which has passed upon the question, apart from the instant case, has held that intrastate milk competing with interstate is subject to milk orders issued under the Agricultural Marketing Agreement Act. *United States* v. *Krechting,* 26 F. Supp. 266; *United States* v. *Andrews,* 26 F. Supp. 123; *United States* v. *H. P. Hood & Sons,* 26 F. Supp. 672; *United States* v. *Schwarz* (N. D. Ill.) decided January 30, 1941.

The term "competition" as used in the findings describes a dynamic and frequently complex economic relationship. The finding that the milk processed by respondent competes with other milk, including milk from outside the State, means that respondent and other handlers are struggling as "rivals for the same trade." *Lipson* v. *Socony Vacuum Corporation,* 87 F. 2d 265, 270; *Schill* v. *Remington-Putnam Book Co.,* 17 A. 2d 175, 178. Where such rivalry exists, it is inevitable that the imposition of restrictions upon some of the antagonists and not upon others will greatly injure the business of those whose freedom of action is restricted.

Although the unchallenged finding of "competition" necessarily carries with it this connotation, the record shows in more detail that both the handlers of interstate milk and the farmers who produce it will be harmed if intrastate milk is exempt from regulation.

A handler not complying with the minimum price system established under an order will have advantages over his competitors. He will be able to pay the producers less than his rivals are required to pay, and thus will be

in a position to undersell them on the market. In order to protect themselves competitors will seek to reduce the amounts they pay producers, and inevitably the entire price structure, interstate and intrastate, will collapse. A price order applicable only to interstate transactions would thus either be unworkable or would discriminate against the interstate dealings of those subjected to it.

The Court has frequently held that the commerce power extends to the regulation of intrastate acts when necessary to make the control of interstate commerce effective. *Shreveport Case,* 234 U. S. 342; *Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1; *Schechter Corp.* v. *United States,* 295 U. S. 495, 544–546; *National Labor Relations Board* v. *Jones & Laughlin Corp.,* 301 U. S. 1, 36–38; *Currin* v. *Wallace,* 306 U. S. 1; *Mulford* v. *Smith,* 307 U. S. 38; *United States* v. *Darby,* 312 U. S. 100, 121. This principle is merely an application of the basic constitutional doctrine, embodied in the "necessary and proper" clause but implied in any event (*McCulloch* v. *Maryland,* 4 Wheat. 316), which permits Congress to choose the means appropriate to the accomplishment of a purpose within the federal power, even though the means itself might not expressly fall within the powers granted. *United States* v. *Darby,* 312 U. S. 100, at 121, and cases cited.

The statute authorizes the Secretary to regulate intrastate transactions which compete with interstate. This is shown by the language of the Act; its legislative history; the committee reports; and the Congressional debates.

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

The principal questions for our decision are whether certain price regulation by the Secretary of Agriculture of milk produced and sold intrastate is authorized by the

provisions of the Agricultural Marketing Agreement Act of June 3, 1937, 50 Stat. 246, 7 U. S. C. § 608c, and is a permissible regulation under the commerce clause of the Constitution.

Section 8c of the Act authorizes the Secretary of Agriculture to issue marketing orders fixing minimum prices to be paid to producers of milk and certain other commodities. Paragraph 1 of the section provides that orders of the Secretary "shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof."

The United States sought in the present suit a decree directing respondent to comply with the Secretary's Order No. 41, of August 28, 1939, regulating the handling of milk in the "Chicago, Illinois, marketing area." Respondent is a handler in that area of milk which it purchases from producers in Illinois. The order, which is of the type described in the opinion of this Court in *United States* v. *Rock Royal Co-operative*, 307 U. S. 533, 551–555, is by its terms applicable to respondent, and purports to carry out the statutory scheme for regulating the price of milk paid to producers considered in the opinion in that case. By the order the Secretary found that all milk produced for sale in the marketing area "is handled in the current of interstate commerce, or so as directly to burden, obstruct, or affect interstate commerce in milk or its products . . . ," and directed that it apply to such "handling of milk" in the marketing area "as is in the current of interstate commerce, or which directly burdens, obstructs, or affects interstate commerce."

The order, as provided by the statute, § 8c (5), classifies milk according to its uses, and establishes a formula for determining the minimum price to be paid to producers

for each class of milk. It prescribes the method of determining the value of milk received from producers by each handler during each month. It requires the payment of a uniform unit price to producers, computed by dividing the total value of milk reported by all handlers in the marketing area by the total quantity of such milk, with deductions of certain amounts to provide a cash balance in a "producer-settlement fund." The handler is required to pay producers the uniform price, subject to butterfat and location differentials. But he is also required to pay into the settlement fund, or permitted to withdraw from it, as the case may be, certain amounts, depending on whether the total value of the milk used by him is greater, or less, respectively, than his total payments to producers at the uniform price. The amounts withdrawn from the settlement fund by handlers are required to be used to bring the price received by certain producers up to the uniform price set in the order, where, because of the purpose for which the handler has sold it, the value of their milk is less than the uniform price. Handlers are required to make reports to the Administrator containing information necessary for the execution of the order and to bear the expense of administering it.

Respondent's answer in the District Court sets up that its business is entirely intrastate, and that, in consequence, the statute does not, and under the commerce clause can not constitutionally, apply to it. The answer also sets up additional grounds, which need not now be considered, for respondent's contention that the order is invalid, and by way of counterclaim prays that the United States and its officers and agents be enjoined from enforcing the order. The court found that respondent had not complied with the order; that in the course of its business it purchases milk from producers within the State of Illinois, processes the milk and sells it in the state "in competition with the milk of other handlers in the area"; that

none of respondent's milk is physically intermingled with that which has crossed state lines; and that, prior to the order, 60 per cent of the milk sold in the marketing area was produced in Illinois and 40 per cent in neighboring states, and that at the time of the findings "over 60 per cent" was produced in Illinois. The record shows that "approximately 40%" comes from without the state.

The court held that "the order was issued by the Secretary in full compliance with the law. All conditions precedent to the effectiveness of said order have occurred," but that the business of the defendant "was not in the current of interstate . . . commerce, and did not directly burden, obstruct or affect interstate . . . commerce in milk marketed within the Chicago, Illinois, marketing area." It accordingly decreed that the complaint be dismissed, and granted the injunction prayed by the counterclaim.

The Circuit Court of Appeals affirmed, 123 F. 2d 100, on the sole ground that Congress is without authority under the commerce clause to regulate intrastate transactions in milk which affect interstate commerce through competition only. It recognized that respondent's milk is sold in competition with other milk moving interstate; that the "milk problem is a serious one and apparently for the most effective control requires unified regulations," and that if respondent is not subject to the present regulations is "may well be that the effective sanction of the order will wither before the force of competition, the morale of the market will disintegrate, and this attempt at solution of the problem by the National Government will fail." But it concluded that there is a hiatus between the constitutional power of State and Nation which precludes any solution of the problem by Congressional legislation.

We think there is no such hiatus. Congress plainly has power to regulate the price of milk distributed through the medium of interstate commerce, *United States* v. *Rock Royal Co-operative, supra,* and it possesses every power

needed to make that regulation effective. The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. See *McCulloch* v. *Maryland,* 4 Wheat. 316, 421; *United States* v. *Ferger,* 250 U. S. 199; *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 221; *United States* v. *Darby,* 312 U. S. 100, 118–19. The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. *Gibbons* v. *Ogden,* 9 Wheat. 1, 196. It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.

Familiar examples are the Congressional power over commodities inextricably commingled, some of which are moving interstate and some intrastate, see *United States* v. *New York Central R. Co.,* 272 U. S. 457, 464; the power to regulate safety appliances on railroad cars, whether moving interstate or intrastate, *Southern Ry. Co.* v. *United States,* 222 U. S. 20; the power to control intrastate rates of a common carrier which affect adversely federal regulation of the performance of its functions as an interstate carrier, *Shreveport Case,* 234 U. S. 342; *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563; the regulation by the Tobacco Inspection Act of tobacco produced intrastate and destined to consumers within the state as well as without, *Currin* v. *Wallace,* 306 U. S. 1; the regulation of both interstate and intrastate marketing of

tobacco under the Agricultural Adjustment Act, *Mulford* v. *Smith,* 307 U. S. 38, 47; and see cases collected and discussed in *United States* v. *Darby,* 312 U. S. 100, 118–125.

Competitive practices which are wholly intrastate may be reached by the Sherman Act because of their injurious effect on interstate commerce. *Northern Securities Co.* v. *United States,* 193 U. S. 197; *Swift & Co.* v. *United States,* 196 U. S. 375; *United States* v. *Patten,* 226 U. S. 525; *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295; *Local 167* v. *United States,* 291 U. S. 293; *Stevens Co.* v. *Foster & Kleiser Co.,* 311 U. S. 255. So too the marketing of a local product in competition with that of a like commodity moving interstate may so interfere with interstate commerce or its regulation as to afford a basis for Congressional regulation of the intrastate activity. It is the effect upon the interstate commerce or its regulation, regardless of the particular form which the competition may take, which is the test of federal power. Cf. *Shreveport Case, supra; Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co., supra; National Labor Relations Board* v. *Jones & Laughlin Corp.,* 301 U. S. 1, 36–43; *United States* v. *Darby, supra,* 122.

As the court below recognized, and as seems not to be disputed, the marketing of intrastate milk which competes with that shipped interstate would tend seriously to break down price regulation of the latter. Under the conditions prevailing in the milk industry, as the record shows, the unregulated sale of the intrastate milk tends to reduce the sales price received by handlers and the amount which they in turn pay to producers. Study of the order which we have summarized makes clear that the unregulated handler selling fluid milk can pay producers substantially less than the minimum price set in the order for milk of that class, and yet pay as much as, or more than, the "uniform price" prescribed by the regulatory scheme for all pro-

ducers, which is based upon the average price for the several classes of milk combined. Such a handler would have an advantage over others in the sale of the class of milk in which he principally deals, and could force his competitors dealing in interstate milk to surrender the market or seek to reduce prices to producers in order to retain it.

It is no answer to suggest, as does respondent, that the federal power to regulate intrastate transactions is limited to those who are engaged also in interstate commerce. The injury, and hence the power, does not depend upon the fortuitous circumstance that the particular person conducting the intrastate activities is, or is not, also engaged in interstate commerce. See *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1; *Stevens Co.* v. *Foster & Kleiser Co.*, *supra*. It is the effect upon interstate commerce or upon the exercise of the power to regulate it, not the source of the injury which is the criterion of Congressional power. *Second Employers' Liability Cases*, 223 U. S. 1, 51. We conclude that the national power to regulate the price of milk moving interstate into the Chicago, Illinois, marketing area, extends to such control over intrastate transactions there as is necessary and appropriate to make the regulation of the interstate commerce effective; and that it includes authority to make like regulations for the marketing of intrastate milk whose sale and competition with the interstate milk affects its price structure so as in turn to affect adversely the Congressional regulation.

We turn to the question whether Congress has exercised that authority by § 8c (1). Respondent argues that Congress, in enacting it, did not intend to exercise its full power over commerce, and that read in the light of its legislative history the section does not authorize the regulation of competing intrastate milk. In terms the statute speaks of the handling of products "in the current of interstate commerce" or "which directly burdens, obstructs, or af-

fects, interstate commerce." The argument is that the word "directly" in the statute is restrictive, evidencing an intention to exercise less than the full authority possessed by Congress, and a purpose not to extend that authority to the regulation of local products which affect the interstate commodities and their regulation only by competing with them.

In support of this contention respondent points to the precursor of the present statute, the Agricultural Adjustment Act of 1933, 48 Stat. 31, 35, as amended by 48 Stat. 528, which contained provisions omitted from the present statute, specifically authorizing certain regulation of products "in competition with" those in interstate commerce. Section 8 (2) of the 1933 Act, as amended, authorized the Secretary to enter into marketing agreements with those "engaged in the handling of any agricultural commodity or product thereof, in the current of or in competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce." And § 8 (3) provided for the issuing of licenses to those engaged "in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof." In the 1935 amendments to the Agricultural Adjustment Act these provisions were replaced by the phraseology which was taken over without change into § 8c (1) of the Agricultural Marketing Agreement Act of 1937, already quoted. Hence it is to the legislative history of the 1935 amendments that we must turn to ascertain the significance of the phrase, "directly affects" interstate commerce, which then appeared in the statute for the first time.

The bills providing for the 1935 amendments, as introduced, eliminated the differences between § 8 (2) and § 8 (3) of the 1933 Act, as amended, and authorized the Secretary to issue licenses to those "engaged in the handling of any agricultural commodity or product thereof, or any

competing commodity or product thereof, in the current of or in competition with or so as to burden, obstruct, or in any way affect, interstate or foreign commerce." S. 1807, H. R. 7713 and 8052, 74th Cong., 1st Sess. In the reports of the House and Senate Committees on Agriculture, it was pointed out that although "the full extent of the Federal power over interstate commerce is intended to be vested in the Secretary," it was "not intended to authorize the licensing of persons handling goods only in intrastate commerce except where such handling burdens, obstructs, or affects interstate commerce." S. Rep. No. 548, p. 6, H. Rep. No. 808, p. 5, H. Rep. No. 952, p. 5, 74th Cong., 1st Sess.

These bills were pending in Congress when *Schechter Corp.* v. *United States,* 295 U. S. 495, was decided on May 27, 1935. In consequence of that decision a new bill, H. R. 8492, was reported out which superseded the pending bills and eventually became the Act of 1935. The new bill, in terms, permitted the Secretary to regulate the handling of products which "directly affects" interstate commerce. As the legislative history demonstrates, this phraseology was deliberately chosen to conform to that adopted in the opinion in the *Schechter* case, as signifying the full reach of the commerce power, and with the avowed purpose of conferring on the Secretary authority over intrastate products to the full extent of that power. See 79 Cong. Rec. 9478 and S. Rep. No. 1011, p. 8, H. Rep. No. 1241, p. 8, 74th Cong., 1st Sess.

In the *Schechter* case the Court was concerned only with the alleged infringements of the "Code of Fair Competition" for the live poultry industry of the New York City metropolitan area, which had been adopted under the provisions of § 3 of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 195, 196. The violations of the code charged were that wholesale distributors who had purchased poultry in New York, most

of which came from without the state, and who were engaged in slaughtering and reselling to retailers, had failed to maintain for their employees wages and hours prescribed by the code, and had failed to abandon "selective selling" to their customers in New York which the code had prohibited.

The Court's opinion pointed out that the defendants were not charged with injury to interstate commerce or interference with persons engaged in that commerce, and that the acts charged had no different relation to or effect upon interstate commerce than like acts in any other local business which handles commodities brought into the state. *Schechter Corp.* v. *United States, supra,* 545–6. It characterized their effect upon interstate commerce as "indirect," and distinguished them from those acts and transactions intrastate which, because they "directly affect" interstate commerce, are within the Congressional regulatory power. In explanation of this distinction and as examples of direct effects which are within the commerce power it referred to the "fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce," citing the *Shreveport Case, supra,* and referred to intrastate restraints upon competition injuriously affecting interstate commerce condemned by the Sherman Act, citing *Local 167* v. *United States, supra,* and other cases.

In adopting the change in the new bill, giving to the Secretary the authority to regulate the handling of products "directly affecting" interstate commerce, and in deleting the phrase "in competition with" interstate commerce, the House and Senate Committees on Agriculture, after referring to the *Schechter* case stated: "This phrase has been omitted from the proposed section 8c (1) of the bill which deals with orders . . . because the proposed language makes it clear that the full extent of the Federal power over interstate and foreign commerce and no more

is intended to be vested in the Secretary of Agriculture in connection with orders." See S. Rep. No. 1011, p. 9; H. Rep. No. 1241, p. 8, 74th Cong., 1st Sess.

The same interpretation of the amendments was given by the Committee representative charged with explaining them on the floor of the Senate, who declared, 79 Cong. Rec. 11139, "The position of the committee in respect to these amendments is that intrastate commerce may burden or affect interstate commerce and that consequently this is a constitutional enactment under the decision of the Court in the Shreveport case." The House debates also disclose general recognition that the bill as amended was intended to be a full exercise of the federal power over competing intrastate milk. 79 Cong. Rec. 9479–9480, 9485.

The opinions of some members of the Senate,[1] conflicting with the explicit statements of the meaning of the statutory language made by the Committee reports and members of the Committees on the floor of the Senate and the House, are not to be taken as persuasive of the Congressional purpose. Cf. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 318. Moreover, other Senators, not members of the Committee on Agriculture, accepted its views of the extent to which the federal power was to be exerted by the proposed legislation.[2]

We think it clear that Congress, by the provisions of § 8c (1), conferred upon the Secretary authority to regulate the handling of intrastate products which by reason of its competition with the handling of the interstate milk so affects that commerce as substantially to interfere with its regulation by Congress; and that the statute so read is a constitutional exercise of the commerce power. Such was the view expressed in *United States* v. *Rock Royal*

[1] 79 Cong. Rec., 11135–6.

[2] 79 Cong. Rec., 11134–9.

Co-operative, supra, 307 U. S. at 568. We adhere to that opinion now.

The judgment will be reversed, but, as errors assigned below have not been passed on there or argued here, the cause will be remanded to the Circuit Court of Appeals for further proceedings in conformity with this opinion. The mandate will issue forthwith.

Reversed.

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

EXHIBIT SUPPLY CO. *v.* ACE PATENTS CORPORATION.*

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

No. 154. Argued January 15, 16, 1942.—Decided February 2, 1942.

1. In a case involving a patent, concerning which there was no conflict of decisions by Circuit Courts of Appeals, certiorari was granted because of the nature of the questions involved, and because it was shown that the industry affected by a decision sustaining the patentee's contentions was located in a single circuit so that litigation resulting in such conflicts would not be likely to occur. P. 128.
2. Claim 4, as amended, of the Nelson patent, No. 2,109,678, relates to the structure of a resilient switch or circuit closer, so disposed on the board of a game table as to serve as a target which, when struck by a freely rolling ball, will momentarily close an electrical circuit. It claims as elements of the invention a conductor standard anchored to the table, a coil spring surrounding the standard, means carrying the spring pendantly from the upper portion of the standard, with the coils of the spring spaced from the standard, "and conductor means in said circuit and embedded in the table at a point

*Together with No. 155, *Genco, Inc.* v. *Ace Patents Corporation,* and No. 156, *Chicago Coin Machine Co.* v. *Ace Patents Corporation,* also on writs of certiorari, 314 U. S. 702, to the Circuit Court of Appeals for the Seventh Circuit.

spaced from the standard and engageable by a portion of the spring when it is flexed to close the aforementioned circuit." *Held:*

(1) The word "embedded" as used in the claim embraces any conductor means solidly set or firmly fixed in the table, whether or not it protrudes above or below the surface. P. 135.

(2) By amendment of the claim so as to describe the conductor means as "embedded in the table," instead of "carried by the table," as it stood before amendment, devices in which the conductor means is a nail or pin driven into the table were not excluded. P. 135.

(3) By such amendment, however, made to meet objections of the Patent Office based on the prior art, the patentee restricted the claim to those combinations in which the conductor means, though carried on the table, is also embedded in it; recognized and emphasized the difference between the two phrases, and proclaimed his abandonment of all that is embraced in that difference. P. 136.

(4) The amendment operates as a disclaimer of that difference and must be strictly construed against him. P. 137.

(5) What the patentee, by a strict construction of his claim, has lost by disclaimer can not be regained by recourse to the doctrine of equivalents. P. 137.

119 F. 2d 349, modified.

CERTIORARI, 314 U. S. 702, in three cases, to review the affirmance of decrees holding a patent claim valid and infringed and enjoining the alleged infringements.

Mr. John H. Sutherland, with whom *Mr. Clarence E. Threedy* was on the brief, for petitioners.

Mr. Casper W. Ooms, with whom *Mr. John A. Russell* was on the brief, for respondent.

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

Respondent began the present litigation as three separate suits against the respective petitioners for infringement of the Nelson Patent No. 2,109,678 of March 1, 1938, for a "contact switch for ball rolling games." The defenses were non-invention in view of the prior art, anticipation by prior publication, use and sale, non-in-

fringement and a file wrapper estoppel. The three suits were consolidated and tried together. Upon full consideration of the issues the District Court and the Circuit Court of Appeals for the Seventh Circuit held Claim 4 of the patent valid and infringed. 119 F. 2d 349.

We granted certiorari, 314 U. S. 702, on a petition which challenged only the decree of infringement below, on the ground that it enlarged the scope of the patent as defined by the claim, by resort to the doctrine of equivalents, and that Nelson, the patentee, by the amendment of his claims in the Patent Office, had surrendered Claim 4 so far as it would otherwise read upon the alleged infringing devices. Neither in their petition nor in their brief and argument in this Court have petitioners contended that the patent is invalid for want of invention. Although there is no conflict of decision, we were moved to grant the petition by the nature of the questions presented, together with a showing that the industry affected by the patent is located in the seventh circuit so that litigation in other circuits resulting in a conflict of decision would not be likely to occur.

The patent relates to the structure of a resilient switch or circuit closer, so disposed on the board of a game table as to serve as a target which, when struck by a freely rolling ball, will momentarily close an electrical circuit. Specifications and drawings disclose a target or switch comprising a conductor standard mounted in the table and carrying a coil spring having a leg pendantly disposed in a conductor ring located in the table and slightly offset from the standard. The standard and ring are wired in a circuit with a relay coil and a source of electrical energy. When a ball rolling on the table bumps the coil spring from any direction, the leg of the spring is deflected momentarily bringing it into contact with the ring, so as to close the circuit for operating the relay coil and any connected auxiliary game device. Any de-

sired number of targets may be placed on the board in a suitably spaced relationship; in pin ball games a single ball may successively bump and close a number of the switch devices. In describing his invention the patentee declared it to be his intention "to cover all changes and modifications of the example of the invention herein chosen for purposes of the disclosure, which do not constitute departures from the spirit and scope of the invention."

The prior art as disclosed by the record shows no device in which the coil spring serves both as a target and a switch. The advantages of the device are said to be that the combination is peculiarly adapted to use in pin ball games; that the coil spring structure is so organized as to form both a switch for operating auxiliary recording or signalling devices and a target which is accessible from any direction.

Claim 4 [1] claims as the elements of the invention the conductor standard anchored in the table, the coil spring surrounding the standard which carries the spring pendantly from its top, with the spring spaced from the standard to enable the spring to be resiliently flexed, "and conductor means in said circuit and embedded in

[1] "4. In a ball rolling game having a substantially horizontal table over which balls are rollable, the combination with said table of a substantially vertical standard anchored in said table with its lower end carrying on the underside of the table a lead for an electric circuit and its upper end extending a substantial distance above the top surface of the table, a coil spring surrounding the standard, means carrying said spring pendantly from the upper portion of the standard above the table with the coils of the spring spaced from the standard to enable the spring to be resiliently flexed when bumped by a ball rolling on the table, said spring being in the aforementioned circuit and constituting a conductor, and conductor means in said circuit and embedded in the table at a point spaced from the standard and engageable by a portion of the spring when it is flexed to close the aforementioned circuit."

the table at a point spaced from the standard and engageable by a portion of the spring when it is flexed to close the aforementioned circuit." The drawings of the patent show the "conductor means" last mentioned in the form of a ring or ferrule set in the table with its axis at right angles to the table and with its flange projecting slightly above the surface of the table. The leg pending from the coil spring is so disposed at the center of the annular ferrule that a ball striking the spring in any direction will bring the pendant leg into contact with the ring so as to close the circuit.

The six devices alleged to infringe the patent differ from the particular claim of the invention described in the specifications, only in the specific form and method of supporting the "conductor means" which is "engageable by a portion of the spring when it is flexed." In two of the accused devices, plaintiff's Exhibits 5 and 7, there is substituted for the ring conductor set in the table a nail or pin driven into the table and surrounded near its upper end by a ring attached to the end of the resilient coil spring, or formed there of the coil wire. When the spring is struck the circuit is closed by the contact of ring and nail at a point above the table. This arrangement contrasts with that of the conductors as shown in the patent drawings, in which a ring set in the table and the pendant leg of the coil form the contact at a point near or below the surface of the table. In the one case, the ring conductor is supported by the table and the complementary conductor is attached to, or is formed of, the wire of the spring at its end. In the other, the locations of the ring and of the complementary conductor are reversed.

Two others of the accused devices, plaintiff's Exhibits 6 and 10, show a further alteration. In Exhibit 6, the nail or pin, instead of being driven directly into the table, is affixed to and supported by a metal plate resting

on the upper surface of the table with the coil spring standard passing through it and holding it firmly on the table. The conductor extends to the wire connection through a hole in the table underneath the plate. In Exhibit 10 the conductor is insulated from the plate, which is rigidly anchored to the coil spring standard, which in turn is anchored to the table.

In the remaining two accused devices, plaintiff's Exhibits 8 and 9, an insulating core or sleeve surrounds the coil standard and supports an annular or enveloping conductor wired in the circuit, spaced and insulated from the coil standard so that the circuit is closed by contact of the conductor and the coil when it is flexed. In Exhibit 8 the sleeve is electrically connected with a metal plate, held in position on the top of the table by the standard which passes through the plate. A wire leading from the plate passes through a hole in the table underneath the plate. In Exhibit 9 the annular conductor is located above the table top and a wire leading from it passes through a hole in the table.

Comparison of the several accused devices shows that in all but Exhibits 5 and 7 the conductor means complementary to the coil spring is not embedded in the table, but is supported by an insulated plate resting on the table or an insulating core held in position by the standard. In Exhibits 6 and 10 the conductor means passes to its wire connection through a hole in the table underneath the plate. In Exhibit 8 the connecting wire passes through a hole in the table to a metal plate resting on its surface, and in Exhibit 9 to the conductor means located above the surface of the table.

Petitioners insist that respondent is estopped to assert infringement by the file wrapper record in the Patent Office; and, in any event, that estoppel can be avoided and infringement established only by resort to the doctrine of equivalents, which they assert is incompatible

with the statutory requirements for the grant of a patent and with the doctrine that the patent claims measure the patented invention.

The file wrapper history, so far as now relevant, relates to Claim 7 which, after amendment, was allowed as Claim 4 now in issue. The original Claim 7 with its amendments is set forth as follows, matter added by amendment in parentheses; matter stricken in italics and underscored:

(4) *7.* In a ball rolling game having a substantially horizontal table over which balls are rollable,
the combination with said table of a substantially vertical standard anchored in said table with its lower
end carrying on the underside of the table a lead for an
A [1] electric circuit and its upper end extending a substantial distance above the top surface of the table, a
coil spring surrounding the standard, means carrying
said spring pendantly from the upper portion of the
per C standard (ABOVE THE TABLE) with the coils of the spring spaced from the
" " standard *and the lower end of the coil spring terminating*
" " *at a distance above the top surface of the table* to enable the spring to be resiliently flexed when bumped
by a ball rolling on the table, said spring being in the
aforementioned circuit and constituting a conductor, and
per B *other* conductor means (IN SAID CIRCUIT AND EMBEDDED IN) *carried by* the table at a point
spaced from the standard and engageable by a

portion of
the spring when it is flexed to close the aforementioned
circuit.

The original application contained six claims, all of which the examiner rejected because he thought no patentable significance had been shown. The inventor submitted certain amendments, and two new claims, 7 and 8, and induced the examiner to reconsider the patentability of the invention. Four of the claims were then allowed, but the examiner rejected Claim 7 as failing to claim the invention. He said: "It is old in the art to make an electrical contact by flexing a coil spring as shown by the art already cited in the case. In order to distinguish over the references therefor, the applicant's particular type of contact structure, comprising an extension on the coil spring adapted to engage an annular contact embedded in the table, must appear in the claims. . . ." Applicant rejected the examiner's suggestion that the "contact structure" be adapted to engage "an annular contact embedded in the table." Instead he cancelled "other" from the claim and substituted for "carried by" the phrase "in said circuit and embedded in," saying Claim 7 has been "significantly amended" "to define the complementary conductor contact as being embedded in the table." He added that "it is too far to go to state that the specific leg 19 must be defined," and "the allowed claims can it seems, be very simply avoided by taking the leg 19, separating it from the spring 18 and embedding it as a pin in the table so that the spring when flexed would contact the pin. . . . Claim 7 covers such alternative form and . . . in justice to applicant . . . should be allowed."

The examiner in reply recognized as "true" applicant's suggestion that if the leg pendant from the spring "were removed from the spring and embedded in the table an

operative device would result," but pointed out that the device claimed by the amendment "would be inoperative as the coil spring could not both terminate at a distance above the table and extend into a ferrule embedded therein." Thereupon the applicant added to the claim the words "above the table" and cancelled the phrase, "and the lower end of the coil spring terminating at a distance above the top surface of the table." The claim as amended was then allowed as Claim 4.

The claim before amendment plainly read on plaintiff's Exhibits 5 and 7 in which the nail or pin conductor is driven into the table, since the nail or pin is a "conductor means carried by the table" "engageable by a portion of the spring when flexed." The claim thus read is for an operative device, since the nail or pin projects above the table and may be engaged by the coil spring similarly located. The claim, as amended and allowed as Claim 4, likewise reads on plaintiff's Exhibits 5 and 7 if the nail or pin conductor which is driven into the table is "embedded in the table."

Petitioners do not seriously assert here that it is not so embedded. In fact, their brief expressly states that "we pass this contention." They could not well do otherwise, for the pin or nail, even though it protrudes above or below the table, not only conforms to the dictionary definition of "embed"—"To set solidly as in a bed," Webster; "To fix firmly in a surrounding mass of some solid material," Oxford Dictionary—but examination of the drawings and specifications indicates clearly enough that the claim was not intended to be limited to a complementary conductor located wholly between the upper and nether surfaces of the table. The specifications and drawings express no such limitation, and it is clear that the use of the word "embedded" in the claim as finally amended, when read in its context of claim and specifications, does not indicate such a limitation.

The patent drawings show the embedded ring conductor extending slightly both above and below the table. The examiner, in his second rejection of Claim 7, in saying that if the leg pendant from the spring were removed from the spring and "embedded" in the table an operative device would result, could not have referred to the embedded leg or nail as being wholly located below the surface of the table, since the pin so disposed would not be "engageable" "by a portion of the spring when it is flexed" by a ball rolling in any direction. The term is to be read as used in a permissible sense which would conform to the drawings and the function which the conductor to which the term was applied was obviously intended to perform.

We think that the word "embedded," as applied in Claim 4, must be taken to embrace any conductor means solidly set or firmly fixed in the table, whether or not it protrudes above or below the surface. Claim 7 before amendment read on the accused devices, plaintiff's Exhibits 5 and 7, which exhibit the nail or pin embedded in the table but protruding above its surface. Consequently the patentee by amending the claim so as to define the conductor means as embedded in the table did not exclude from the amended claim devices exemplified by these exhibits, and they must be deemed to be infringements.

There remains the question whether respondent may rely upon the doctrine of equivalents to establish infringement by the four other accused devices. Respondent concedes that the conductor means in the four devices are not literally "embedded in the table," but insists that the changes in structure which they exhibit over that of plaintiff's Exhibits 5 and 7 are but the mechanical equivalents of the "conductor means embedded in the table" called for by the amended claim, and so are entitled to the protection afforded by the doctrine of equivalents. Petitioners do not seriously urge that the conductor means in the

four accused devices are not mechanical equivalents of the conductor means embedded in the table which the patent claims. Instead, they argue that the doctrine should be discarded because it does not satisfy the demands of the statute that the patent shall describe the invention. R. S. § 4888; 35 U. S. C. § 33.

We do not find it necessary to resolve these contentions here. Whatever may be the appropriate scope and application of the doctrine of equivalents, where a claim is allowed without a restrictive amendment, it has long been settled that recourse may not be had to that doctrine to recapture claims which the patentee has surrendered by amendment.

Assuming that the patentee would have been entitled to equivalents embracing the accused devices had he originally claimed a "conductor means embedded in the table," a very different issue is presented when the applicant, in order to meet objections in the Patent Office, based on references to the prior art, adopted the phrase as a substitute for the broader one "carried by the table." Had Claim 7 been allowed in its original form, it would have read upon all the accused devices, since in all the conductor means complementary to the coil spring are "carried by the table." By striking that phrase from the claim and substituting for it "embedded in the table," the applicant restricted his claim to those combinations in which the conductor means, though carried on the table, is also embedded in it. By the amendment, he recognized and emphasized the difference between the two phrases and proclaimed his abandonment of all that is embraced in that difference. *Hubbell* v. *United States,* 179 U. S. 77, 83; *Weber Electric Co.* v. *Freeman Electric Co.,* 256 U. S. 668, 677–78; *I. T. S. Rubber Co.* v. *Essex Rubber Co.,* 272 U. S. 429, 440, 444; *Smith* v. *Magic City Kennel Club,* 282 U. S. 784, 789; *Schriber Co.* v. *Cleveland Trust Co.,*

311 U. S. 211; cf. in case of disclaimer *Altoona Theatres* v. *Tri-Ergon Corp.*, 294 U. S. 477, 492, 493. The difference which he thus disclaimed must be regarded as material, and since the amendment operates as a disclaimer of that difference it must be strictly construed against him. *Smith* v. *Magic City Kennel Club, supra,* 790; *Shepard* v. *Carrigan,* 116 U. S. 593, 598; *Goodyear Dental Vulcanite Co.* v. *Davis,* 102 U. S. 222, 228. As the question is one of construction of the claim, it is immaterial whether the examiner was right or wrong in rejecting the claim as filed. *Hubbell* v. *United States, supra,* 83; *I. T. S. Rubber Co.* v. *Essex Rubber Co., supra,* 443. It follows that what the patentee, by a strict construction of the claim, has disclaimed—conductors which are carried by the table but not embedded in it—cannot now be regained by recourse to the doctrine of equivalents, which at most operates, by liberal construction, to secure to the inventor the full benefits, not disclaimed, of the claims allowed.

Plaintiff's Exhibits 5 and 7 do, and its Exhibits 6, 8, 9 and 10 do not, infringe. The judgments will be modified accordingly.

Modified.

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

MR. JUSTICE BLACK, dissenting, with whom MR. JUSTICE DOUGLAS concurs:

I think the judgments below should be reversed in full.

There can be no infringement of a void patent, and a patent which shows neither invention nor discovery is void.[1] The mere application of an old mechanical in-

[1] *Dunbar* v. *Myers,* 94 U. S. 187; *Thompson* v. *Boisselier,* 114 U. S. 1; *Saranac Machine Corp.* v. *Wirebounds Co.,* 282 U. S. 704.

strument to a new use is not an invention and therefore not patentable.[2]

The combination patented here contains not a single new element. The whole device is nothing more than an electric switch mounted on a table, which closes and opens with the flexing and reflexing of an ordinary coil spring when hit by a rolling ball. The spring, standing upright on the table, serves as a target in a pin ball game, its resiliency being utilized not only to make and break the circuit but to make the ball rebound.

The Constitution authorizes the granting of patent privileges only to inventors who make "discoveries." And the statute provides for the granting of patents only to those who have "invented or discovered" something "new." To call the device here an invention or discovery such as was contemplated by the Constitution or the statute is, in my judgment, to degrade the meaning of those terms.

Patentees have rights given them by law. "But the public has rights also. The rights of both should be upheld and enforced by an equally firm hand, whenever they come under judicial consideration." [3] By failing to assign error on the issue of patentability, parties to an infringement suit should not be permitted to foreclose a court from protecting the public interest. And here, as in other cases where there is plain error, we should notice it.[4]

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[2] *Phillips* v. *Page,* 24 How. 164; *Paramount Publix Corp.* v. *Tri-Ergon Corp.,* 294 U. S. 464.

[3] *Densmore* v. *Scofield,* 102 U. S. 375, 378.

[4] *Sibbach* v. *Wilson & Co.,* 312 U. S. 1, 16.

WRIGHT ET AL. *v.* LOGAN ET AL.

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

No. 229. Argued January 9, 1942.—Decided February 2, 1942.

1. The right of a farmer to be adjudged a bankrupt under § 75 (s) of the Bankruptcy Act is not conditioned upon the diligence with which he has sought to obtain a composition or an extension under § 75 (a)–(r). P. 141.
2. Any right to redeem from a mortgage foreclosure and sale which a farmer-debtor has at the time of applying for adjudication under § 75 of the Bankruptcy Act continues to be part of his assets and subject to the administration of the bankruptcy court. P. 142.

119 F. 2d 354, reversed.

CERTIORARI, 314 U. S. 592, to review a judgment which affirmed a judgment of the bankruptcy court dismissing bankruptcy proceedings by farmer-debtors and upholding the full force and effect of foreclosure proceedings in a state court.

Mr. Elmer McClain, with whom *Mr. William Lemke* was on the brief, for petitioners.

Mr. Harold F. Lindley, with whom *Mr. Paul F. Jones* was on the brief, for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioners are Illinois farmers. Pursuant to a state court foreclosure decree, forty acres of their farm land were sold to W. S. Logan, the mortgagee. The state court master executed and delivered to Logan a certificate of sale, but a deed was not given at that time. By Illinois statute, mortgagors are given the right to redeem for

twelve months after the date of foreclosure sale; and if this right is not exercised, creditors are given a similar right for an additional three months thereafter. Ill. Rev. Stat. (1941) c. 77, §§ 18, 20. On May 3, 1934, a day before the expiration of fifteen months from the sale, the petitioners filed in Federal District Court a petition for extension of time in which to pay their debts, under § 74 of the Bankruptcy Act. 11 U. S. C. § 202. Prior to that time there had been an oral agreement which the Appellate Court of the Third District of Illinois subsequently (January 15, 1937) held to have the effect of keeping the petitioners' right of redemption alive. 288 Ill. App. 481, 6 N. E. 2d 265. The forty acres were included in the petitioners' schedule of assets submitted in the § 74 proceedings, and Logan was listed as a creditor. The District Court refused to grant the proposed extension, and the Circuit Court of Appeals affirmed. 75 F. 2d 687.

Thereafter, April 5, 1935, the petitioners filed an amendment seeking composition or extension of their indebtedness as authorized by sub-paragraphs (a) to (r) of § 75 of the Bankruptcy Act. 11 U. S. C. § 203. Finding that the petition was filed in good faith and was in accordance with the requirements of the Act, the judge referred the matter to a conciliation commissioner. Subsequent efforts to effect a composition or extension having failed, on March 2, 1940, the petitioners filed an amendment alleging this failure and asking that the court adjudicate them bankrupt under 75 (s), which provides: "Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition or extension proposal . . . may amend his petition or answer asking to be adjudged a bankrupt."

Although the petitioners' allegations brought them squarely within the language of 75 (s), the District Court ordered that the amended petition be denied; that the proceedings be dismissed; that the mortgagee's successors in

interest[1] be permitted to exercise rights as owners under the foreclosure; that the deed issued to the mortgagee by the state master in chancery after the bankruptcy proceedings had begun be given full force and effect; and that possession of the forty acres be surrendered to the respondents. The Circuit Court of Appeals affirmed, 119 F. 2d 354, holding that 75 imposes upon farmer debtors duties corresponding to the privileges conferred; that if a farmer debtor fails to prosecute his composition proceedings to a conclusion within a reasonable time, the court can deny him the privilege of adjudication under 75 (s); and that, although these farmer debtors had filed under other subsections of 75, they had already enjoyed all the benefits to which they would have been entitled under 75 (s), and therefore were not entitled to obtain a repetition of those benefits by what the court thought was a mere formal change in their petition. Because of an asserted conflict with *Cohan* v. *Elder,* 118 F. 2d 850, and because of the importance of the issue in farmer debtor cases, we granted certiorari.

Section 75 (s) does not by its language condition a farmer's right to adjudication upon the diligence with which he has sought to obtain composition or extension under subsections (a) to (r). It "applies explicitly to a case of a farmer who has failed to obtain the acceptance or a majority in number and amount of all creditors whose claims are affected by a proposal for a composition of an extension of time to pay his debts." *John Hancock Ins. Co.* v. *Bartels,* 308 U. S. 180, 184. That was the situation of the farmers here. And "the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress . . . lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act." *Wright* v. *Union*

[1] W. S. Logan, the original mortgagee, died while the proceedings were pending. The respondents here are devisees under his will.

Central Ins. Co., 311 U. S. 273, 279. Farmers cannot be deprived of the benefits of the Act because a court may believe that they have received the equivalent of what it prescribes. Cf. *Borchard* v. *California Bank*, 310 U. S. 311. We think the *Bartels*, *Wright*, and *Borchard* cases control our conclusion here, and that the court below was in error in dismissing the applications for adjudication under 75 (s).

In the memorandum accompanying the District Court's order directing the petitioners to surrender possession of the disputed forty acres, there is no discussion of their right to redeem. We therefore treat the order as based on the holding that the petitioners' lack of diligence deprived them of the benefits of 75 (s) and that the equivalent of the benefits of 75 (s) had already been conferred anyway. Because we consider such a holding erroneous, we find it unnecessary to pass upon other questions discussed by the Circuit Court of Appeals, concerning survival of the petitioners' right to redeem. It is nevertheless appropriate to point out at this time that whatever right of redemption the petitioners had when they first applied for adjudication under 75 continued to be a part of their assets, subject to administration by the bankruptcy court. For 75 (n) subjects all of the farmer debtor's assets, specifically including rights of redemption, to the jurisdiction of the bankruptcy court, and provides that "the period of redemption shall be extended . . . for the period necessary for the purpose of carrying out the provisions of this section." 11 U. S. C. (Supp. II) § 203 (amendment of August 28, 1935, 49 Stat. 942). See *Wright* v. *Union Central Ins. Co.*, 304 U. S. 502, 513–516.

The judgment is reversed and the cause remanded to the District Court for proceedings in conformity with this opinion.

Reversed.

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

COLUMBIA RIVER PACKERS ASSOCIATION, INC. *v.* HINTON ET AL.

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

No. 142. Argued January 12, 13, 1942.—Decided February 2, 1942.

A dispute between a processor of fish on the one hand, and independent fishermen and their association on the other, concerning only the terms upon which the fishermen will sell fish to the processor, and in no way involving the employer-employee relationship, is not a "labor dispute" within the meaning of the Norris-LaGuardia Act, which declares that no court of the United States shall, except upon certain specified conditions, have jurisdiction to issue an injunction "in a case involving or growing out of a labor dispute." P. 145.

117 F. 2d 310, reversed.

CERTIORARI, 314 U. S. 600, to review a decree which reversed a decree of injunction granted by the District Court, 34 F. Supp. 970, in a suit by the above-named packers association to enjoin numerous fishermen and their association or union, the respondents herein, from an alleged attempt to monopolize the fish industry in Oregon, Washington and Alaska, in violation of the Sherman Act.

Messrs. Jay Bowerman and *Ralph E. Moody* for petitioner.

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

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner filed a bill for an injunction charging that the respondents attempted to monopolize the fish industry in Oregon, Washington, and Alaska, in violation of the Sherman Act. 26 Stat. 209. The Norris-La-

Guardia Act declares that no federal court shall, except under certain specified circumstances, have jurisdiction to issue an injunction in any case which involves or grows out of a "labor dispute."[1] The jurisdictional requirements were not present here. But the District Court held that, since this case did not involve or grow out of a "labor dispute," these requirements were irrelevant; and, finding that the respondents had violated the Sherman Act to the injury of the petitioner, issued the injunction sought. 34 F. Supp. 970. The Circuit Court of Appeals reversed, holding that a "labor dispute" was involved and that the District Court was therefore without jurisdiction to enjoin. 117 F. 2d 310. To review this question, we granted certiorari. 314 U. S. 600.

The petitioner has plants for processing and canning fish in Oregon, Washington, and Alaska. It distributes its products in interstate and foreign commerce. Its supply of fish chiefly depends upon its ability to purchase from independent fishermen. The dispute here arose from a controversy about the terms and conditions under which the respondents would sell fish to the petitioner.

The respondents are the Pacific Coast Fishermen's Union, its officers and members,[2] and two individuals who, like the petitioner, process and sell fish. Although affiliated with the C. I. O., the Union is primarily a fishermen's association, composed of fishermen who conduct their operations in the Pacific Ocean and navigable streams in Washington and Oregon and some of their employees. The fishermen own or lease fishing boats, ranging in value from $100 to $15,000, and carry on their business as inde-

[1] ". . . no court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act. . . ." 47 Stat. 70.

[2] Two of the respondents, although members of the Union, are not fishermen. They are buyers for processors.

pendent entrepreneurs, uncontrolled by the petitioner or other processors.

The Union acts as a collective bargaining agency in the sale of fish caught by its members. Its constitution and by-laws provide that "Union members shall not deliver catches outside of Union agreements," and in its contracts of sale it requires an agreement by the buyer not to purchase fish from nonmembers of the Union. The Union's demand that the petitioner assent to such an agreement precipitated the present controversy. Upon the petitioner's refusal, the Union induced its members to refrain from selling fish to the petitioner, and since the Union's control of the fish supply is extensive, the petitioner was unable to obtain the fish it needed to carry on its business.

We think that the court below was in error in holding this controversy a "labor dispute" within the meaning of the Norris-LaGuardia Act. That a dispute among businessmen over the terms of a contract for the sale of fish is something different from a "controversy concerning terms or conditions of employment, or concerning the association . . . of persons . . . seeking to arrange terms or conditions of employment" calls for no extended discussion. This definition and the stated public policy of the Act—aid to "the individual unorganized worker . . . commonly helpless . . . to obtain acceptable terms and conditions of employment" and protection of the worker "from the interference, restraint, or coercion of employers of labor"—make it clear that the attention of Congress was focussed upon disputes affecting the employer-employee relationship, and that the Act was not intended to have application to disputes over the sale of commodities.[3]

[3] Cf. § 6 of the Clayton Act: ". . . the labor of a human being is not a commodity or article of commerce." 38 Stat. 731. The Norris-LaGuardia Act, manifesting "the purpose of the Congress further to extend the prohibition of [§ 20 of] the Clayton Act," *New Negro*

We recognize that by the terms of the statute there may be a "labor dispute" where the disputants do not stand in the proximate relation of employer and employee. But the statutory classification,[4] however broad, of parties and circumstances to which a "labor dispute" may

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Alliance v. *Grocery Co.*, 303 U. S. 552, 562, cannot be taken as having erased the distinctions between an association of commodity sellers and an association of employees. Specific recognition by Congress of associations of fishermen as sellers of commodities has been given in an act "Authorizing associations of producers of aquatic products." 48 Stat. 1213.

[4] Section 13 of the Act provides:

"When used in this Act, and for the purposes of this Act—

"(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as hereinafter defined) of 'persons participating or interested' therein (as hereinafter defined).

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 47 Stat. 73.

relate does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing. Our decisions in *New Negro Alliance* v. *Grocery Co.*, 303 U. S. 552, and *Milk Wagon Drivers' Union* v. *Lake Valley Co.*, 311 U. S. 91, give no support to the respondents' contrary contention, for in both cases the employer-employee relationship was the matrix of the controversy.

The controversy here is altogether between fish sellers and fish buyers. The sellers are not employees of the petitioners or of any other employer, nor do they seek to be. On the contrary, their desire is to continue to operate as independent businessmen, free from such controls as an employer might exercise. That some of the fishermen have a small number of employees of their own, who are also members of the Union, does not alter the situation. For, the dispute here, relating solely to the sale of fish, does not place in controversy the wages or hours, or other terms and conditions of employment, of these employees.

We are asked to consider other contentions pressed by the respondents, which it is said would support the reversal below. But the Circuit Court neither canvassed nor passed upon these contentions. It will be free to do so upon remand.

Reversed.

MR. JUSTICE ROBERTS and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

CLOVERLEAF BUTTER CO. *v.* PATTERSON, COMMISSIONER OF AGRICULTURE AND INDUSTRIES OF ALABAMA, ET AL.

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

No. 28. Argued December 9, 10, 1941.—Decided February 2, 1942.

1. Acting under authority of a state statute, state officials inspected and seized packing stock butter acquired by a manufacturer for use in the manufacture of renovated butter for interstate commerce. *Held* that such state action was inconsistent with and excluded by the federal laws and regulations relating to the manufacture of renovated butter. Internal Revenue Code, §§ 2320–2327. P. 167.
2. By the regulatory provisions of Internal Revenue Code, § 2325, the entire process of manufacture of renovated butter is subject to federal supervision. P. 154.
3. The federal legislation involved here is not solely a revenue measure; it is authorized by the Commerce Clause. P. 162.
4. Section 1 of the Act of May 9, 1902, providing that importations of renovated butter shall be subject to the laws of the State as though produced therein, is inapplicable to the present case. P. 161.
5. The effect of § 4 of the Act of May 9, 1902, is that state action in respect of renovated butter is not foreclosed merely by federal taxation in this field. Such state action may, however, as here, be superseded by the exercise of other federal power. P. 162.
6. Where Congress exercises its power over interstate commerce by legislation with which a regulation by the State conflicts, either expressly or impliedly, such state regulation becomes inoperative and the federal legislation exclusive in its application. Pp. 155–156.

116 F. 2d 227, reversed.

CERTIORARI, 313 U. S. 551, to review the affirmance of a decree dismissing the bill in a suit for an injunction.

Messrs. Erle Pettus and *Horace C. Wilkinson* for petitioner.

Messrs. Charles L. Rowe and *William H. Loeb,* Assistant Attorney General of Alabama, argued the cause, and *Mr. Thomas S. Lawson,* Attorney General, and *Mr. Loeb* were on the brief, for respondents.

The protection of the health of its citizens is an inherent power of the State. So long as the exercise of this power does not conflict with the federal laws, the State may act without limitation. *Minnesota Rate Cases,* 230 U. S. 352, 398–412; *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 184, 188–191; *Eichholz* v. *Public Service Comm'n,* 306 U. S. 268, 274.

The State may prohibit within its borders the manufacture of adulterated food, where part of that food will be sold to its citizens. Such action does not violate the Commerce Clause even though its effect is to impose a burden on interstate commerce. *Clason* v. *Indiana,* 306 U. S. 439; *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 407, 505; *Carey* v. *South Dakota,* 250 U. S. 118; *Corn Products Rfg. Co.* v. *Eddy,* 249 U. S. 427; *Weigle* v. *Curtice Bros. Co.,* 238 U. S. 285; *Sligh* v. *Kirkwood,* 237 U. S. 52; *Savage* v. *Jones,* 225 U. S. 501; *Crossman* v. *Lurman,* 192 U. S. 189; *Plumley* v. *Massachusetts,* 155 U. S. 461; *Powell* v. *Pennsylvania,* 127 U. S. 678. See also: *Skiriotes* v. *Florida,* 313 U. S. 69; *California* v. *Thompson,* 313 U. S. 109.

Congress has not exclusively occupied the field by the Renovated Butter Act; nor has it, by such Act, regulated interstate commerce so completely as to prohibit state action. The Act is not intended as a regulation of commerce. It is but an extension of the Oleomargarine Act, which was a taxing Act. *In re Kollock,* 165 U. S. 526, 537.

The incorporation of R. S. § 3243 into the Renovated Butter Act is a specific indication of the Congressional intention to leave the State unrestricted in the exercise

of its police power. Section 1 of the Act further indicates the will of Congress that, with respect to the regulation of renovated butter, interstate commerce might be subjected to restrictions by the States.

The purpose of § 1 was to permit the State to protect the health of its citizens with respect to unclean butter, even though such butter, renovated or packing stock, might still remain in the original packages in which it had been introduced into the State. See *In re Rahrer*, 140 U. S. 545; *Clark Distilling Co.* v. *Western Maryland Ry.*, 242 U. S. 311.

State officers enforcing by seizure police regulations with regard to foods will not be enjoined merely because there exist similar federal laws and regulations in respect to the same subject matter and there has been no federal seizure.

The decision is controlled by *Mintz* v. *Baldwin*, 289 U. S. 346; *Pacific States Co.* v. *White*, 296 U. S. 176; *Kelly* v. *Washington*, 302 U. S. 1; *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177; *Townsend* v. *Yeomans*, 301 U. S. 441; and *Currin* v. *Wallace*, 306 U. S. 1.

Mr. Justice Reed delivered the opinion of the Court.

The petitioner, Cloverleaf Butter Company, is engaged at Birmingham, Alabama, in the manufacture of process or renovated butter from packing stock butter. It obtains 25% of its supplies of packing stock butter from the farmers and country merchants of Alabama and 75% from those of other states, and it ships interstate 90% of its finished product. The production of renovated butter is taxed and regulated by the United States. Internal Revenue Code, c. 16, §§ 2320 to 2327 inc. It is also regulated by Alabama. Ala. Code 1940, Tit. 2, c. 1.

The respondents, Alabama officials charged with the duty of enforcing the Alabama laws in regard to renovated

butter, entered petitioner's factory and, in a little more than a year, seized on sixteen separate occasions a total of over twenty thousand pounds of packing stock butter, the material from which the finished product is made. Defendants also seized some butter moving to the factory in interstate commerce. There is no allegation that condemnation proceedings have been completed.

Alleging repeated seizures and danger of their continuance, to the demoralization and financial impairment of its business, petitioner brought an action, Judicial Code § 24 (1), in the District Court to enjoin the defendants from acting under the Alabama statute, either to determine the wholesomeness of renovated butter made from the raw material in petitioner's hands, to inspect its raw material and plant, or to seize and to detain petitioner's packing stock butter. The theory of the bill is that the federal legislation and regulations concerning the manufacture of process or renovated butter exclude such state action. Cf. *Hebe Co.* v. *Shaw,* 248 U. S. 297; *Corn Products Rfg. Co.* v. *Eddy,* 249 U. S. 427. There was a motion to dismiss on the ground that the complaint did not state a cause of action. A stipulation entitled as one of "facts" was entered into. The District Court dismissed the bill, the Circuit Court of Appeals affirmed, 116 F. 2d 227, and we granted certiorari because of the important question of federal law involved in petitioner's contention that these federal statutes providing for regulation of production of a commodity excluded state action. 313 U. S. 551.

The so-called stipulation of facts just mentioned is really a limitation of issues. One paragraph of the stipulation will crystallize the essential elements of the dispute. It reads: "The parties to this cause stipulate and agree that the legal questions in dispute between the parties are: . . . 2. Does the inspection of packing stock butter, in interstate commerce, used by the plaintiff in the manufac-

ture of process or renovated butter as alleged in the bill of complaint, made or directed to be made by the Secretary of Agriculture of the United States, pursuant to the Federal laws and regulations relating to renovated or process butter, have the effect in connection with said Federal laws of excluding the State of Alabama, its officers and agents, from inspecting or seizing or suspending the packing stock butter, in interstate commerce out of which renovated butter to be sold in interstate commerce as alleged in the complaint is manufactured by the plaintiff as alleged in the complaint?" As other paragraphs state variations of this controversy, or conclusions of law not controlling on the courts, *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 51, we need not consider them further. The central question presented in the petition for certiorari accords with the excerpt from the stipulation.

Apparently there is no specific allegation or admission that the packing stock butter which Alabama inspected and seized was the property of the petitioning manufacturer at the time. It has, however, been so treated by the courts and parties, and properly so, we conclude, from the allegations of the bill.[1] The reach of this decision is therefore limited to Alabama's inspection and seizure of packing stock butter, actually owned by petitioner and held in its own hands or those of its bailees, whether in factory,

[1] Petitioner, paragraph 19 of its bill of complaint, avers that packing stock butter is delivered to it for processing which is produced in Alabama and other states; that the Alabama officials, paragraph 20, claim the right to enter the premises where it receives the butter acquired by it in interstate commerce and to "seize, suspend or otherwise deprive plaintiff of the right to use such raw material or packing stock butter, and to stop and search trucks moving in interstate commerce hauling said raw material from places without the State of Alabama to plaintiff's place of business in Birmingham, Alabama, and to seize, suspend or otherwise deprive plaintiff the right to use the said raw material or packing stock butter being so transported in interstate commerce and to [stop and search] trucks transporting the aforesaid raw material

warehouse, or course of carriage, for manufacture into process or renovated butter for interstate or foreign commerce.

The test to be applied to the action of the state in seizing material intended solely for incorporation into a product prepared for interstate commerce is the effect of that action upon the national regulatory policy declared by the federal statute. Cf. *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 505. Not only

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from points in Alabama to plaintiff's plant in Birmingham, Alabama, to be used in the manufacture of process or renovated butter as aforesaid."

Petitioner further avers, as to seizures at its plant, "Between, to-wit, the 17th day of April, 1939, and the 22nd day of June, 1940, defendants on 16 separate occasions, seized in Birmingham, Alabama, a total of 20924 pounds of plaintiff's raw material or packing stock butter which originated in whole or in part, in states of the United States outside of the State of Alabama and which had been so delivered to the plaintiff's plant in Birmingham, Alabama, as raw material and which was not being sold, offered or exposed for sale, or attempted for sale in its then condition but was being held by the plaintiff solely and exclusively for the purpose of using the same as raw material out of which to manufacture process or renovated butter in the usual course of plaintiff's business. . . . Plaintiff avers on, to-wit, the 21st day of June, 1940, in making the last seizure, above referred to, the defendants stopped a truck moving in interstate commerce from the State of Georgia to the State of Alabama transporting said raw material known as packing stock butter from the State of Georgia to the plaintiff in Birmingham, Alabama. Plaintiff avers that as a result of the seizure of said raw materials by defendants, it has been denied the use thereof; the seizure and detention of said raw material has caused great financial loss to the plaintiff in that plaintiff is required to pay the storage on the same and is denied the use of such raw materials that plaintiff sorely needs in the conduct of its business, and has caused plaintiff's plant to remain idle from time to time for the lack of sufficient raw material to keep the same operating; that said action of the defendants demoralizes plaintiff's employees who are employed, to operate said plant, and is calculated to and does interfere with the sale of its finished product in interstate commerce."

does Congressional power over interstate commerce extend, the "Laws of any State to the Contrary notwithstanding," [2] to interstate transactions and transportation, but it reaches back to the steps prior to transportation and has force to regulate production "with the purpose of so transporting" the product. *United States* v. *Darby,* 312 U. S. 100, 117. It extends to the intrastate activities which so affect commerce as to make regulation of them appropriate means to the attainment of a legitimate end, regulation of interstate commerce. *Id.,* 118 *et seq.,* and cases cited. By the regulatory provisions of I. R. C. § 2325, note 10, *infra,* the entire process of manufacture is subject to federal supervision. Thus, so far as any situation here involved is concerned, the scope of Congressional power is such that it may override the exercise of state power and render impossible its application to petitioner's manufacturing processes.

This power of Congress to exercise exclusive control over operations in interstate commerce is not in dispute here.[3] Nor is this power limited to situations where national uniformity is so essential that, lacking Congres-

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[2] Constitution, Article VI.

[3] Cases which sustain state enactments as permissible, where federal legislation generally applicable to the field exists, recognize that federal action might forbid or exclude the state statutes approved in those instances. *Savage* v. *Jones,* 225 U. S. 501, 529: "The question remains whether the statute of Indiana is in conflict with the act of Congress known as the Food and Drugs Act of June 30, 1906 (34 Stat. 768, c. 3915). For the former, so far as it affects interstate commerce even indirectly and incidentally, can have no validity if repugnant to the Federal regulation." *Corn Products Rfg. Co.* v. *Eddy,* 249 U. S. 427; *Mintz* v. *Baldwin,* 289 U. S. 346, 351; *Pacific States Co.* v. *White,* 296 U. S. 176, 183; *Hartford Indemnity Co.* v. *Illinois,* 298 U. S. 155, 158; *Welch Co.* v. *New Hampshire,* 306 U. S. 79, 85; *Eichholz* v. *Comm'n,* 306 U. S. 268, 274; *Duckworth* v. *Arkansas,* 314 U. S. 390.

sional permission, all state action is inadmissible notwithstanding a complete absence of federal legislation.[4] Exclusive federal regulation may arise, also, from the exercise of the power of Congress over interstate commerce where, in the absence of Congressional action, the states may themselves legislate. It has long been recognized that, in those fields of commerce where national uniformity is not essential, either the state or federal government may act. *Willson* v. *Black-bird Creek Marsh Co.*, 2 Pet. 245; *California* v. *Thompson*, 313 U. S. 109, 114. Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation.[5] But

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[4] *Cooley* v. *Board of Wardens*, 12 How. 299, 319; *Bowman* v. *Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 485; *Leisy* v. *Hardin*, 135 U. S. 100, 119; *Minnesota Rate Cases*, 230 U. S. 352, 399. Where the federal legislation authorizes state action, such state action is permissible even as to matters which could otherwise be regulated only by uniform national enactments. *In re Rahrer*, 140 U. S. 545, 561; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 325, *et seq.*; *Whitfield* v. *Ohio*, 297 U. S. 431; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334, 350.

[5] *Merchants Exchange* v. *Missouri*, 248 U. S. 365, 368 (United States Warehouse Act permits state laws for inspection and weighing by specific direction of § 29, 39 Stat. 490; cf. Act of March 2, 1931, c. 366, 46 Stat. 1465); *Whipple* v. *Martinson*, 256 U. S. 41 (state regulates prescriptions of narcotics further than United States); *Northwestern Bell Tel. Co.* v. *Nebraska Comm'n*, 297 U. S. 471, 479 (telephone depreciation); *Hartford Indemnity Co.* v. *Illinois*, 298 U. S. 155, 159 (specific authority for state laws to continue in operation); *Kelly* v. *Washington*, 302 U. S. 1, 9 (state inspection of hulls omitted from federal inspection); *South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U. S. 177, note 5 (state regulation of truck weight and width omitted from federal regulation by the federal Motor Carrier Act of 1935, 49 Stat. 546); *Welch Co.* v. *New Hamp-*

where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically [6] or by implication,[7] the state legislation becomes inoperative and the federal legislation exclusive in its application.

When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation.[8]

Apparently there are no cases of this Court dealing specifically with state interference with federally regulated manufacturing. It is evident, we think, that the same principles govern state action in this field as in the instances cited under note 7 to show the exclusive power of federal enactments in transportation, employers liabil-

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shire, 306 U. S. 79 (maximum hours of employees regulated by state prior to effective date of federal regulation); *Eichholz* v. *Comm'n,* 306 U. S. 268, 274 (intrastate transportation regulations infringed); *Maurer* v. *Hamilton,* 309 U. S. 598, 606 (state regulation of size and weight reserved from federal regulation). Frequently this Court has recognized the power of the state in such circumstances over other interstate carriers. *Minnesota Rate Cases,* 230 U. S. 352, 408, and cases cited; *Erie R. Co.* v. *Williams,* 233 U. S. 685; *Erie R. Co.* v. *Public Utility Comm'rs,* 254 U. S. 394, 409; *Missouri Pacific R. Co.* v. *Norwood,* 283 U. S. 249.

[6] Cf. 7 U. S. C. § 269 (1940); 29 U. S. C. § 160 (a) (1940).

[7] *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 437; *Adams Express Co.* v. *Croninger,* 226 U. S. 491, 505; *New York Central R. Co.* v. *Winfield,* 244 U. S. 147, 150; *Oregon-Washington R. Co.* v. *Washington,* 270 U. S. 87, 101 (cf. amendment to meet decision, 44 Stat. 250); *Napier* v. *Atlantic Coast Line,* 272 U. S. 605, 612; *Missouri Pacific R. Co.* v. *Porter,* 273 U. S. 341, 345; *Hines* v. *Davidowitz,* 312 U. S. 52, 66; *Illinois Natural Gas Co.* v. *Central Ill. Pub. Serv. Co.,* 314 U. S. 498, 509.

[8] *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co., supra; Savage* v. *Jones,* 225 U. S. 501, 533; *Corn Products Rfg. Co.* v. *Eddy,* 249 U. S. 427, 435; *Whipple* v. *Martinson,* 256 U. S. 41, 45; *Mintz* v. *Baldwin,* 289 U. S. 346, 350; *Kelly* v. *Washington,* 302 U. S. 1, 10.

ity, quarantine and aliens. The rule is clear that state action may be excluded by clear implication or inconsistency. Its application to individual cases creates difficulties. The differentiation between cases where the assumption of federal power is exclusive and where it admits state action is narrow. For example, in *Oregon-Washington R. Co.* v. *Washington,* 270 U. S. 87, Section 8 of the Plant Quarantine Act, 37 Stat. 315, as amended 39 Stat. 1165, 7 U. S. C. § 161, was held to exclude a state quarantine against plant infestation. Yet, a little later, in *Mintz* v. *Baldwin,* 289 U. S. 346, a very similar statute, the Cattle Contagious Diseases Act, was held to permit a state quarantine, because this latter act differed from the former, in that its provisions, page 352, "by specification of the cases in which action under it shall be exclusive, disclose the intention of Congress that, subject to the limitations defined, state measures may be enforced. This difference is essential and controlling." Cf. 21 U. S. C. § 126.

It is urged that the later *Welch, Eichholz* and *Maurer* cases, cited above, which allow state action when the federal statute does not cover the particular point regulated, show a trend away from the doctrine of the *Oregon-Washington Co.* decision. Other similar instances may be found in notes 3 and 5, *supra.* In all of these, however, it was the ruling of this Court that the federal enactment was consistent with the narrow regulation sought to be enforced by the state, so that the state enactment did not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U. S. 52, 67. As the principle upon which the cases referred to in this paragraph are decided is clear, a single comparison will sufficiently illustrate the reasons which lead to a denial of state power. *Savage* v. *Jones,* 225 U. S. 501, construed an Indiana statute requiring disclosure of formulas on foods offered

for sale in Indiana while in interstate commerce. The Pure Food and Drugs Act, 34 Stat. 768, prohibited, so far as here pertinent, interstate shipments if misbranded by bearing "any statement, design, or device . . . false or misleading." This Court said, p. 532:

"Congress has thus limited the scope of its prohibitions. It has not included that at which the Indiana statute aims. Can it be said that Congress, nevertheless, has denied to the State, with respect to the feeding stuffs coming from another State and sold in the original packages, the power the State otherwise would have to prevent imposition upon the public by making a reasonable and nondiscriminatory provision for the disclosure of ingredients, and for inspection and analysis?"

The Indiana Act was upheld. On the other hand, *McDermott* v. *Wisconsin,* 228 U. S. 115, makes plain the basis for prohibiting interferences with federal power. In this latter case a Wisconsin law required glucose mixtures offered for retail sale to be labeled "Glucose flavored with" the flavoring material. Any other "designation or brand" on the package was prohibited. A glucose mixture was offered labeled "Karo Corn Syrup" "10% Cane Syrup, 90% Corn Syrup." Pointing out that federal authority, for the sake of efficiency in protecting the public against misbranding in interstate trade, extended far enough to regulate labeling on packages while being offered to consumers, and that the Pure Food and Drugs Act tolerated the more euphemistic label prohibited by the state, this Court said, p. 133:

"Conceding to the State the authority to make regulations consistent with the Federal law for the further protection of its citizens against impure and misbranded food and drugs, we think to permit such regulation as is embodied in this statute is to permit a State to discredit and burden legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal statute

which have accrued both to the Government and the shipper, and to impair the effect of a Federal law which has been enacted under the Constitutional power of Congress over the subject."

In the *Savage* case, there was no conflict, inconsistency or interference; in the *McDermott* case, there was. *McDermott* pointed out the distinction, and the inapplicability of the *Savage* rule to the Wisconsin situation. 228 U. S. 115, 131–32.

Turning to the statutes in question, we find that the greater part of the legislation relating to process or renovated butter is in § 2320 to § 2327 of the Internal Revenue Code.[9] These sections define process or renovated butter, fix the rate of poundage tax upon it, as well as the amount of special tax upon its manufacturers, and provide for their collection. They require manufacturers to file such notices and inventories, keep such books, render such returns, post such signs, affix such number to his factory, and furnish such bond as the Treasury Department may require. Wholesale dealers are required to keep books and render returns to the same department. Penalties are provided. Specific provisions are made for inspection of the places of manufacture or storage of the materials and the renovated butter itself. Power is given to confiscate the finished product. Sanitary provisions applicable for slaughtering, meat canning or similar establishments are extended to cover process and renovated butter factories. The sections necessary for the discussion are set out in the note below.[10] The references to animal and meat in-

[9] These sections are derived from the Acts of August 2, 1886, c. 840, 24 Stat. 209; May 9, 1902, c. 784, 32 Stat. 193; August 10, 1912, c. 284, 37 Stat. 273.

[10] § 2325. Inspection, manufacture, storage, and marking of process or renovated butter. "The Secretary of Agriculture is authorized and required to cause a rigid sanitary inspection to be made, at such times as he may deem proper or necessary, of all factories and store-

spection statutes in § 2327 (b) made applicable to the butter in question the power of the Secretary of Agriculture to inspect and certify as wholesome for human food salt pork and bacon intended for exportation, and the requirement that inspected carcasses of cattle, sheep and swine found unwholesome shall not be subjects of interstate transportation.

There are two provisions of law applicable to process and renovated butter production which may be conveniently considered and disposed of at this point.

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houses where process or renovated butter is manufactured, packed, or prepared for market, and of the products thereof and materials going into the manufacture of the same. All process or renovated butter and the packages containing the same shall be marked with the words 'Renovated Butter' or 'Process Butter' and by such other marks, labels, or brands and in such manner as may be prescribed by the Secretary of Agriculture, and no process or renovated butter shall be shipped or transported from its place of manufacture into any other State or Territory or the District of Columbia, or to any foreign country, until it has been marked as provided in this section. The Secretary of Agriculture shall make all needful regulations for carrying this section and sections 2326 (c) and 2327 (b) into effect and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and the condition of the material from which it is made. And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in course of exportation or shipment he shall have power to confiscate the same."

§ 2326 (c). Failure to comply with provisions relating to the manufacture, storage, and marking of process or renovated butter. "Any person, firm, or corporation violating any of the provisions of section 2325 shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than $50 nor more than $500 or by imprisonment not less than one month nor more than six months, or by both said punishments, in the discretion of the court."

§ 2327 (b). Inspection of live cattle and meat. "All parts of an act providing for an inspection of meats for exportation, approved August

(a) By § 1 of the Act of May 9, 1902, it is provided that importations of process and renovated butter shall be subject to the laws of the state as though produced therein.[11] This is obviously an adaptation of the Wilson or Original Packages Act to the problem of butter substitutes, passed to overcome the force of some of the cases forbidding state prohibition of sales of these substitutes.[12] It is clearly inapplicable to the case now under consideration, but indicates a Congressional purpose not to hinder the free exercise of state power, except as it may be inconsistent with the federal legislation. The argument that

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30, 1890, c. 839, 26 Stat. 414, and of an Act to provide for the inspection of live cattle, hogs, and the carcasses and products thereof which are the subjects of interstate commerce, approved March 3, 1891, c. 555, 26 Stat. 1089, and of amendment thereto approved March 2, 1895, c. 169, § 1, 28 Stat. 732, which are applicable to the subjects and purposes described in section 2325 shall apply to process or renovated butter."

§ 2327 (c). Slaughtering and meat canning. "The sanitary provisions for slaughtering, meat canning, or similar establishments as set forth in the act of June 30, 1906, c. 3913, 34 Stat. 676, shall be extended to cover renovated butter factories as defined in this subchapter, under such regulations as the Secretary of Agriculture may prescribe."

[11] 32 Stat. 193, 21 U. S. C. § 25. "All articles known as oleomargarine, butterine, imitation, process, renovated, or adulterated butter, or imitation cheese, or any substance in the semblance of butter or cheese not the usual product of the dairy and not made exclusively of pure and unadulterated milk or cream, transported into any State or Territory or the District of Columbia, and remaining therein for use, consumption, sale, or storage therein, shall, upon the arrival within the limits of such State or Territory or the District of Columbia, be subject to the operation and effect of the laws of such State or Territory or the District of Columbia, enacted in the exercise of its police powers to the same extent and in the same manner as though such articles or substances had been produced in such State or Territory or the District of Columbia, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

[12] Cf. 26 Stat. 313; *In re Rahrer,* 140 U. S. 545; *Schollenberger* v. *Pennsylvania,* 171 U. S. 1; *Collins* v. *New Hampshire,* 171 U. S. 30; *State* v. *Collins,* 70 N. H. 218, 45 A. 1080, aff. by an equally divided court, 187 U. S. 636; *Plumley* v. *Massachusetts,* 155 U. S. 461.

it is improper to infer a restriction on confiscation of material when confiscation of product is permitted fails to give weight to the difference between a confiscation which interferes with production under federal supervision and confiscation after production because of a higher standard demanded by a state for its consumers. The latter type is permissible under all the authorities.

(b) By § 4 of the same Act, R. S. § 3243 was made "to extend to and include and apply to" manufacture of processed and renovated butter. That section, now I. R. C. § 3276, provides that the payment of the tax laid by the act under consideration "shall not be held to exempt any person from any" state penalty "or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State." It is urged by respondent that this section makes it "clear that the power of the States over the subject of the manufacture and sale of process and renovated butter within their respective limits was to be unrestricted, even though the effect of such regulation might be the imposition of an indirect burden upon interstate commerce." This section without doubt manifests the will of Congress that federal taxation shall not, of itself, incapacitate the state. *Austin* v. *Tennessee,* 179 U. S. 343; *Plumley* v. *Massachusetts,* 155 U. S. 461, 466. In our view, however, the section goes no farther than to make certain that federal taxation shall not paralyze state action. Other regulations may or may not supersede state laws. Cf. *Merchants Exchange* v. *Missouri,* 248 U. S. 365, 368; *Hartford Indemnity Co.* v. *Illinois,* 298 U. S. 155, 159.

There are also two other elements of the federal legislation which may be considered from the negative viewpoint. This is not solely a revenue act. Respondent strongly urges that it must be treated as primarily for the purpose of increasing federal income, and that therefore there should be no judicial deduction that the incidental

regulatory features are exclusive. For this there is support in the precedents. *McCray* v. *United States,* 195 U. S. 27.[13] While there has long been recognition of the authority of Congress to obtain incidental social, health or economic advantages from the exercise of constitutional powers,[14] it has been said that such collateral results must be obtained from statutory provisions reasonably adapted to the constitutional objects of the legislation. *Linder* v. *United States,* 268 U. S. 5, 17. But here the respondent's contention is inapplicable because the regulatory provisions in controversy are authorized by the Commerce Clause. *Pittsburgh Melting Co.* v. *Totten,* 248 U. S. 1, 8; *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381; *United States* v. *Darby, supra,* 119.

Further, we agree with respondent's contention that there is no authority to confiscate or destroy materials under the renovated butter act. It should be noted that packing stock adulterated under the definitions of § 402 of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1046, when introduced into or while in interstate commerce may be confiscated under § 304 while in interstate commerce or at any time thereafter. Cf. *United States* v. *Nine Barrels of Butter,* 241 F. 499. Petitioner argues that the provisions for meat inspection, made applicable to process and renovated butter factories by I. R. C. § 2327, note 10, *supra,* include Title 21, § 72 of the United States Code. Section 72 does authorize the destruction of unfit carcasses of cattle, hogs and sheep intended for human consumption, and we assume, if applicable, would authorize a similar destruction of the materials intended for butter

[13] Cf. *In re Kollock,* 165 U. S. 526; *Plumley* v. *Massachusetts,* 155 U. S. 461, 466. These were based on the earlier act of 1886, 24 Stat. 209, which did not carry the inspection and condemnation provisions now applicable to process and renovated butter.

[14] *Veazie Bank* v. *Fenno,* 8 Wall. 533; *McCray* v. *United States,* 195 U. S. 27, 55; *United States* v. *Darby,* 312 U. S. 100, 115.

manufacture. Section 72, however, is derived from 34 Statutes at Large 674. The provisions which I. R. C. § 2327 makes applicable are the sanitary provisions as set forth in the Act of June 30, 1906, c. 3913, 34 Stat. 676.[15] These relate only to inspection and not to condemnation or destruction.[16] Nor do we find such power in the regulatory provisions of § 2325, note 10, *supra,* or any interpretation by the Department of Agriculture leading to that conclusion. The regulations contain no directions for condemnation. B. D. I. Order No. 1—Revised, December 24, 1936; 9 C. F. R. 301. The views of the Solicitors of Agriculture have long been in accord with our conclusion. Opinion No. 2829, October 18, 1940.[17]

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[15] "The Secretary of Agriculture shall cause to be made, by experts in sanitation or by other competent inspectors, such inspection of all slaughtering, meat canning, salting, packing, rendering, or similar establishments in which cattle, sheep, swine, and goats are slaughtered and the meat and meat food products thereof are prepared for interstate or foreign commerce as may be necessary to inform himself concerning the sanitary conditions of the same, and to prescribe the rules and regulations of sanitation under which such establishments shall be maintained; and where the sanitary conditions of any such establishment are such that the meat or meat food products are rendered unclean, unsound, unhealthful, unwholesome, or otherwise unfit for human food, he shall refuse to allow said meat or meat food products to be labeled, marked, stamped, or tagged as 'inspected and passed.' "

[16] An error appeared in 26 U. S. C. § 997 (c) in the codification of the proviso of 37 Stat. 273, which extended the sanitary provisions of the Act of June 30, 1906, 34 Stat. 676, to renovated butter, so that the codification read: "The sanitary provisions for slaughtering, meat canning, or similar establishments as set forth in sections 71 to 93 of Title 21, shall be extended to cover renovated butter factories as defined in this subchapter, under such regulations as the Secretary of Agriculture may prescribe." This error was corrected in I. R. C. § 2327 (c). See note 10, *supra.*

[17] Legislative history indicates that a contrary purpose was in the mind of the departmental proponents of the 1912 legislation. See 48 Cong. Rec. 2690–91, 6325; House Rep. No. 271, 62d Cong., 2d Sess., p. 4; Sen. Rep. No. 696, 62d Cong., 2d Sess., p. 2; Conference Report,

The state act, which petitioners say conflicts and interferes with the federal, is the usual type of general food and drug regulation. Alabama Code 1940, Tit. 2, c. 1. Power is conferred on the state Board of Agriculture and Industries to promulgate rules and regulations with the Commissioner of Agriculture and Industries as the chief administrative official. The issue arises over action taken under § 495, quoted so far as pertinent below.[18]

The controversy comes to this: The federal law requires, § 2325, note 10, *supra*, "a rigid sanitary inspection . . . of all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market, and of the products thereof and materials going into the manufacture of the same," i. e., packing stock butter.[19]

House Rep. No. 1150, 62d Cong., 2d Sess., pp. 1, 10; Hearings on the Estimates of Appropriations (Agricultural Appropriation Bill), House Committee on Agriculture, 62d Cong., 2d Sess., pp. 325–328; Hearing on Agriculture Appropriation Bill, Senate Subcommittee of Committee on Agriculture and Forestry, 62d Cong., 2d Sess., pp. 14–15.

[18] "Any article, substance, material, or product, the possession and sale of which is regulated under the provisions of this chapter, which is adulterated, misbranded . . . within the meaning of any provision of this chapter, and which is manufactured for sale, held in possession with intent to sell, offered or exposed for sale, or sold or delivered within this state, shall be liable to be proceeded against in the circuit court of the county where the same is found, and seized for confiscation by writ of attachment for condemnation. Such writ shall issue upon the sworn complaint of the commissioner or his duly authorized agent, . . . If a judgment of condemnation and confiscation is rendered against such article or product as being adulterated . . . the same shall be disposed of by destruction or sale, as the court may direct . . ."

[19] 26 U. S. C. § 2325. "And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in course of exportation or shipment he shall have power to confiscate the same."

But, as we have seen, the Secretary of Agriculture of the United States cannot condemn the packing stock butter. The Commissioner of Agriculture and Industries of Alabama claims authority under the state statute to condemn packing stock butter held for renovation.[20] Does the state's claim interfere or conflict with the federal power?

On the face of the statutes a solution of the conflict might be reached on the ground that the state statute authorizes condemnation only when the packing stock butter is held for sale "within the state" in its then condition. Such a suggestion does not meet the issue, however. The bill alleges, and the motion to dismiss and stipulation admit, the seizure of a kind of raw material none of which, either that seized or used, had ever been so held or offered for sale in packing stock condition.

We lay aside also, as inapplicable, the suggestion that the highest court of Alabama, in *State* v. *Cecil*, 216 Ala. 391, 113 So. 254, held that the Agricultural Code of that state was not intended to cover goods in interstate commerce, and that, therefore, since these materials are in interstate commerce, they are beyond the scope of the Alabama Code. The opinion in the *Cecil* case dealt with a different section, one relating to licensing farm product commission merchants. The defendant was engaged in interstate business only. For that section the decision of the Alabama court is final. It did not consider the section here under examination, and in our view, which, of course, is not controlling on Alabama courts, § 495 in the absence of conflict or interference with a specific federal act would be effective to condemn goods held in Alabama under the terms of the section, even though the goods were commingled with a mass, some of which would be ultimately

[20] ". . . which is manufactured for sale, held in possession with intent to sell, offered or exposed for sale, or sold or delivered within this State . . ."

exported from the state. State power over food supplies held within its borders would extend at least so far. *Sligh* v. *Kirkwood,* 237 U. S. 52. On the other hand, federal control over interstate commerce would, if it is exercised, extend over that portion of the material which would ultimately be sold in Alabama as renovated butter. *Minnesota Rate Cases,* 230 U. S. 352, 399; *Currin* v. *Wallace,* 306 U. S. 1, 11; *United States* v. *Rock Royal Co-op.,* 307 U. S. 533, 568; *United States* v. *Darby,* 312 U. S. 100, 122. But, of course, if any of the finished product is offered for sale in Alabama, such product becomes immediately subject to the requirements of the pure food laws of that state.

Coming finally to the query whether the state's claim interferes or conflicts with the purpose or provisions of the federal legislation, we determine that it does. The manufacture and distribution in interstate and foreign commerce of process and renovated butter is a substantial industry which, because of its multi-state activity, cannot be effectively regulated by isolated competing states. Cf. *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 588; *United States* v. *Darby,* 312 U. S. 100, 122. Its wholesome and successful functioning touches farm producers and city consumers. Science made possible the utilization of large quantities of packing stock butter which fell below the standards of public demand [21] and Congress under-

[21] The annual report of the Commissioner of Internal Revenue for the year ending June 30, 1903, shows that, during the first fiscal year after the adoption of the renovated butter act, the production was 54,658,790 pounds. House Doc. No. 11, 58th Cong., 2d Sess., p. 161. In more recent years, according to the report for the year ending June 30, 1940, p. 144, table 39, the production was:

1931.....	1,499,041 lbs.	1936.....	2,252,920 lbs.
1932.....	1,124,299 "	1937.....	2,737,181 "
1933.....	1,002,131 "	1938.....	2,435,499 "
1934.....	1,219,166 "	1939.....	2,906,117 "
1935.....	1,844,561 "	1940.....	2,706,852 "

took to regulate the production in order that the resulting commodity might be free of ingredients deleterious to health. It left the states free to act on the packing stock supplies prior to the time of their delivery into the hands of the manufacturer and to regulate sales of the finished product within their borders. But, once the material was definitely marked for commerce by acquisition of the manufacturer, it passed into the domain of federal control.

Inspection of the factory and of the material was provided for explicitly. Confiscation of the finished product was authorized upon a finding of its unsuitability for food through the use of unhealthful or unwholesome materials, a finding that might be based upon visual or delicate laboratory tests, or upon observation of the use of such materials in the process of manufacture. I. R. C. § 2325; 9 C. F. R. §§ 301.41–43. By the statutes and regulations,[22] the Department of Agriculture has authority to watch the consumer's interest throughout the process of manufacture and distribution. It sees to the sanitation of the factories in such minutiae as the clean hands of the employees and the elimination of objectionable odors, inspects the materials used, including air for aerating the oils, and confiscates the finished product when materials which would be unwholesome if utilized are present after manufacture.[23] Confiscation by the state of material in production nullifies federal discretion over ingredients.

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[22] 9 C. F. R. §§ 301.3–21, 301.32–33.

[23] *Id.*, "301.33 Deleterious products seizable. The Secretary of Agriculture will determine whether or not materials being used in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product. If any materials which have been so determined to be deleterious to health or unwholesome in the finished product are found to be present in any process or renovated butter, intended for, or in course of, exportation or shipment in interstate commerce, such process or renovated butter will be confiscated, as provided for in § 301.44."

It is said that the state and the United States have worked coöperatively in protecting consumers from vicious practices in the handling of processed butter; that any action by the state aids the policy of both in disposing of unfit food; and that therefore a harmonious federal-state relationship should not be hampered. Our duty to deal with contradictory functions of state and nation, on any occasion, and particularly when one or the other is challenged by private interests, calls for the utmost effort to avoid conclusions which interfere with the governmental operations of either. Nothing could be more fertile for discord, however, than a failure to define the boundaries of authority. Clashes may and should be minimized by mutual tolerance; but they are much less likely to happen when each knows the limits of its responsibility. And, it is only reasonable to assume that the theory of denying inconsistent powers to a state is based largely upon the benefits to the regulated industry of freedom from inconsistencies.

Congress hardly intended the intrusion of another authority during the very preparation of a commodity subject to the surveillance and comprehensive specifications of the Department of Agriculture. To uphold the power of the State of Alabama to condemn the material in the factory, while it was under federal observation and while federal enforcement deemed it wholesome, would not only hamper the administration of the federal act but would be inconsistent with its requirements. Whether the sanction used to enforce the regulation is condemnation of the material or the product is not significant. Since there was federal regulation of the materials and composition of the manufactured article, there could not be similar state regulation of the same subject.[24]

Reversed.

[24] Cf. *Charleston & W. C. Ry. Co.* v. *Varnville Co.*, 237 U. S. 597, 604,—"When Congress has taken the particular subject-matter in hand

MR. CHIEF JUSTICE STONE:

I think the judgment should be affirmed.

The decision of the Court appears to me to depart radically from the salutary principle that Congress, in enacting legislation within its constitutional authority, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless the state act, in terms or in its practical administration, conflicts with the act of Congress or plainly and palpably infringes its policy. *Sinnot* v. *Davenport,* 22 How. 227, 243; *Missouri, K. & T. Ry. Co.* v. *Haber,* 169 U. S. 613, 623; *Reid* v. *Colorado,* 187 U. S. 137, 148; *Savage* v. *Jones,* 225 U. S. 501, 533; *Missouri, K. & T. Ry. Co.* v. *Harris,* 234 U. S. 412, 419; *Carey* v. *South Dakota,* 250 U. S. 118, 122; *Atchison, T. & S. F. Ry. Co.* v. *Railroad Commission,* 283 U. S. 380, 391; *Townsend* v. *Yeomans,* 301 U. S. 441, 454; *Kelly* v. *Washington,* 302 U. S. 1, 10; cf. *Maurer* v. *Hamilton,* 309 U. S. 598, 614.

We have here no question of an unexercised discretionary power given by Congress to a federal official as the means of regulating interstate commerce, where the full exercise of his authority would conflict with an assertion of the state power. In such circumstances the state's authority to act turns upon the question, which this Court has often been called upon to answer, whether the failure of the federal official to exercise his full power is in effect a controlling administrative ruling that no further regulation by either federal or state government is needful. *Napier* v. *Atlantic Coast Line Ry. Co.,* 272 U. S. 605; cf. *Mintz* v. *Baldwin,* 289 U. S. 346; *Northwestern Bell Telephone Co.* v. *Railway Commission,* 297 U. S. 471; *Welch Co.* v. *New Hampshire,* 306 U. S. 79.

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coincidence is as ineffective as opposition. . . ." *Erie R. Co.* v. *New York,* 233 U. S. 671, 683,—"It is not that there may be division of the field of regulation, but an exclusive occupation of it when Congress manifests a purpose to enter it."

Here, concededly, the Secretary is exercising all the authority he has. His authority under 32 Stat. 196, 26 U. S. C. § 2325, to seize and condemn is restricted to the manufactured product, "renovated butter." It does not extend to "packing stock butter" intended to be used in making the product. But as construed by the Court the act has deprived Alabama of the power which it would otherwise possess to seize spoiled packing stock butter, without conferring that authority on any federal officer. Thus both the federal and the state governments are left powerless to condemn an article which is a notorious menace to health,[1] a substantial part of which is never shipped out of the state. A congressional purpose to immunize from regulation, state and national, a substance so obviously requiring control is not lightly to be inferred, especially where public health or safety is concerned. *Mintz* v. *Baldwin, supra,* 350; *Kelly* v. *Washington, supra,* 14; *Welch Co.* v. *New Hampshire, supra,* 85.

The Secretary is also given authority by the federal act to inspect the place and process of manufacturing renovated butter, the ingredients going into it, and the renovated product itself, which he may confiscate if he finds it to be deleterious to health. But his authority over packing stock butter before it is used for manufacture is restricted to its inspection. The inspection thus affords a means of determining whether the manufactured product in which packing stock is used, and which the Secretary may seize, contains a deleterious ingredient, the presence

[1] A report of August 25, 1933, p. 3, by a member of the staff of the microanalytical laboratory of the Food and Drug Administration indicated the following contents in three samples of 100 grams each from certain lots of packing stock seized from companies which manufacture renovated butter: (A) 37 fly maggots, 7 rodent hairs, 1 feather, cinders and sand; (B) 4 fly maggots, 1 fly, 2 ants, 1 cow hair, 1 human hair, grass and sawdust; (C) 1 fly maggot, 11 brown ants, 1 human hair, 1 beetle larva, 1 beetle head.

of which in the product can often be ascertained, if at all, only by delicate chemical tests.[2]

The legislative history of the federal act shows, what is evident from its words, that its aim is to use the federal power to prevent, by seizure and condemnation, the interstate distribution of renovated butter when found unfit for food. 35 Cong. Rec. 3316, 4586. The grant of authority to the Secretary to inspect the ingredients and seize the product gives no indication of a congressional purpose to hamper state control over the contaminated materials before their manufacture into the finished product. Indeed, Congress not only confined the Secretary's authority to make seizures to the renovated product, but in assuming this control it was at pains to provide by 32 Stat. 193, 21 U. S. C. § 25, that the states should be free to exert their police power over the renovated material "in the same manner as though" it "had been produced in such State or Territory." The sponsor in the Senate of the bill containing this provision emphasized that it was not intended to restrict the power of the states, but rather to expand their authority to include original packages in interstate commerce. 35 Cong. Rec. 3605. In the face of these disavowals with respect to the finished product which Congress brought under federal authority, one can hardly infer a congressional purpose to restrict the states' power over the ingredient which Congress did not seek to control; or that Congress could have had any object in denying the states power to seize the offensive ingredient when it left them free to seize the product because it contained the ingredient.

Moreover, not only is there a complete want of conflict between the two statutes and their administration, but it seems plain that the Alabama statute, both by its terms and in its practical administration, aids and supplements

[2] See Note 3, *infra*.

the federal regulation and policy. Consequently there is no room for any inference that Congress, by its enactment, sought to stay the hands of the state in the exercise of a power with which the federal act does not conflict. The basic and identical concern of both governments is to protect the consuming public from contaminated butter. If the state seizes unfit packing stock, the federal authorities are relieved of the necessity of detecting it and of seizing the renovated product which it contaminates.[3] In exercising the powers conferred on him by the Act, the Secretary is not concerned with the quality of packing stock save as it is used in making renovated butter. Seizure of it by the state at the same time removes all necessity and duty of federal inspection, since, in any

[3] The Assistant Chief of the Bureau of Dairy Industry, in a letter to the Solicitor for the Department, July 22, 1941, which accompanied a proposed bill to give the department authority to condemn filthy ingredients going into renovated butter, said:

"It is axiomatic that despite the processes through which butter or butter oil pass during the course of manufacturing renovated butter, certain soluble materials unfit for human consumption cannot be removed and it is difficult if not impossible to detect them in the finished product. For example, a lot of butter may be infested with maggots and should be condemned for use in the manufacture of renovated butter. If not, in the melting process fat from these maggots will be mixed with the butter fat and the animal fat may be detected in the finished product only by chemical laboratory tests, if at all."

A representative of the Department, appearing at the House Committee Hearings on the Agricultural Appropriation Bill for the fiscal year ending June 30, 1913, noted another difficulty in locating contaminated renovated butter:

"But if 500 pounds of rotten packing stock is in a factory, maybe there is 10,000 pounds of other packing stock there; and you can understand how impossible it is for us to follow through that packing stock so as to be able to identify it when it comes out of the factory and is offered for sale."

Hearings of the House Committee on Agriculture on the Agricultural Appropriation Bill, 62d Cong., 2d Sess., p. 328.

event, it will never become an ingredient of renovated butter.

The opinion, while recognizing that the Department has long taken the view that it has no power to seize packing stock butter, disregards administrative actualities in assuming that state seizure of it would involve an "intrusion" into the federal domain, which would "hamper the administration of the federal act." The record of administration is not one of belligerency and jurisdictional jealousy, but of active and sympathetic coöperation between state and federal agencies in effecting a common purpose, prevention of the consumption of unfit butter, whether that objective is accomplished by state seizure of the packing stock or federal condemnation of the renovated product.[4] To find in such circumstances an intent to restrict

[4] The Memorandum of the Chief of The Bureau of Dairy Industry to the Solicitor of The Department of Agriculture, October 4, 1940, states in part: "The development and perfection during the past few years of new methods for analyzing and examining butter has resulted in increased regulatory activity and action against farm-made or 'packing stock' butter intended for use in the manufacture of process or renovated butter. Certain State regulatory agencies and the Federal Food and Drug Administration have been particularly active.

"The Bureau of Dairy Industry, which is the administrative agency designated by the Secretary of Agriculture to enforce the process or renovated butter act, is entirely sympathetic with the activities of these agencies, although the apparently limiting provisions of Section 5 of the Act of May 9, 1902 (32 Stat. 196), with which this Bureau is primarily concerned, as construed in opinions of your office, have necessarily governed and guided this Bureau in its administrative policy in carrying out the provisions of the Act."

In his Annual Report on Regulatory Work of the Bureau of Dairy Industry, 1940, the Officer in Charge of Dairy Products Inspection reported, p. 4: "In conducting the inspection of all process or renovated butter factories, this office has maintained close contact with . . . local state and city regulatory agencies and officials and whenever possible cooperative action for improvement of conditions have been taken." *Id.*, 1939, p. 4: "The result of State regulatory activity in the

state power, not required by the words of the statute, is to condemn a working, harmonious federal-state relationship for the sake of a sterile and harmful insistence on exclusive federal power.

The controlling elements in this case seem identical with those in the application of the Pure Food and Drugs Act of 1906, 34 Stat. 768, which this Court has held imposes no restriction on state action which supplements the federal act and does not conflict with its terms or practical administration. In sustaining local regulations requiring the labels placed on animal foodstuffs to disclose their ingredients, in addition to the truthful description of the product demanded by the federal act, this Court said: "The requirements, the enforcement of which the bill seeks to enjoin, are not in any way in conflict with the provisions of the Federal act. They may be sustained without impairing in the slightest degree its operation and effect. There is no question here of conflicting standards or of opposition of state to Federal authority." *Savage* v. *Jones, supra,* 225 U. S. at 539. State regulation yields only when it is in conflict with the administration or terms of the Pure Food and Drugs Act. Cf. *McDermott* v. *Wisconsin,* 228 U. S. 115. The same view has been taken in other cases where state and federal governments

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South has been beneficial in improving the procurement methods used in getting packing stock butter to the factories. More frequent pickups have been inaugurated and both Atlanta and Birmingham factories have expended hundreds of dollars in new specially made cans with tight fitting covers, and the packing stock received is very much cleaner." *Id.,* 1938, p. 2: "Much of the credit for improvement in quality of packing stock butter belongs to State and Federal regulatory agencies cooperating in campaigns to improve procurement practices." *Id.,* p. 3: "In conducting the inspection of process or renovated butter factories, this office has maintained close contact with State and city regulatory officials and when deemed advisable cooperative action for improvement of sanitary conditions has been taken."

by concurrent and nonconflicting control over subjects of commerce were seeking to protect the health or safety of the public. *Corn Products Refining Co.* v. *Eddy,* 249 U. S. 427; *Reid* v. *Colorado,* 187 U. S. 137; *Missouri, K. & T. Ry. Co.* v. *Haber, supra,* 169 U. S. 613; cf. *Whipple* v. *Martinson,* 256 U. S. 41; *Hartford Accident & Ind. Co.* v. *Illinois,* 298 U. S. 155; *Kelly* v. *Washington, supra,* 302 U. S. 1. Such should be our construction of the Renovated Butter Act. It seems ironical for us to say that although state seizures of petitioner's packing stock are not precluded by the judicial and administrative [5] construction of the Pure Food and Drugs Act, which authorizes federal confiscation of the filthy ingredient, petitioner has nevertheless discovered an avenue of escape by appeal to the Renovated Butter Act which does not authorize federal seizure of the ingredient.

It is one thing for courts in interpreting an Act of Congress regulating matters beyond state control to construe its language with a view to carrying into effect a general though unexpressed congressional purpose. It is quite another to infer a purpose, which Congress has not expressed, to deprive the states of authority which otherwise constitutionally belongs to them, over a subject which Congress has not undertaken to control. Due regard

[5] A report by the officer in charge of the Cereal and Dairy Section, Food Division, of the Food and Drug Administration, to the Commissioner of Food and Drugs, on January 20, 1942, discloses that between July 1, 1933 and January 1, 1942, thirty-six seizures were made of lots of packing stock butter consigned to process butter plants. In commenting upon the extent of state coöperation in such seizures, it was noted that in twenty-one of such cases the packing stock was detained by the state authorities pending the filing by federal officials of a libel for condemnation proceedings under the Pure Food and Drugs Act, 21 U. S. C. § 334. These seizures included four lots of packing stock totaling over 5,000 pounds shipped to petitioner, and detained by the Alabama authorities until condemnation proceedings were begun in the federal court.

for the maintenance of our dual system of government demands that the courts do not diminish state power by extravagant inferences regarding what Congress might have intended if it had considered the matter, or by reference to their own conceptions of a policy which Congress has not expressed and is not plainly to be inferred from the legislation which it has enacted. Considerations which lead us not to favor repeal of statutes by implication, *United States* v. *Borden Co.*, 308 U. S. 188, 198–9; *United States* v. *Jackson*, 302 U. S. 628, 631; *Posados* v. *National City Bank*, 296 U. S. 497, 503, 505, should be at least as persuasive when the question is one of the nullification of state power by congressional legislation.

MR. JUSTICE FRANKFURTER, MR. JUSTICE MURPHY, and MR. JUSTICE BYRNES join in this opinion.

MR. JUSTICE FRANKFURTER:

I agree entirely with the opinion of the CHIEF JUSTICE. I shall add only a few words on the general bearing of the majority opinion upon the legislative process.

From the very beginning of our government in 1789, federal legislation like that now under review has usually not only been sponsored but actually drafted by the appropriate executive agency. This was true of the Act of August 10, 1912, 37 Stat. 273, amending the Renovated Butter Act. The Department of Agriculture not only urged the enactment of the legislation upon Congress, it drafted its provisions. If the Department wanted Congress to withdraw from the states their power to condemn unsanitary packing stock and to confide such power in the federal government, it could easily have made appropriate provision in the draft submitted by it to Congress. However, the Department did not do so. It did ask Congress to make some restrictions upon the authority which had been exercised by the states in regulating the manufac-

ture and sale of butter for the protection of their citizens. But the restrictions did not include withdrawal from the states of the power to condemn unhealthful packing stock butter. The sponsors of this legislation, the experts of the Department of Agriculture, could have submitted to Congress appropriate language for the accomplishment of that result. They did not do so. The Court now does it for them even though the Department has no such desire.

To require the various agencies of the government who are the effective authors of legislation like that now before us to express clearly and explicitly their purpose in dislodging constitutional powers of states—if such is their purpose—makes for care in draftsmanship and for responsibility in legislation. To hold, as do the majority, that paralysis of state power is somehow to be found in the vague implications of the federal renovated butter enactments, is to encourage slipshodness in draftsmanship and irresponsibility in legislation.

The majority opinion points out that the successive Solicitors of the Department of Agriculture have uniformly been of the opinion that the Department lacks the power to condemn or destroy unwholesome packing stock butter. If the Department were not content to have the states continue to exercise that power, it would have gone to Congress. In these circumstances it is strange to find in this legislation a denial to the states of powers which the Department has disclaimed and to the exercise of which by the states it has never objected.

The result of this decision is to deny Alabama the power to protect the health of its citizens without replacing such protection by that of the federal government. The CHIEF JUSTICE does well to call attention to the fact that such a construction of the Renovated Butter Act gratuitously destroys the harmonious coöperation between the nation and the states in safeguarding the health of our people. If

ever there was an intrusion by this Court into a field that belongs to Congress, and which it has seen fit not to enter, this is it. And what is worse, the decision is purely destructive legislation—the Court takes power away from the states but is, of course, unable to transfer it to the federal government.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* ALABAMA ASPHALTIC LIMESTONE CO.

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

No. 328. Argued January 15, 1942.—Decided February 2, 1942.

1. Pursuant to a plan of its creditors, an insolvent corporation was adjudged bankrupt; its assets were sold by the bankruptcy trustee, bid in by the creditors' committee, and acquired by a new corporation in exchange for its stock, all of which was issued to creditors of the old corporation in satisfaction of their claims, the old stockholders being eliminated. Non-assenting minority creditors were paid in cash. Operations were not interrupted by the reorganization and were carried on subsequently by substantially the same persons as before. *Held:*

(1) A "reorganization" within the meaning of § 112 (i) (1) of the Revenue Act of 1928; so that, in computing depreciation and depletion for the year 1934, the assets of the new corporation, so acquired, had the same basis that they had when owned by the old corporation. Pp. 181, 183.

(2) The continuity of interest test was satisfied since the creditors had effective command over the disposition of the property from the time when they took steps to enforce their demands against their insolvent debtor by the institution of bankruptcy proceedings. At that time they stepped into the shoes of the old stockholders. P. 183.

(3) The transaction here met the statutory standard of a "reorganization" even though at the time of acquisition by the new corporation the property belonged to the committee and not to the old corporation, since the acquisition by the committee was an integrated part of a single reorganization plan. P. 184.

2. The full priority rule of *Northern Pacific R. Co.* v. *Boyd*, 228 U. S. 482, applies to proceedings in bankruptcy as well as to equity receiverships. P. 183.
3. The full priority rule gives creditors, whether secured or unsecured, the right to exclude stockholders entirely from a reorganization plan when the debtor is insolvent. P. 183.

119 F. 2d 819, affirmed.

CERTIORARI, 314 U. S. 598, to review a judgment affirming a decision of the Board of Tax Appeals, 41 B. T. A. 324, which overruled a deficiency assessment.

Assistant Attorney General Clark, with whom *Solicitor General Fahy,* and *Messrs. J. Louis Monarch* and *Samuel H. Levy* were on the brief, for petitioner.

Mr. James A. O'Callaghan for respondent.

Messrs. Walter J. Brobyn, Edgar J. Goodrich, and *Neil Burkinshaw* filed a brief, as *amici curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent, in 1931, acquired all the assets of Alabama Rock Asphalt, Inc., pursuant to a reorganization plan consummated with the aid of the bankruptcy court. In computing its depreciation and depletion allowances for the year 1934, respondent treated its assets as having the same basis which they had in the hands of the old corporation. The Commissioner determined a deficiency, computed on the price paid at the bankruptcy sale.[1] The Board of Tax Appeals rejected the position of the Commissioner. 41 B. T. A. 324. The Circuit Court of Appeals affirmed. 119 F. 2d 819. We granted the petition for certiorari be-

[1] Petitioner now takes the position that the new basis should be measured by the market value of the assets rather than the bid price. See *Bondholders Committee* v. *Commissioner, post,* p. 189.

cause of the conflict between that decision [2] and *Commissioner* v. *Palm Springs Holding Corp.*, 119 F. 2d 846, decided by the Circuit Court of Appeals for the Ninth Circuit, and *Helvering* v. *New President Corp.*, 122 F. 2d 92, decided by the Circuit Court of Appeals for the Eighth Circuit.

The answer to the question [3] turns on the meaning of that part of § 112 (i) (1) of the Revenue Act of 1928 (45 Stat. 791, 818) which provides: "The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of . . . substantially all the properties of another corporation. . . ."

The essential facts can be stated briefly. The old corporation was a subsidiary of a corporation which was in receivership in 1929. Stockholders of the parent had financed the old corporation taking unsecured notes for their advances. Maturity of the notes was approaching and not all of the noteholders would agree to take stock for their claims. Accordingly, a creditors' committee was formed, late in 1929, and a plan of reorganization was proposed to which all the noteholders, except two, assented. The plan provided that a new corporation would be formed which would acquire all the assets of the old corporation. The stock of the new corporation, preferred and common, would be issued to the creditors in satisfaction of their claims. Pursuant to the plan, involuntary bankruptcy proceedings were instituted in 1930. The appraised value of the bankrupt corporation's assets was about $155,000. Its obligations were about $838,000, the unsecured notes with accrued interest aggregating somewhat over $793,000.

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[2] And see *Commissioner* v. *Kitselman*, 89 F. 2d 458, and *Commissioner* v. *Newberry Lumber & Chemical Co.*, 94 F. 2d 447, which are in accord with the decision below.

[3] If there was a "reorganization," the respondent was entitled to use the asset basis of the old corporation as provided in § 113 (a) (7).

The bankruptcy trustee offered the assets for sale at public auction. They were bid in by the creditors' committee for $150,000. The price was paid by $15,000 in cash, by agreements of creditors to accept stock of a new corporation in full discharge of their claims, and by an offer of the committee to meet the various costs of administration, etc. Thereafter, respondent was formed and acquired all the assets of the bankrupt corporation. It does not appear whether the acquisition was directly from the old corporation on assignment of the bid or from the committee. Pursuant to the plan, respondent issued its stock to the creditors of the old corporation—over 95% to the noteholders and the balance to small creditors. Nonassenting creditors were paid in cash. Operations were not interrupted by the reorganization and were carried on subsequently by substantially the same persons as before.

From the *Pinellas* case (287 U. S. 462) to the *LeTulle* case (308 U. S. 415) it has been recognized that a transaction may not qualify as a "reorganization" under the various revenue acts though the literal language of the statute is satisfied. See Paul, Studies in Federal Taxation (3d Series), pp. 91 *et seq.* The *Pinellas* case introduced the continuity of interest theory to eliminate those transactions which had "no real semblance to a merger or consolidation" (287 U. S. p. 470) and to avoid a construction which "would make evasion of taxation very easy." *Id.* p. 469. In that case, the transferor received in exchange for its property cash and short term notes. This Court said (*id.* p. 470): "Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase-money notes." In the *LeTulle* case, we held that the term of the obligation received by the seller was immaterial. "Where the consideration is wholly in the transferee's bonds, or

part cash and part such bonds, we think it cannot be said that the transferor retains any proprietary interest in the enterprise." 308 U. S. pp. 420–421. On the basis of the continuity of interest theory as explained in the *LeTulle* case, it is now earnestly contended that a substantial ownership interest in the transferee company must be retained by the holders of the ownership interest in the transferor. That view has been followed by some courts. *Commissioner* v. *Palm Springs Holding Corp., supra; Helvering* v. *New President Corp., supra.* Under that test, there was "no reorganization" in this case, since the old stockholders were eliminated by the plan, no portion whatever of their proprietary interest being preserved for them in the new corporation. And it is clear that the fact that the creditors were for the most part stockholders of the parent company does not bridge the gap. The equity interest in the parent is one step removed from the equity interest in the subsidiary. In any event, the stockholders of the parent were not granted participation in the plan *qua* stockholders.

We conclude, however, that it is immaterial that the transfer shifted the ownership of the equity in the property from the stockholders to the creditors of the old corporation. Plainly, the old continuity of interest was broken. Technically that did not occur in this proceeding until the judicial sale took place. For practical purposes, however, it took place not later than the time when the creditors took steps to enforce their demands against their insolvent debtor. In this case, that was the date of the institution of bankruptcy proceedings. From that time on, they had effective command over the disposition of the property. The full priority rule of *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 482, applies to proceedings in bankruptcy as well as to equity receiverships. *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106. It gives creditors, whether secured or unsecured, the right to ex-

clude stockholders entirely from the reorganization plan when the debtor is insolvent. See *In re 620 Church St. Bldg. Corp.*, 299 U. S. 24. When the equity owners are excluded and the old creditors become the stockholders of the new corporation, it conforms to realities to date their equity ownership from the time when they invoked the processes of the law to enforce their rights of full priority. At that time they stepped into the shoes of the old stockholders. The sale "did nothing but recognize officially what had before been true in fact." *Helvering* v. *New Haven & S. L. R. Co.*, 121 F. 2d 985, 987.

That conclusion involves no conflict with the principle of the *LeTulle* case. A bondholder interest in a solvent company plainly is not the equivalent of a proprietary interest, even though upon default the bondholders could retake the property transferred. The mere possibility of a proprietary interest is, of course, not its equivalent. But the determinative and controlling factors of the debtor's insolvency and an effective command by the creditors over the property were absent in the *LeTulle* case.

Nor are there any other considerations which prevent this transaction from qualifying as a "reorganization" within the meaning of the Act. The *Pinellas* case makes plain that "merger" and "consolidation" as used in the Act includes transactions which "are beyond the ordinary and commonly accepted meaning of those words." 287 U. S. p. 470. Insolvency reorganizations are within the family of financial readjustments embraced in those terms as used in this particular statute. Some contention, however, is made that this transaction did not meet the statutory standard because the properties acquired by the new corporation belonged at that time to the committee and not to the old corporation. That is true. Yet, the separate steps were integrated parts of a single scheme. Transitory phases of an arrangement frequently are dis-

regarded under these sections of the revenue acts where they add nothing of substance to the completed affair. *Gregory* v. *Helvering*, 293 U. S. 465; *Helvering* v. *Bashford*, 302 U. S. 454. Here they were no more than intermediate procedural devices utilized to enable the new corporation to acquire all the assets of the old one pursuant to a single reorganization plan.

Affirmed.

MR. JUSTICE ROBERTS did not participate in the consideration or decision of this case.

PALM SPRINGS HOLDING CORPORATION *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 503. Argued January 15, 1942.—Decided February 2, 1942.

Pursuant to a plan made by indenture bondholders of an insolvent corporation, a new corporation was formed, which acquired more than one-half of the bond issue in exchange for shares of its stock issued to bondholder creditors, but none of which was issued to any present or former stockholder of the old corporation for any right of his *qua* stockholder; and the properties of the old corporation were bought in and acquired by the new corporation at trustee's foreclosure sale. *Held*, a "reorganization" within the meaning of § 112 (i) (1) (A) of the Revenue Act of 1932. *Helvering* v. *Alabama Asphaltic Limestone Co.*, *ante*, p. 179. P. 188.

119 F. 2d 846, reversed.

CERTIORARI, 314 U. S. 598, to review a judgment sustaining a deficiency assessment which had been sustained in part by the Board of Tax Appeals.

Mr. John E. Hughes, with whom *Mr. Thomas R. Dempsey* was on the brief, for petitioner.

Assistant Attorney General Clark, with whom *Solicitor General Fahy,* and *Messrs. J. Louis Monarch* and *Samuel H. Levy* were on the brief, for respondent.

Mr. Thomas J. Herbert, Attorney General of Ohio, filed a brief on behalf of that State, as *amicus curiae,* in support of petitioner.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case is a companion case to *Helvering* v. *Alabama Asphaltic Limestone Co., ante,* p. 179. This, too, was an insolvency reorganization, though a different procedure was employed to consummate it. The old corporation had outstanding about $300,000 face amount of first mortgage bonds, secured by a lien on its realty. The property, which was an hotel, was leased to an operating company. In 1931, as a result of transactions not relevant here, one Pinney became the sole stockholder of the old corporation and of the operating company. The furniture and fixtures in the hotel were owned by the operating company. They were covered by a chattel mortgage which, together with the lease on the hotel, were assigned and pledged as part of the security for the bond issue. In 1931, both companies were in financial difficulties and insolvent, at least in the equity sense. A bondholders' committee was formed, which received deposits of more than half of the face amount of the bonds. Petitioner was formed in 1932. Pursuant to the plan of reorganization, six shares of petitioner's preferred stock and four shares of its common stock were issued to assenting bondholders for each $1000 bond. In addition, all of petitioner's remaining common stock was issued to one Lacoe, in return for his agreement to pay the costs of incorporating petitioner, up to $1000, and for his agreement to lend money to petitioner. Before the actual issuance of

any of the shares, Lacoe agreed to transfer 1,000 shares of the common stock to Pinney, the sole stockholder of the two companies, for his services in the reorganization and as an inducement to him to continue as manager of the hotel. None of the stock of petitioner, however, was issued to any stockholder or former stockholder of either of the companies for any rights any of them had as stockholders. In May, 1932, the indenture trustee declared the principal of the bonds due and payable. Pursuant to the terms of the indenture, the trustee sold all of the properties of the old corporation, including the lease and chattel mortgage, to petitioner, the highest bidder. The bid price was $61,800. It was satisfied by the payment of about $18,700 in cash and by the delivery to the trustee of bonds of a face amount of $292,000 for the balance. Foreclosure proceedings against the old corporation and the operating company were then instituted. At the foreclosure sale, the furniture and fixtures, comprising all of the property of the operating company, were bought in by petitioner.

The Commissioner, in determining a deficiency in petitioner's income and excess profits tax for the fiscal year ended May 31, 1936, disallowed depreciation deductions on both the realty and personal property on the basis of cost to the old corporation and operating company.[1]

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[1] Sec. 113 (a) (7) of the 1932 Act (47 Stat. 169, 198) provides in part:

"(a) BASIS (UNADJUSTED) OF PROPERTY.—The basis of property shall be the cost of such property; except that—

. . . . . .

"(7) TRANSFERS TO CORPORATION WHERE CONTROL OF PROPERTY REMAINS IN SAME PERSONS.—If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount

He used as the basis the cost of the assets to petitioner plus the cost of additions. The Board of Tax Appeals sustained the Commissioner's determination with respect to the personal property but rejected it with respect to the realty. The Circuit Court of Appeals sustained the Commissioner on both points. 119 F. 2d 846.

Though the petition for certiorari raised the question, petitioner now concedes that the acquisition of the furniture and fixtures from the operating company was not a "reorganization" within the meaning of § 112 (i) (1) (A) of the Revenue Act of 1932. So we do not reach that issue. As respects the assets acquired from the old corporation, we think there was a "reorganization" within the meaning of § 112 (i) (1) (A) of the 1932 Act. That provision is the same in the 1932 Act as in the 1928 Act, which was involved in *Helvering* v. *Alabama Asphaltic Limestone Co., supra.* That case is determinative of this controversy. The transaction fits the literal language of the statute. The new corporation acquired the assets directly at the trustee's and the foreclosure sales. The legal procedure employed by the creditors is not material. The critical facts are that the old corporation was insolvent and that its creditors took steps to obtain effective com-

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of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made."

That provision is applicable here. See, § 114 (a), § 113 (b), § 113 (a) (12) of the Revenue Act of 1934, 48 Stat. 680. The property here involved was acquired after February 28, 1913, in a taxable year prior to January 1, 1934, as required by § 113 (a) (12). Respondent argues that this transaction was not a "reorganization" within the meaning of § 113 (a) (7). And he points out that "control" was not in the participating creditors since the majority of the new common stock had been distributed, for a consideration other than an exchange of bonds, to Lacoe and Pinney. But he does not contend that, assuming there was a "reorganization," an "interest" in the property of 50 per cent or more did not remain in the same persons (the bondholders) immediately after the transfer.

mand over its property. For the reasons stated in *Helvering* v. *Alabama Asphaltic Limestone Co., supra,* the creditors at that time acquired the equivalent of the proprietary interest of the old equity owner. Accordingly, the continuity of interest test is satisfied.

Reversed.

MR. JUSTICE ROBERTS did not participate in the consideration or decision of this case.

BONDHOLDERS COMMITTEE, MARLBOROUGH INVESTMENT CO., FIRST MORTGAGE BONDS, *v.* COMMISSIONER OF INTERNAL REVENUE.*

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

No. 128. Argued January 15, 1942.—Decided February 2, 1942.

1. Where property formerly owned by an insolvent corporation, subject to a deed of trust securing bonds, but which it has conveyed to another, is acquired through action of its bondholders by a newly formed corporation, partly through foreclosure of the mortgage and partly by purchase for cash from others to whom the legal title has passed by *mesne* conveyances, there is no "reorganization" within the meaning of § 112 (i) (1) (A) and (B) of the Revenue Act of 1932, as between the old and the new corporations—although, pursuant to the plan, all of the stock of the new corporation is issued to the bondholders of the old—since the property had ceased to be property of the old corporation. P. 192.
2. Section 113 (a) (7) of the Revenue Act of 1932 authorizes a carry-over of the basis of the properties in the hands of the transferor, not their basis in the hands of one who may have occupied an earlier position in the chain of ownership. P. 192.
3. The reorganization provisions here in question cover only intercorporate transactions. P. 193.

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*Together with No. 129, *Marlborough House, Inc.* v. *Commissioner of Internal Revenue,* also on writ of certiorari, 314 U. S. 590, to the Circuit Court of Appeals for the Ninth Circuit.

4. Section 112 (b) (5) of the Revenue Act, *supra*, includes transfers by individuals, but requires that the transferor remain in control, it being inapplicable where the transferor is bought out for cash. P. 193.
5. The cost of assets bid in by a mortgage creditor on foreclosure is to be determined by the fair market value of the property. P. 193.

118 F. 2d 511, affirmed.

CERTIORARI, 314 U. S. 590, to review judgments which reversed decisions of the Board of Tax Appeals, 40 B. T. A. 882, overruling deficiency assessments.

Mr. William Z. Kerr, with whom *Mr. Stephen V. Carey* was on the brief, for petitioners.

Assistant Attorney General Clark, with whom *Solicitor General Fahy* and *Messrs. J. Louis Monarch* and *Samuel H. Levy* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The primary question involved in these cases is whether the transaction in question qualified as a "reorganization" under that portion of § 112 (i) (1) of the Revenue Act of 1932 (47 Stat. 169, 196) which provides: "The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of . . . substantially all the properties of another corporation). . . ."

In 1927, the Marlborough Investment Co. issued its bonds in the principal amount of $500,000. They were secured by its apartment building in Seattle and the personal property therein. There was a default in May, 1932. A bondholders' committee was formed and there were deposited with it more than 97% of the total of over $450,000 face amount of the bonds then outstanding. In view of *Helvering* v. *Alabama Asphaltic Limestone Co.,*

ante, p. 179, the precise mechanics whereby the reorganization was consummated are not material. Suffice it to say, that pursuant to a plan of reorganization formulated by the committee under the broad powers accorded it in the deposit agreement, there was a foreclosure and sale; the committee was the successful bidder at the price of $340,425, which was paid by the surrender of deposited bonds plus cash; Marlborough House, Inc. was formed by the bondholders; it acquired the property from the committee and issued all of its stock to the depositing bondholders; and non-assenting bondholders were paid in cash their *pro rata* share of the purchase price. In determining the income tax liability of the committee [1] for a part of 1933, and of the new corporation for a part of 1933 and for 1934 and 1935, the Commissioner used as the basis for computing depreciation the price bid at the foreclosure sale. The Board of Tax Appeals found that neither the fair market value of the deposited bonds plus the cash expended in partial payment, nor the fair market value of the property, was in excess of $340,425, at the date of the foreclosure sale or when the committee took possession. The Board held that, since the new corporation had acquired the property in connection with a "reorganization," it was entitled to use the basis in the hands of the old corporation, less depreciation. 40 B. T. A. 882. The Circuit Court of Appeals reversed. 118 F. 2d 511.

For the reasons stated in *Helvering* v. *Alabama Asphaltic Limestone Co., supra,* this transaction clearly would have been a "reorganization" within the meaning of § 112 (i) (1) but for one fact. That fact is that the prop-

[1] The committee took possession of the property and managed it for a part of the year 1933, prior to the date when the new corporation acquired it. The Board held that the committee was taxable as a corporation on the income received during that period by it. The committee did not petition for review of that determination by the Circuit Court of Appeals.

erty was not acquired by the committee or the new corporation from Marlborough Investment Co.[2] In December, 1928, several years prior to the insolvency reorganization, Marlborough Investment Co., the issuer of the bonds, had transferred the property to another corporation. As a result of *mesne* conveyances the property was held in May, 1932 by State Developers, Inc. and one Cooley. While the foreclosure proceedings were pending, that corporation and Cooley executed and delivered a quitclaim deed to the property, in consideration of the payment of the cash sum of $10,025, which was furnished by the committee.

In view of these circumstances, there was no "reorganization" within the meaning of § 112 (i) (1). The parenthetical part of clause A which is relevant here covers "the acquisition by one corporation" of substantially all of the properties "of another corporation." Clause B covers certain transfers "by a corporation" of all or a part of its assets "to another corporation" where the transferor or its stockholders continue in control. These were not "properties" of Marlborough Investment Co. It had long since ceased to own them. It was not the "transferor." Furthermore, § 113 (a) (7) authorizes a carry-over of the basis of the properties [3] in the hands of the "transferor," not their basis in the hands of one who may have occupied an earlier position in the chain of ownership. Hence it is immaterial

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[2] Though respondent apparently did not urge this point before the Board or the court below, it may, of course, support the judgment here by any matter appearing in the record. *LeTulle* v. *Scofield,* 308 U. S. 415, 421, and cases cited.

[3] By § 114 (a), the basis upon which depreciation is allowed is the adjusted basis provided in § 113 (b) for the purpose of determining gain or loss. By § 113 (b), such adjusted basis is the basis determined under § 113 (a). By § 113 (a), the basis of property shall be "cost," with enumerated exceptions. One of those exceptions is contained in § 113 (a) (7), set forth in *Palm Springs Holding Corp.* v. *Commissioner, ante,* p. 185, note 1.

that under the rule of *Helvering* v. *Alabama Asphaltic Limestone Co., supra,* the bondholders had succeeded to all of the proprietary interest in Marlborough Investment Co. The property whose basis is in controversy here was not acquired from it. Nor was there a "reorganization" as between the committee or the new corporation on the one hand and State Developers, Inc. and Cooley on the other. Cooley was an individual. The "reorganization" provisions in question cover only inter-corporate transactions. Sec. 113 (a) (8) provides for a carry-over of the basis of the properties in the hands of the "transferor" if the property was acquired by a corporation after December 31, 1920, by the issuance of its stock or securities "in connection with a transaction" described in § 112 (b) (5). Sec. 112 (b) (5) includes transfers by individuals; [4] but it requires that the transferor remain in control. Cooley and State Developers, Inc. were bought out for cash.

It is argued that, if the committee's acquisition of the properties is to be treated as a purchase rather than a "reorganization," the cost to the committee should be measured by the amount of the cash advanced by the committee, plus the face value of the deposited bonds. There is no foundation for that contention. The basis of assets bid in by a mortgage creditor on foreclosure is to be determined by the fair market value of the property. See Art. 193, Treasury Regulations 77; *Helvering* v. *New President Corp.,* 122 F. 2d 92, 96–97. Although the Commissioner used the bid price in ascertaining the basis, the Board found that the market value of the assets did not exceed that amount. Respondent therefore suggests that a re-

[4] Sec. 112 (b) (5) provides in part: "No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation."

mand to the Board to ascertain the fair market value is not necessary. Accordingly, the judgment below is

Affirmed.

MR. JUSTICE ROBERTS did not participate in the consideration or decision of this case.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* SOUTHWEST CONSOLIDATED CORP.

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

No. 286. Argued January 14, 15, 1942.—Decided February 2, 1942.

1. Pursuant to a plan of creditors, the indenture securing bonds of an insolvent corporation was foreclosed and its properties transferred to a new corporation in exchange for common stock and stock purchase warrants of the latter, the common stock going mostly to bondholders of the old corporation, but a small portion of it, together with part of the warrants, to the old corporation's participating unsecured creditors, the other warrants going to the old corporation's preferred and common stockholders. Its non-participating security holders were paid cash, which was obtained in the course of the transaction by means of a loan from a bank which the new corporation later assumed and paid. *Held,* that the transaction is not a "reorganization" under § 112 (g) (1) of the Revenue Act of 1934. P. 198.

   To constitute a "reorganization" under clause B of that section, the assets of the transferor corporation must be acquired solely for voting stock of the transferee. Voting stock plus some other consideration does not meet the statutory requirement.

2. The provision of the Revenue Act of 1934, § 112 (g) (1) (B), as amended retroactively by the Revenue Act of 1939, that in determining whether an exchange is solely for voting stock "the assumption by the acquiring corporation of a liability of the other, or the fact that property acquired is subject to a liability, shall be disregarded," is inapplicable to an indebtedness arising out of the reorganization, such as the bank loan described *supra,* as dis-

tinguished from a debt of the transferor antedating the transaction. P. 198.

3. Warrants entitling the holder to buy voting common stock at so much per share are not "voting stock" within the meaning of § 112 (g) (1) (B) of the Revenue Act of 1934. P. 200.
4. Under clause C of § 112 (g) (1) of the Revenue Act of 1934, which requires that immediately after the transfer the transferor or its stockholders or both be in control of the transferee corporation, and § 112 (h) which defines "control," there is no reorganization where at the critical date control is in creditors of the old corporation by virtue of shares issued to them by the new corporation. P. 201.
5. "Recapitalization" within the meaning of clause D of § 112 (g), *supra*, implies a reshuffling of a capital structure within the framework of an existing corporation, and a transaction which shifts the ownership of the proprietary interest in the corporation is not "a mere change in identity, form, or place of organization" within the meaning of clause E. P. 202.

119 F. 2d 561, reversed.

CERTIORARI, 314 U. S. 598, to review a judgment which affirmed a decision of the Board of Tax Appeals overruling deficiency assessments.

Assistant Attorney General Clark, with whom *Solicitor General Fahy* and *Messrs. J. Louis Monarch* and *Samuel H. Levy* were on the brief, for petitioner.

Mr. A. Chauncey Newlin, with whom *Mr. Fred Simon* was on the brief, for respondent.

Messrs. Walter J. Brobyn, Edgar J. Goodrich, and *Neil Burkinshaw* filed a brief, as *amici curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The primary problem in this case is whether the transaction in question qualified as a "reorganization" under § 112 (g) (1) of the Revenue Act of 1934. 48 Stat. 680, 705. Sec. 112 (g) provides:

"As used in this section and section 113—

"(1) The term 'reorganization' means (A) a statutory merger or consolidation, or (B) the acquisition by one corporation in exchange solely for all or a part of its voting stock: of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation; or of substantially all the properties of another corporation, or (C) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (D) a recapitalization, or (E) a mere change in identity, form, or place of organization, however effected."

Respondent filed an income and excess profits tax return for a part of the year 1934 and for the entire year 1935, reporting a net loss for each year. Petitioner, in determining deficiencies, made certain adjustments on the theory that the acquisition by respondent in 1934 of all of the assets of its predecessor, Southwest Gas Utilities Corp., was not a "reorganization" as defined in § 112 (g) (1). The cost basis of the assets in the hands of the old corporation had been about $9,000,000. They were purchased at foreclosure and receivership sales for $752,000. Respondent used the former figure as the basis in computing gains and losses on the acquired assets. Thus it deducted some $75,000 as bad debts. Petitioner, in using the lower figure as the basis, allowed that deduction only to the extent of $1.26. Deficiencies computed on that theory showed a net income, rather than a net loss, for each year. The Board of Tax Appeals rejected the Commissioner's view.[1]

[1] The petition for review by the taxpayer contended that this transaction was a "reorganization" within the purview of § 112 (g) (1), and therefore that the carry-over basis provided in § 113 (a) (7) was applicable. No other issues were raised or considered by the Board or the court below. We pass only on that question, leaving open such other questions as may be appropriately presented to the Board.

The Circuit Court of Appeals affirmed the judgment of the Board. 119 F. 2d 561.

The old corporation was burdened with some $2,870,000 face amount of first lien bonds, certain unsecured claims, and issues of preferred and common stock. There was a default in interest on the bonds in May, 1932. A bondholders' committee was formed, which obtained the deposit of about 85% of the bonds outstanding. Members of the committee became directors of the old corporation and, beginning in the fall of 1932, were in control of it. In 1934, equity receivers were appointed by the Delaware chancery court. A plan of reorganization was formulated, which was approved by the court. The plan called for the formation of a new company which would acquire the assets of the old in exchange for voting common stock and Class A and Class B stock purchase warrants. Most of the common stock, issued under the plan, was to go to the bondholders; a small portion, together with the Class A warrants, was to be issued to the unsecured creditors. Class B warrants were to be issued to the preferred and common stockholders. Pursuant to the plan and a court order, the assets securing the bonds were sold by the indenture trustee at a foreclosure sale in 1934. They were bid in by the bondholders' committee for $660,000. The unpledged assets also were sold at public auction and were bought in by the committee for $92,000. Respondent was thereupon formed, and the committee transferred all the assets of the old corporation to it. The Board found that the fair market value of the assets at that time was $1,766,694.98. The stock and warrants of respondent were distributed pursuant to the plan. Non-participating security holders, owning $440,000 face amount of obligations, received about $106,680 in cash. The cash necessary to make this payment was obtained by a loan from a bank. The loan was assumed by the respondent and later repaid by it. About 49,300 shares of common

stock and 2,760 Class A warrants were issued to the creditors; over 18,445 Class B warrants were issued to the stockholders. Class A warrants carried the right to buy one share of common stock at $6 a share during 1934, the price being increased $1 per share each year until expiration in 1938. Class B warrants carried the same right except that the price was $10 a share during 1934 and was increased by $5 per share each year until expiration in 1938. There were 1,760 Class A warrants and 4,623 of the Class B warrants exercised. On the basis of the fair market value of the assets at the time they were acquired in the reorganization, respondent computes that the Class A warrants had a value of $29 each and the Class B warrants a value of $25 each.

Under the statute involved in *Helvering* v. *Alabama Asphaltic Limestone Co., ante,* p. 179, there would have been a "reorganization" here. For, the creditors of the old company had acquired substantially the entire proprietary interest of the old stockholders. See *Helvering* v. *Minnesota Tea Co.,* 296 U. S. 378. But clause B of § 112 (g) (1) of the 1934 Act effects an important change as respects transactions whereby one corporation acquires substantially all of the assets of another. See S. Rep. No. 558, 73d Cong., 2d Sess., Committee Reports, Revenue Acts 1913–1938, pp. 598–599. The continuity of interest test is made much stricter. See Paul, Studies in Federal Taxation (3d Series), pp. 36–41. Congress has provided that the assets of the transferor corporation must be acquired in exchange "solely" for "voting stock" of the transferee. "Solely" leaves no leeway. Voting stock plus some other consideration does not meet the statutory requirement. See Hendricks, Developments in the Taxation of Reorganizations, 34 Col. L. Rev. 1198, 1202–1203. Congress, however, in 1939 amended clause B of § 112 (g) (1) by adding, "but in determining whether the exchange is solely for voting stock the assumption by the acquiring

corporation of a liability of the other, or the fact that property acquired is subject to a liability, shall be disregarded." 53 Stat. 871. That amendment was made to avoid the consequences of *United States* v. *Hendler,* 303 U. S. 564. See H. Rep. No. 855, 76th Cong., 1st Sess., pp. 18–20; S. Rep. No. 648, 76th Cong., 1st Sess., p. 3. And it was made retroactive so as to include the 1934 Act. 53 Stat. 872. But, with that exception, the requirements of § 112 (g) (1) (B) are not met if properties are acquired in exchange for a consideration other than, or in addition to, voting stock. Under that test, this transaction fails to qualify as a "reorganization" under clause B.

In the first place, security holders of the old company owning $440,000 face amount of obligations were paid off in cash. That cash was raised, during the reorganization, on a loan from a bank. Since that loan was assumed by respondent, it is argued that the requirement of clause B, as amended in 1939, was satisfied. But, in substance, the transaction was precisely the same as if respondent had paid cash plus voting stock for the properties. We search the legislative history of the 1939 amendment in vain for any indication that it was designed to do more than to alter the rule of the *Hendler* case. That case dealt with a situation where an indebtedness which antedated the transaction in question was assumed by the transferee. There the debt assumed clearly was a "liability of the other" corporation. The situation here is quite different. The rights of the security holders against the old corporation were drastically altered by the sale made pursuant to the plan. The sale not only removed the lien from the property and altered the rights of security holders in it; it also limited and defined the rights of the individual creditors if they elected to take cash rather than participate in the plan. See Weiner, Conflicting Functions of the Upset Price, 27 Col. L. Rev. 132, 137–138. In *Helvering* v. *Alabama Asphaltic Limestone Co., supra,*

ante, p. 179, we regarded the several steps in a reorganization as mere "intermediate procedural devices utilized to enable the new corporation to acquire all the assets of the old one pursuant to a single reorganization plan." Under that approach, part of the consideration which respondent paid for the properties of its predecessor was cash in the amount of about $106,680. The fact that it was paid to the bank, rather than to the old corporation or its creditors, is immaterial. The requirement to pay cash arose out of the reorganization itself. It derived, as did the requirement to pay stock, from the plan pursuant to which the properties were acquired. It was a necessary incident of the court decree which wiped out the liability of the old corporation and substituted another one in its place. Though the liability assumed had its origin in obligations of the transferor, its nature and amount were determined and fixed in the reorganization. It therefore cannot be labelled as an obligation of the "other" or predecessor corporation within the meaning of the 1939 amendment. Nor can the property be said to have been acquired "subject to" that liability within the purview of that amendment. The words "subject to" normally connote, in legal parlance, an absence of personal obligation. That seems to be the case here, for the preceding clause of the amendment covers the case of "assumption."

In the second place, the warrants which were issued were not "voting stock." Whatever rights a warrant holder may have "to require the obligor corporation to maintain the integrity of the shares" covered by the warrants (see Berle, Studies in the Law of Corporation Finance (1928), pp. 136–142), he is not a shareholder. *Gay* v. *Burgess Mills,* 30 R. I. 231, 74 A. 714. Cf. *Miles* v. *Safe Deposit Co.,* 259 U. S. 247, 252. His rights are wholly contractual. As stated by Holmes, J., in *Parkinson* v. *West End Street Ry. Co.,* 173 Mass. 446, 448, 53 N. E. 891, 892, he "does not become a stockholder by his contract in

equity any more than at law." At times, his right may expire on the consolidation of the obligor corporation with another. *Id.* If, at the time he exercises his right, there are no authorized and unissued shares to satisfy his demand, he will get damages, not specific performance. *Bratten* v. *Catawissa Railroad Co.*, 211 Pa. 21, 60 A. 319. And see *Van Allen* v. *Illinois Central R. Co.*, 7 Bosw. 515. Thus, he does not have, and may never acquire, any legal or equitable rights in shares of stock. *Lisman* v. *Milwaukee, L. S. & W. Ry. Co.*, 161 F. 472, 480, aff'd 170 F. 1020. And he cannot assert the rights of a shareholder. See Hills, Convertible Securities, 19 Calif. L. Rev. 1, 4. Accordingly, the acquisition in this case was not made "solely" for voting stock.[2] And it makes no difference that, in the long run, the unexercised warrants expired and nothing but voting stock was outstanding. The critical time is the date of the exchange. In that posture of the case, it is no different than if other convertible securities had been issued, all of which had been converted within the conversion period.

Nor can this transaction qualify as a "reorganization" under clause C of § 112 (g) (1). That clause requires that, "immediately after the transfer," the "transferor or its stockholders or both" be in "control" of the transferee corporation. "Control" is defined in § 112 (h) as "the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation." Here, "control" at the critical date was not in the old corporation or its "stockholders." The participating creditors had received, pursuant to the plan, rights to receive over a majority of the stock of the new company, even though all of the war-

[2] The contrary view expressed in a letter by the Commissioner, dated January 27, 1937 (1937 C. C. H. Vol. 3, Par. 6118), does not have the status of a formal ruling of the Treasury, nor does it seem to reflect an established course of administrative construction.

rants allocated to stockholders had been issued and exercised. The contrary conclusion was reached in *Commissioner* v. *Cement Investors, Inc.*, 122 F. 2d 380, 384,[*] on the theory that the bondholders of the insolvent predecessor company could be regarded as its "stockholders" within the meaning of § 112 (g) (1) (C), since they had acquired an equitable interest in the property and were empowered to supplant the stockholders. We have adopted that theory in *Helvering* v. *Alabama Asphaltic Limestone Co., supra,* in determining whether the bondholders had retained a sufficient continuity in interest so as to bring the transaction within the statutory definition of merger or consolidation contained in the revenue acts prior to 1934. But it is one thing to say that the bondholders "stepped into the shoes of the old stockholders" so as to acquire the proprietary interest in the insolvent company. It is quite another to say that they were the "stockholders" of the old company within the purview of clause C. In the latter, Congress was describing an existing, specified class of security holders of the transferor corporation. That class, as we have seen, received a participation in the plan of reorganization. For purposes of clause C, they must be counted in determining where "control" over the new company lay. They cannot be treated under clause C as something other than "stockholders" of the old company merely because they acquired a minority interest in the new one. Indeed, clause C contemplates that the old corporation or its stockholders, rather than its creditors, shall be in the dominant position of "control" immediately after the transfer, and not excluded or relegated to a minority position. Plainly, the normal pattern of insolvency reorganization does not fit its requirements.

Clause D is likewise inapplicable. There was not that reshuffling of a capital structure, within the framework of an existing corporation, contemplated by the term "recapitalization." And a transaction which shifts the owner-

[*] No. 644, 316 U. S. 527.

ship of the proprietary interest in a corporation is hardly "a mere change in identity, form, or place of organization" within the meaning of clause E.

Reversed.

MR. JUSTICE ROBERTS did not participate in the consideration or decision of this case.

UNITED STATES *v.* PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, ET AL.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 42. Argued December 15, 1941.—Decided February 2, 1942.

1. The question of the propriety, under New York practice, of grounding a motion for summary judgment in this case on the record in *Moscow Fire Ins. Co.* v. *Bank of New York & Trust Co.*, 280 N. Y. 286, is one of state law, upon which the decision of the highest court of the State is final. P. 216.
2. The *Moscow* case is not *res judicata* here, since the respondent was not a party to that suit. P. 216.
3. The affirmance here by an equally divided court of the judgment in the *Moscow* case, 309 U. S. 624, although conclusive and binding upon the parties to that controversy, can not be regarded as an authoritative determination of the principles of law there involved. P. 216.
4. Judicial notice may here be taken of the record in this Court of the *Moscow* case. P. 216.
5. The claim of the United States in this case, based on the Litvinov Assignment—whereby the Russian Government, incidently to its recognition by the United States in 1933, assigned certain claims to the United States—raises a federal question. P. 217.
6. Upon review of a judgment of a state court, this Court will determine independently all questions on which a federal right is necessarily dependent. P. 217.
7. The determination of what title the United States obtained to the New York assets of a Russian insurance company, by virtue of the Litvinov Assignment and the Russian decrees of 1918 and 1919 nationalizing the insurance business, involves questions of

foreign law upon which the decision of the state court is not conclusive. P. 218.

8. An official declaration by the Commissariat for Justice of the R. S. F. S. R., as to the intended effect of a decree of the Russian Government nationalizing insurance companies, tendered to the court below pursuant to § 391 of the New York Civil Practice Act, was properly before that court on appeal, though not a part of the record, and may be considered here. P. 220.

9. The Russian Government's decree nationalizing the insurance business was intended to embrace the property of the New York branch of the Russian insurance company involved in this case. P. 221.

The Commissariat for Justice is empowered to interpret existing Russian law; its declaration as to the intended extraterritorial effect of the nationalization decree is conclusive.

10. Claims of the kind here in question were embraced in the Litvinov Assignment. P. 224.

11. The Litvinov Assignment is broad and inclusive as to the claims embraced. Its purpose to eliminate all possible sources of friction between the countries requires that it be construed liberally. P. 224.

12. Incidently to its recognition by the United States in 1933, the Russian Government, by the Litvinov Assignment, assigned certain claims to the United States. Previously, the Russian Government had by decree nationalized the insurance business. A balance of the assets of a New York branch of a Russian insurance corporation, remaining after the payment of domestic creditors, was claimed by the United States, seeking to protect claims which it held, and claims of its nationals, against Russia or its nationals. A New York state court directed other distribution of the assets. *Held:*

By the nationalization decree, the property in question became vested in the Russian Government; the right of the Russian Government passed to the United States under the Litvinov Assignment; and the United States is entitled to the property as against the corporation and its foreign creditors. P. 234.

13. Although aliens are entitled to the protection of the Fifth Amendment, that Amendment does not preclude giving full force and effect to the Litvinov Assignment. P. 228.

14. The Federal Government is not barred by the Fifth Amendment from securing for itself and its nationals priority over creditors who are nationals of foreign countries and whose claims arose abroad. P. 228.

The fact that New York has marshaled the claims of the foreign creditors here involved and authorized their payment does not except them from the application of this principle.

15. The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees. P. 229.

16. The power of the President in respect to the recognition of a foreign government, includes the power to remove such obstacles to full recognition as the settlement of claims of our nationals. P. 229.

Recognition of the Russian Government and the Litvinov Assignment were interdependent.

17. The decision of the Executive with respect to the recognition of the Russian Government and acceptance of the Litvinov Assignment are conclusive on the courts. P. 230.

18. State law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement. P. 230.

19. Enforcement in this case of the policy of the State of New York would conflict with the federal policy, whether the State's policy was premised on the absence of extraterritorial effect of the Russian decrees, the conception of the New York branch as a distinct juristic personality, or disapproval by New York of the Russian program of nationalization. P. 231.

20. Power over external affairs is not shared by the States; it is vested exclusively in the National Government. P. 233.

284 N. Y. 555, 32 N. E. 2d 552, reversed.

CERTIORARI, 313 U. S. 553, to review a judgment affirming the dismissal of the complaint in a suit by the United States to recover a balance of the assets of the New York branch of a Russian insurance company. See 259 App. Div. 871, 20 N. Y. S. 2d 665.

Solicitor General Fahy, with whom *Assistant Attorney General Shea* and *Messrs. Melvin H. Siegel, Richard H. Demuth, Paul A. Sweeney,* and *Oscar H. Davis* were on the brief, for the United States.

The state courts are without power to deny effect to the Soviet nationalization decrees upon grounds of a

state policy against confiscation. *United States* v. *Belmont,* 301 U. S. 324.

The authority of the *Belmont* case is not limited by *Guaranty Trust Co.* v. *United States,* 304 U. S. 126. In that case, apart from the holding with respect to sovereign immunity, an issue not here involved, the decision was merely that defenses to the merits of an assigned claim which would be available under local law regardless of the ownership of the claim were not intended to be barred by the Litvinov Assignment. The question here is whether the states have power to deny enforcement of a valid claim simply because the nationalization decrees under which ownership of such claim was transferred from the Insurance Company to the Soviet Government are considered contrary to the moral principles of the forum.

The Executive Department, in recognizing the Soviet Government and accepting the Litvinov Assignment, has established as the policy of the Nation that, in order to settle all questions outstanding between the two governments, and particularly in order to provide a method for the settlement of American claims against the Soviet Government, no objection should be asserted to the Soviet nationalization of the property of Russian nationals, wherever situated. This executive policy, which the Executive Department had constitutional power to adopt, is in conflict with the local policy announced by the court below; and under the Supremacy Clause, or even apart from that clause, the state policy must yield.

The validity of the federal policy, if embodied in a formal treaty, would not be open to doubt, even if it be assumed that the States have concurrent power to regulate the subject in the silence of the Federal Government. *Santovincenzo* v. *Egan,* 284 U. S. 30; *Hauenstein* v. *Lynham,* 100 U. S. 483; *Sullivan* v. *Kidd,* 254 U. S. 433; *Asakura* v. *Seattle,* 265 U. S. 332; *Missouri* v. *Hol-*

land, 252 U. S. 416; *Terrace* v. *Thompson,* 263 U. S. 197, 222–224; *Frick* v. *Webb,* 263 U. S. 326; *Hines* v. *Davidowitz,* 312 U. S. 52, 69, fn. The sole issue with respect to the validity of the executive policy, therefore, is whether the powers of the President in the conduct of foreign relations include the power, without the consent of the Senate, to determine the public policy of the United States with respect to the Soviet nationalization decrees. This question must be answered in the affirmative.

It is settled that "What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government." *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 137; *Gelston* v. *Hoyt,* 3 Wheat. 246, 323; *Jones* v. *United States,* 137 U. S. 202, 212. The authority of the political department is not limited, however, to the determination of the government to be recognized. The President is also empowered to determine the policy to govern the question of recognition. Objections to the President's determination of the government "as well as to the underlying policy" must be addressed to the political department. *Guaranty Trust Co.* v. *United States, supra,* at 137–138. Such has long been the settled doctrine of this Court. *Kennett* v. *Chambers,* 14 How. 38, 50.

The power to formulate policy may also be rested on the President's power to enter related agreements for the settlement of outstanding questions affecting the determination of the question of recognition. Limited or conditional recognition is well known to international law and is often a necessary instrument in the conduct of foreign relations. 1 Moore, Dig. Int. Law, § 27, pp. 73–74; 1 Hackworth, Dig. Int. Law, §§ 34, 48.

Independently of his powers in respect of recognition, the President has power to establish a national policy

under his authority to make agreements with foreign powers. The authority of the President to enter into executive agreements with foreign nations without the consent of the Senate is established. *Principality of Monaco* v. *Mississippi,* 292 U. S. 313, 331; *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 306, 316; *State of Russia* v. *National City Bank,* 69 F. 2d 44, 48; Corwin, The President: Office and Powers, 228–240; Sayre, The Constitutionality of the Trade Agreements Act, 39 Col. L. Rev. 751; Levitan, Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States, 35 Ill. L. Rev. 365; Moore, Treaties and Executive Agreements, 20 Pol. Sci. Quar. 385, 389–392, 399–417. The Litvinov Assignment is an appropriate exercise of the power.

No discrimination against a fundamental foreign law on moral grounds may be made unless the political departments of the Federal Government determine that such discrimination does not conflict with the interests of the Nation.

Despite the discussion of the separate juristic entity of the New York branch of the Insurance Company, the basis of the *Moscow* opinion was the view that the Soviet decrees, because of their confiscatory character, are contrary to the local public policy. Under any other construction of the opinion, the decision would be so palpably without basis in New York law as to require invocation of the rule that, where a federal right is asserted, neither plainly untenable non-federal grounds (*Postal Tel. Cable Co.* v. *Newport,* 247 U. S. 464, 475; *Enterprise Irrig. Dist.* v. *Farmers' Mut. Canal Co.,* 243 U. S. 157, 164; *Ward* v. *Board of County Comm'rs,* 253 U. S. 17, 22; *Ancient Egyptian Order* v. *Michaux,* 279 U. S. 737, 745, 749) nor any cloak or pretext to evade the federal claim (*Vandalia Railroad* v. *Indiana ex rel. South Bend,* 207 U. S. 359, 367; *Leathe* v. *Thomas,* 207 U. S. 93, 99;

Davis v. *Wechsler,* 263 U. S. 22, 24; *Fox River Paper Co.* v. *Railroad Commission,* 274 U. S. 651, 655; *McCoy* v. *Shaw,* 277 U. S. 302, 303–304) can preclude this Court from deciding the federal question.

Mr. Alfred C. Bennett for Louis H. Pink, Superintendent of Insurance of New York, respondent.

The decision in the *Moscow* case was correct. After recognition of the Soviet Government the state courts were bound to recognize its decrees even though they were confiscatory. But they could construe the decrees and determine their effect with respect to property situate in New York.

The liquidation proceedings are *in rem. United States* v. *Belmont,* 301 U. S. 324; *United States* v. *Bank of New York & Trust Co.,* 296 U. S. 463; *Banco de Espana* v. *Federal Reserve Bank,* 114 F. 2d 438, 442; *Sullivan* v. *State of Sao Paulo,* 122 F. 2d 355. The final order is binding upon the world and forecloses any interest of the Soviet Government or its assignee, the United States Government.

The United States is bound by the public policy of New York in the same manner as private litigants. *Standard Oil Co.* v. *United States,* 267 U. S. 76, 79; *United States* v. *The Thekla,* 266 U. S. 328, 339; *Folk* v. *United States,* 233 F. 177, 192; *United States* v. *Midway Northern Oil Co.,* 232 U. S. 619.

The enforcement by the courts of New York of foreign laws and decrees affecting New York property may not be demanded as of right. Nor will comity be extended if intervening rights of citizens, or foreign litigants, have been established by New York decisions. Each State has the power to determine for itself the conditions upon which property situated within its territory, both personal and real, may be acquired, enjoyed and transferred.

Rights which have been acquired in New York in and to property situate in New York will be protected by the New York courts, and by this court, whether they belong to non-residents or foreigners, or to its own citizens. *Barth* v. *Backus,* 140 N. Y. 230; *Matter of People,* 242 N. Y. 148; Fifth and Fourteenth Amendments, United States Constitution; *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 491, 492.

Briefs of *amici curiae* were filed by *Messrs. Paul C. Whipp* and *Lounsbury D. Bates,* for the Surviving Directors of First Russian Insurance Co.; by *Mr. Carl S. Stern* for Victor Yermaloff et al.; by *Mr. Borris M. Komar* for Brussendorf et al.; by *Mr. Albert G. Avery* for Frederick H. Cattley et al.; by *Messrs. Frederick H. Wood* and *Albert Ray Connelly* for certain receivers; and by *Mr. Samson Selig* for Andrew Ditmar et al., all urging affirmance.

Mr. Justice Douglas delivered the opinion of the Court.

This action was brought by the United States to recover the assets of the New York branch of the First Russian Insurance Co. which remained in the hands of respondent after the payment of all domestic creditors. The material allegations of the complaint were, in brief, as follows:

The First Russian Insurance Co., organized under the laws of the former Empire of Russia, established a New York branch in 1907. It deposited with the Superintendent of Insurance, pursuant to the laws of New York, certain assets to secure payment of claims resulting from transactions of its New York branch. By certain laws, decrees, enactments and orders, in 1918 and 1919, the Russian Government nationalized the business of insurance and all of the property, wherever situated, of all Russian insurance companies (including the First Russian

Insurance Co.), and discharged and cancelled all the debts of such companies and the rights of all shareholders in all such property. The New York branch of the First Russian Insurance Co. continued to do business in New York until 1925. At that time, respondent, pursuant to an order of the Supreme Court of New York, took possession of its assets for a determination and report upon the claims of the policyholders and creditors in the United States. Thereafter, all claims of domestic creditors, *i.e.*, all claims arising out of the business of the New York branch, were paid by respondent, leaving a balance in his hands of more than $1,000,000. In 1931, the New York Court of Appeals (255 N. Y. 415, 175 N. E. 114) directed respondent to dispose of that balance as follows: first, to pay claims of foreign creditors who had filed attachment prior to the commencement of the liquidation proceeding, and also such claims as were filed prior to the entry of the order on remittitur of that court; and second, to pay any surplus to a quorum of the board of directors of the company. Pursuant to that mandate, respondent proceeded with the liquidation of the claims of the foreign creditors. Some payments were made thereon. The major portion of the allowed claims, however, were not paid, a stay having been granted pending disposition of the claim of the United States. On November 16, 1933, the United States recognized the Union of Soviet Socialist Republics as the *de jure* Government of Russia and as an incident to that recognition accepted an assignment (known as the Litvinov Assignment) of certain claims.[1] The Litvinov Assignment was in the form of a letter, dated November 16, 1933, to the President of the United States from Maxim Litvinov, People's Commissar for Foreign Affairs, reading as follows:

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[1] See Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics, Dept. of State, Eastern European Series, No. 1 (1933) for the various documents pertaining to recognition.

"Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

"The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above not to make any claims with respect to:

"(a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

"(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof."

This was acknowledged by the President on the same date. The acknowledgment, after setting forth the terms of the assignment, concluded:

"I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due, the Government of the Union of Soviet Socialist Republics, and of the amount that may be found to be due on the claim of the Russian Volunteer Fleet."

On November 14, 1934, the United States brought an action in the federal District Court for the Southern District of New York, seeking to recover the assets in the hands of respondent. This Court held in *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, that the well settled "principles governing the convenient and orderly administration of justice require that the jurisdiction of the state court should be respected" (p. 480); and that, whatever might be "the effect of recognition" of the Russian Government, it did not terminate the state proceedings. p. 479. The United States was remitted to the state court for determination of its claim, no opinion being intimated on the merits. p. 481. The United States then moved for leave to intervene in the liquidation proceedings. Its motion was denied "without prejudice to the institution of the time-honored form of action." That order was affirmed on appeal.

Thereafter, the present suit was instituted in the Supreme Court of New York. The defendants, other than respondent, were certain designated policyholders and other creditors who had presented in the liquidation proceedings claims against the corporation. The complaint prayed, *inter alia,* that the United States be adjudged to be the sole and exclusive owner entitled to immediate possession of the entire surplus fund in the hands of the respondent.

Respondent's answer denied the allegations of the complaint that title to the funds in question passed to the

United States and that the Russian decrees had the effect claimed. It also set forth various affirmative defenses—that the order of distribution pursuant to the decree in 255 N. Y. 415, 175 N. E. 114, could not be affected by the Litvinov Assignment; that the Litvinov Assignment was unenforceable because it was conditioned upon a final settlement of claims and counterclaims which had not been accomplished; that under Russian law the nationalization decrees in question had no effect on property not factually taken into possession by the Russian Government prior to May 22, 1922; that the Russian decrees had no extraterritorial effect, according to Russian law; that if the decrees were given extraterritorial effect, they were confiscatory and their recognition would be unconstitutional and contrary to the public policy of the United States and of the State of New York; and that the United States, under the Litvinov Assignment, acted merely as a collection agency for the Russian Government and hence was foreclosed from asserting any title to the property in question.

The answer was filed in March, 1938. In April, 1939, the New York Court of Appeals decided *Moscow Fire Ins. Co.* v. *Bank of New York & Trust Co.*, 280 N. Y. 286, 20 N. E. 2d 758. In May, 1939, respondent (but not the other defendants) moved, pursuant to Rule 113 of the Rules of the New York Civil Practice Act and § 476 of that Act, for an order dismissing the complaint and awarding summary judgment in favor of respondent "on the ground that there is no merit to the action and that it is insufficient in law." The affidavit in support of the motion stated that there was "no dispute as to the facts"; that the separate defenses to the complaint "need not now be considered for the complaint standing alone is insufficient in law"; that the facts in the *Moscow* case and the instant one, so far as material, were "parallel" and the Russian de-

crees the same; and that the *Moscow* case authoritatively settled the principles of law governing the instant one. The affidavit read in opposition to the motion stated that a petition for certiorari in the *Moscow* case was about to be filed in this Court; that the motion was premature and should be denied, or decision thereon withheld pending the final decision of this Court. On June 29, 1939, the Supreme Court of New York granted the motion and dismissed the complaint "on the merits," citing only the *Moscow* case in support of its action. On September 2, 1939, a petition for certiorari in the *Moscow* case was filed in this Court. The judgment in that case was affirmed here by an equally divided Court. 309 U. S. 624. Subsequently, the Appellate Division of the Supreme Court of New York affirmed, without opinion, the order of dismissal in the instant case. The Court of Appeals affirmed with a *per curiam* opinion (284 N. Y. 555, 32 N. E. 2d 552) which, after noting that the decision below was "in accord with the decision" in the *Moscow* case, stated:

"Three of the judges of this court concurred in a forceful opinion dissenting from the court's decision in that case, but the decision left open no question which has been argued upon this appeal. We are agreed that without again considering such questions this court should, in determining title to assets of First Russian Insurance Company, deposited in this State, apply in this case the same rules of law which the court applied in the earlier case in determining title to the assets of Moscow Fire Insurance Company deposited here."

We granted the petition for certiorari because of the nature and public importance of the questions raised.

First. Respondent insists that the complaint in this action was identical in substance and sought the same relief as the petition of the United States in the *Moscow* case, and that his answer set up the same defenses as were suc-

cessfully sustained against the United States by the defendants in that case. He also maintains that both parties agreed, on the motion for summary judgment, that the decision in the *Moscow* case governed this cause, leaving no issues to be tried. We agree with those contentions. It is in accord not only with the motion papers, but also with the ruling of the New York Court of Appeals that the *Moscow* case "left open no question which has been argued upon this appeal." In view of that ruling, we are not free to inquire, as petitioner suggests, into the propriety under New York practice of grounding the motion for summary judgment on the record in the *Moscow* case. That is distinctly a question of state law, on which New York has the last word.

But it does not follow, as respondent urges, that the writ should be dismissed as improvidently granted. The *Moscow* case is not *res judicata,* since respondent was not a party to that suit. *Stone* v. *Farmers' Bank of Kentucky,* 174 U. S. 409; *Rudd* v. *Cornell,* 171 N. Y. 114, 127–128, 63 N. E. 2d 823; *St. John* v. *Fowler,* 229 N. Y. 270, 274, 128 N. E. 199. Nor was our affirmance of the judgment in that case by an equally divided court an authoritative precedent. While it was conclusive and binding upon the parties as respects that controversy (*Durant* v. *Essex Company,* 7 Wall. 107), the lack of an agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases. *Hertz* v. *Woodman,* 218 U. S. 205, 213–214.

The upshot of the matter is that we now reach the issues in the *Moscow* case insofar as they are embraced in the pleadings in this case. And there is no reason why we cannot take judicial notice of the record in this Court of the *Moscow* case. *Bienville Water Supply Co.* v. *Mobile,* 186 U. S. 212, 217; *Dimmick* v. *Tompkins,* 194 U. S. 540, 548; *Freshman* v. *Atkins,* 269 U. S. 121, 124.

Second. The New York Court of Appeals held in the *Moscow* case that the Russian decrees [2] in question had no extraterritorial effect. If that is true, it is decisive of the present controversy. For the United States acquired, under the Litvinov Assignment, only such rights as Russia had. *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 143. If the Russian decrees left the New York assets of the Russian insurance companies unaffected, then Russia had nothing here to assign. But that question of foreign law is not to be determined exclusively by the state court. The claim of the United States based on the Litvinov Assignment raises a federal question. *United States* v. *Belmont,* 301 U. S. 324. This Court will review or independently determine all questions on which a federal right is necessarily dependent. *United States* v. *Ansonia Brass &*

[2] The three decrees on which the United States placed primary emphasis (apart from the one set forth in note 3, *infra*) were described in the findings of the referee in the *Moscow* case as follows:

"88. The decree of November 18, 1919 on the annulment of life insurance contracts abolished insurance of life in all its forms in the Republic and annulled all contracts with insurance companies and savings banks with respect to the insurance of life, capital and income.

"89. The decree of the Soviet of People's Commissars dated March 4, 1919, on the liquidation of obligations of State enterprises, provided that stock certificates and shares of joint stock companies, whose enterprises have been either nationalized or sequestered, are annulled and also provided that such enterprises are free from the payment of all debts to private persons and enterprises which have arisen prior to the nationalization of these enterprises, including payments on bond loans with the exception only of wages due to workers and employees.

"90. The decree of the Soviet of People's Commissars dated June 28, 1918 provides in Article I that the commercial and industrial enterprises enumerated therein, which are located within the boundaries of the Soviet Republic, together with all their capital and property, regardless of what the latter may consist, are declared the property of the Republic."

Copper Co., 218 U. S. 452, 462–463, 471; *Ancient Egyptian Order* v. *Michaux*, 279 U. S. 737, 744–745; *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540; *Pierre* v. *Louisiana*, 306 U. S. 354, 358. Here, title obtained under the Litvinov Assignment depends on a correct interpretation of Russian law. As in cases arising under the full faith and credit clause (*Huntington* v. *Attrill*, 146 U. S. 657, 684; *Adam* v. *Saenger*, 303 U. S. 59, 64), these questions of foreign law on which the asserted federal right is based are not peculiarly within the cognizance of the local courts. While deference will be given to the determination of the state court, its conclusion is not accepted as final.

We do not stop to review all the evidence in the voluminous record of the *Moscow* case bearing on the question of the extraterritorial effect of the Russian decrees of nationalization, except to note that the expert testimony tendered by the United States gave great credence to its position. Subsequently to the hearings in that case, however, the United States, through diplomatic channels, requested the Commissariat for Foreign Affairs of the Russian Government to obtain an official declaration by the Commissariat for Justice of the R. S. F. S. R. which would make clear, as a matter of Russian law, the intended effect of the Russian decree [3] nationalizing insurance companies

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[3] Relevant portions of the Insurance Decree dated November 28, 1918, translated in accordance with the findings of the referee in the *Moscow* case, are:

"603. On the organization of the insurance business in the Russian Republic.

"(1) Insurance in all its forms, such as: fire insurance, insurance on shipments, life insurance, accident insurance, hail insurance, livestock insurance, insurance against failure of crops, etc. is hereby proclaimed as a State monopoly.

"Note. Mutual insurance of movable goods and merchandise by the cooperative organizations is conducted on a special basis.

"(2) All private insurance companies and organizations (stock and share holding, also mutual) upon issuance of this decree are subject

upon the funds of such companies outside of Russia. The official declaration, dated November 28, 1937, reads as follows:

"The People's Commissariat for Justice of the R. S. F. S. R. certifies that by virtue of the laws of the organs of the Soviet Government all nationalized funds and property of

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to liquidation; former rural* (People's Soviet) and municipal mutual insurance organizations operating within the boundaries of the Russian Republic are hereby proclaimed the property of the Russian Socialist Federated Soviet Republic.

"(3) For the immediate organization of the insurance business and for the liquidation of parts of insurance institutions, which have become the property of the Russian Socialist Federated Soviet Republic, a Commission is established under the Supreme Soviet of National Economy, consisting of representatives of the Supreme Soviet of National Economy, the People's Commissariats of Commerce and Industry, Interior Affairs, the Commissar of Insurance and Fire Prevention, Finances, Labor, and State Control, and of Soviet Insurance Organizations (People's Soviet and Municipal Mutual).

"Note. The same commission is charged with the liquidating of private insurance organizations, all property and assets of which, remaining on hand after their liquidation, shall become the property of the Russian Socialist Federated Soviet Republic.

"(4) The above-mentioned reorganization and liquidation of existing insurance organizations and institutions shall be accomplished not later than the first day of April 1919.

. . . . .

"(8) The present decree comes into force on the day of its publication."

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* "zemskie."

The referee in the *Moscow* case found that, upon publication of this decree, all Russian insurance companies were prohibited from engaging in the insurance business in Russia; that they became subject to liquidation and were dissolved; that all of their assets in Russia became the property of the State; that, on publication of the decree, the directors of the companies lost all power to act as directors or conservators of the property, or to represent the companies in any way; and that the Russian Government became the statutory successor and domiciliary liquidator of companies whose property was nationalized.

former private enterprises and companies, in particular by virtue of the decree of November 28, 1918 (Collection of Laws of the R. S. F. S. R., 1918, No. 86, Article 904), the funds and property of former insurance companies, constitute the property of the State, irrespective of the nature of the property and irrespective of whether it was situated within the territorial limits of the R. S. F. S. R. or abroad."

The referee in the *Moscow* case found, and the evidence supported his finding, that the Commissariat for Justice has power to interpret existing Russian law. That being true, this official declaration is conclusive so far as the intended extraterritorial effect of the Russian decree is concerned. This official declaration was before the court below, though it was not a part of the record. It was tendered pursuant to § 391 of the New York Civil Practice Act, as amended by L. 1933, c. 690.[4] In New York, it would seem that foreign law must be found by the court (or in case of a jury trial, binding instructions must be

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[4] That section reads:

"A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree or ordinance, by the executive power thereof, contained in a book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the judicial tribunals thereof, is presumptive evidence of the statute, law, proclamation, edict, decree or ordinance. The unwritten or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of reports of cases adjudged in the courts thereof must also be admitted as presumptive evidence of the unwritten or common law thereof. The law of such state or territory or foreign country is to be determined by the court or referee and included in the findings of the court or referee or charged to the jury, as the case may be. Such finding or charge is subject to review on appeal. In determining such law, neither the trial court nor any appellate court shall be limited to the evidence produced on the trial by the parties, but may consult any of the written authorities above named in this section, with the same force and effect as if the same had been admitted in evidence."

given), though procedural considerations require it to be presented as a question of fact. *Fitzpatrick* v. *International Railway Co.*, 252 N. Y. 127, 169 N. E. 112; *Petrogradsky M. K. Bank* v. *National City Bank*, 253 N. Y. 23, 170 N. E. 479. And under § 391, as amended, it is clear that the New York appellate court has authority to consider appropriate decisions interpreting foreign law even though they are rendered subsequently to the trial. *Los Angeles Investment Securities Corp.* v. *Joslyn*, 282 N. Y. 438, 26 N. E. 2d 968. We can take such notice of the foreign law as the New York court could have taken.[5] *Adam* v. *Saenger, supra.* We conclude that this official declaration of Russian law was not only properly before the court on appeal, but also that it was embraced within those "written authorities" which § 391 authorizes the court to consider, even though not introduced in evidence on the trial. For, while it was not "printed," it would seem to be "other written law" of unquestioned authenticity and authority, within the meaning of § 391.

We hold that, so far as its intended effect[6] is concerned, the Russian decree embraced the New York assets of the First Russian Insurance Co.

Third. The question of whether the decree should be given extraterritorial effect is, of course, a distinct matter. One primary issue raised in that connection is whether, under our constitutional system, New York law can be allowed to stand in the way.

The decision of the New York Court of Appeals in the *Moscow* case is unequivocal. It held that "under the law of this State such confiscatory decrees do not affect the property claimed here" (280 N. Y. 314, 20 N. E. 2d 769);

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[5] Hence, the denial of the motion of the United States to certify the official declaration as part of the record of the *Moscow* case in this Court (281 N. Y. 818, 24 N. E. 2d 487) would seem immaterial to our right to consult it.

[6] See also note 7, *infra.*

that the property of the New York branch acquired a "character of its own" which was "dependent" on the law of New York (p. 310); that no "rule of comity and no act of the United States government constrains this State to abandon any part of its control or to share it with a foreign State" (p. 310); that, although the Russian decree effected the death of the parent company, the situs of the property of the New York branch was in New York; and that no principle of law forces New York to forsake the method of distribution authorized in the earlier appeal (255 N. Y. 415, 175 N. E. 114) and to hold that "the method which in 1931 conformed to the exactions of justice and equity must be rejected because retroactively it has become unlawful" (p. 312).

It is one thing to hold, as was done in *Guaranty Trust Co.* v. *United States, supra,* 304 U. S. at p. 142, that under the Litvinov Assignment the United States did not acquire "a right free of a preëxisting infirmity," such as the running of the statute of limitations against the Russian Government, its assignor. Unlike the problem presented here and in the *Moscow* case, that holding in no way sanctions the asserted power of New York to deny enforcement of a claim under the Litvinov Assignment because of an overriding policy of the State which denies validity in New York of the Russian decrees on which the assigned claims rest. That power was denied New York in *United States* v. *Belmont, supra,* 301 U. S. 324. With one qualification, to be noted, the *Belmont* case is determinative of the present controversy.

That case involved the right of the United States under the Litvinov Assignment to recover, from a custodian or stakeholder in New York, funds which had been nationalized and appropriated by the Russian decrees.

This Court, speaking through Mr. Justice Sutherland, held that the conduct of foreign relations is committed by the Constitution to the political departments of the Fed-

eral Government; that the propriety of the exercise of that power is not open to judicial inquiry; and that recognition of a foreign sovereign conclusively binds the courts and "is retroactive and validates all actions and conduct of the government so recognized from the commencement of its existence." 301 U. S. at p. 328. It further held (p. 330) that recognition of the Soviet Government, the establishment of diplomatic relations with it, and the Litvinov Assignment were "all parts of one transaction, resulting in an international compact between the two governments." After stating that, "in respect of what was done here, the Executive had authority to speak as the sole organ" of the national government, it added (p. 330): "The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (Art. II, § 2), require the advice and consent of the Senate." It held (p. 331) that the "external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning." And it added that "all international compacts and agreements" are to be treated with similar dignity for the reason that "complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states." p. 331. This Court did not stop to inquire whether in fact there was any policy of New York which enforcement of the Litvinov Assignment would infringe since "no state policy can prevail against the international compact here involved." p. 327.

The New York Court of Appeals, in the *Moscow* case (280 N. Y. 309, 20 N. E. 2d 758), distinguished the *Belmont* case on the ground that it was decided on the sufficiency of the pleadings, the demurrer to the complaint admitting that under the Russian decree the property was confiscated by the Russian Government and then trans-

ferred to the United States under the Litvinov Assignment. But, as we have seen, the Russian decree in question was intended to have an extraterritorial effect and to embrace funds of the kind which are here involved. Nor can there be any serious doubt that claims of the kind here in question were included in the Litvinov Assignment.[7] It is broad and inclusive. It should be inter-

[7] A clarification of the Litvinov Assignment was made in an exchange of letters between the American Charge d'Affaires and the People's Commissar for Foreign Affairs on January 7, 1937. The letter of the former read:

"I have the honor to inform you that it is the understanding of the Government of the United States that the Government of the Union of Soviet Socialist Republics considers that by and upon the formation of the Union of Soviet Socialist Republics and the adoption of the Constitution of 1923 of the Union of Soviet Socialist Republics, the Union of Soviet Socialist Republics acquired the right to dispose of the property, rights, or interests therein located abroad of all corporations and companies which had theretofore been nationalized by decrees of the constituent republics or their predecessors.

"The Government of the United States further understands that it was the purpose and intention of the Government of the Union of Soviet Socialist Republics to assign to the Government of the United States, among other amounts, all the amounts admitted to be due or that may be found to be due not only the Union of Soviet Socialist Republics but also the constituent republics of the Union of Soviet Socialist Republics or their predecessors from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, in litigation in the United States Court of Claims, and that the Government of the Union of Soviet Socialist Republics did release and assign all such amounts to the Government of the United States by virtue of the note addressed by you to the President of the United States on November 16, 1933.

"Will you be good enough to confirm the understanding which the Government of the United States has in this matter, concerning the law of the Russian Socialist Federated Soviet Republic, the Constitution and laws of the Union of Soviet Socialist Republics, and the intention and purpose of the Government of the Union of Soviet Socialist Republics in the above-mentioned assignment?"

preted consonantly with the purpose of the compact to eliminate all possible sources of friction between these two great nations. See *Tucker* v. *Alexandroff*, 183 U. S. 424, 437; *Jordan* v. *Tashiro*, 278 U. S. 123, 127. Strict construction would run counter to that national policy. For, as we shall see, the existence of unpaid claims against Russia and its nationals, which were held in this country, and which the Litvinov Assignment was intended to secure, had long been one impediment to resumption of friendly relations between these two great powers.

The reply of the People's Commissar for Foreign Affairs was:

"In reply to your note of January 7, 1937, I have the honor to inform you that the Government of the Union of Soviet Socialist Republics considers that by and upon the formation of the Union of Soviet Socialist Republics and the adoption of the Constitution of 1923 of the Union of Soviet Socialist Republics, the Union of Soviet Socialist Republics acquired the right to dispose of the property, rights, or interests therein located abroad of all corporations and companies which had theretofore been nationalized by decrees of the constituent republics or their predecessors.

"You are further informed that it was the purpose and intention of the Government of the Union of Soviet Socialist Republics to assign to the Government of the United States, among other amounts, all the amounts admitted to be due or that may be found to be due not only the Union of Soviet Socialist Republics but also the constituent republics of the Union of Soviet Socialist Republics or their predecessors from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, in litigation in the United States Court of Claims, and that the Government of the Union of Soviet Socialist Republics did release and assign all such amounts to the Government of the United States by virtue of the note addressed by me to the President of the United States on November 16, 1933.

"I have the honor, therefore, to confirm the understanding, as expressed in your note of January 7, 1937, which the Government of the United States has in this matter, concerning the law of the Russian Socialist Federated Soviet Republic, the Constitution and laws of the Union of Soviet Socialist Republics, and the intention and purpose of the Government of the Union of Soviet Socialist Republics in the above-mentioned assignment."

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The holding in the *Belmont* case is therefore determinative of the present controversy, unless the stake of the foreign creditors in this liquidation proceeding and the provision which New York has provided for their protection call for a different result.

Fourth. The *Belmont* case forecloses any relief to the Russian corporation. For this Court held in that case (301 U. S. at p. 332): ". . . our Constitution, laws and policies have no extraterritorial operation, unless in respect of our own citizens. . . . What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled."

But it is urged that different considerations apply in case of the foreign creditors [8] to whom the New York Court of Appeals (255 N. Y. 415, 175 N. E. 114) ordered distribution of these funds. The argument is that their rights in these funds have vested by virtue of the New York decree; that to deprive them of the property would violate the Fifth Amendment which extends its protection to aliens as well as to citizens; and that the Litvinov Assignment cannot deprive New York of its power to administer the balance of the fund in accordance with its laws for the benefit of these creditors.

At the outset, it should be noted that, so far as appears, all creditors whose claims arose out of dealings with the New York branch have been paid. Thus we are not faced with the question whether New York's policy of protecting

[8] In view of the disposition which we make of this case, we express no view on whether these creditors would be barred from asserting their claims here by virtue of the ruling in *Canada Southern Ry. Co.* v. *Gebhard,* 109 U. S. 527, 538, that "anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere."

the so-called local creditors by giving them priority in the assets deposited with the State (*Matter of People,* 242 N. Y. 148, 158–159, 151 N. E. 159) should be recognized within the rule of *Clark* v. *Williard,* 294 U. S. 211, or should yield to the Federal policy expressed in the international compact or agreement. *Santovincenzo* v. *Egan,* 284 U. S. 30, 40; *United States* v. *Belmont, supra.* We intimate no opinion on that question. The contest here is between the United States and creditors of the Russian corporation who, we assume, are not citizens of this country and whose claims did not arise out of transactions with the New York branch. The United States is seeking to protect not only claims which it holds but also claims of its nationals. H. Rep. No. 865, 76th Cong., 1st Sess. Such claims did not arise out of transactions with this Russian corporation; they are, however, claims against Russia or its nationals. The existence of such claims and their non-payment had for years been one of the barriers to recognition of the Soviet regime by the Executive Department. Graham, Russian-American Relations, 1917–1933: An Interpretation, 28 Am. Pol. Sc. Rev. 387; 1 Hackworth, Digest of International Law (1940), pp. 302–304. The purpose of the discussions leading to the policy of recognition was to resolve "all questions outstanding" between the two nations. Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics, Dept. of State, Eastern European Series, No. 1 (1933), p. 1. Settlement of all American claims against Russia was one method of removing some of the prior objections to recognition based on the Soviet policy of nationalization. The Litvinov Assignment was not only part and parcel of the new policy of recognition (*id.,* p. 13), it was also the method adopted by the Executive Department for alleviating in this country the rigors of nationalization. Congress tacitly recognized that policy. Acting in anticipation of the realization of funds under the Litvinov

Assignment (H. Rep. No. 865, 76th Cong., 1st Sess.), it authorized the appointment of a Commissioner to determine the claims of American nationals against the Soviet Government. Joint Resolution of August 4, 1939, 53 Stat. 1199.

If the President had the power to determine the policy which was to govern the question of recognition, then the Fifth Amendment does not stand in the way of giving full force and effect to the Litvinov Assignment. To be sure, aliens as well as citizens are entitled to the protection of the Fifth Amendment. *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481. A State is not precluded, however, by the Fourteenth Amendment from according priority to local creditors as against creditors who are nationals of foreign countries and whose claims arose abroad. *Disconto Gesellschaft* v. *Umbreit,* 208 U. S. 570. By the same token, the Federal Government is not barred by the Fifth Amendment from securing for itself and our nationals priority against such creditors. And it matters not that the procedure adopted by the Federal Government is globular and involves a regrouping of assets. There is no Constitutional reason why this Government need act as the collection agent for nationals of other countries when it takes steps to protect itself or its own nationals on external debts. There is no reason why it may not, through such devices as the Litvinov Assignment, make itself and its nationals whole from assets here before it permits such assets to go abroad in satisfaction of claims of aliens made elsewhere and not incurred in connection with business conducted in this country. The fact that New York has marshaled the claims of the foreign creditors here involved and authorized their payment does not give them immunity from that general rule.

If the priority had been accorded American claims by treaty with Russia, there would be no doubt as to its validity. Cf. *Santovincenzo* v. *Egan, supra.* The same result

obtains here. The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees. "What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government." *Guaranty Trust Co.* v. *United States, supra,* 304 U. S. at p. 137. That authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition. Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts. See *Guaranty Trust Co.* v. *United States, supra,* p. 138; *Kennett* v. *Chambers,* 14 How. 38, 50–51. As we have noted, this Court in the *Belmont* case recognized that the Litvinov Assignment was an international compact which did not require the participation of the Senate. It stated (301 U. S. pp. 330–331): "There are many such compacts, of which a protocol, a modus vivendi, a postal convention, and agreements like that now under consideration are illustrations." And see *Monaco* v. *Mississippi,* 292 U. S. 313, 331; *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 318. Recognition is not always absolute; it is sometimes conditional. 1 Moore, International Law Digest (1906), pp. 73–74; 1 Hackworth, Digest of International Law (1940), pp. 192–195. Power to remove such obstacles to full recognition as settlement of claims of our nationals (Levitan, Executive Agreements, 35 Ill. L. Rev. 365, 382–385) certainly is a modest implied power of the President who is the "sole organ of the federal government in the field of international relations." *United States* v. *Curtiss-Wright Corp., supra,* p. 320. Effectiveness in handling the delicate problems of foreign relations requires no less. Unless

such a power exists, the power of recognition might be thwarted or seriously diluted. No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs (see Moore, Treaties and Executive Agreements, 20 Pol. Sc. Q. 385, 403–417) is to be drastically revised. It was the judgment of the political department that full recognition of the Soviet Government required the settlement of all outstanding problems including the claims of our nationals. Recognition and the Litvinov Assignment were interdependent. We would usurp the executive function if we held that that decision was not final and conclusive in the courts.

"All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature, . . ." The Federalist, No. 64. A treaty is a "Law of the Land" under the supremacy clause (Art. VI, Cl. 2) of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity. *United States* v. *Belmont, supra,* 301 U. S. at p. 331. See Corwin, The President, Office & Powers (1940), pp. 228–240.

It is, of course, true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy. *Guaranty Trust Co.* v. *United States, supra,* p. 143 and cases cited. For example, in *Todok* v. *Union State Bank,* 281 U. S. 449, this Court took pains in its construction of a treaty, relating to the power of an alien to dispose of property in this country, not to invalidate the provisions of state law governing such dispositions. Frequently the obligation of a treaty will be dependent on state law. *Prevost* v. *Greneaux,* 19 How. 1. But state

law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement. See *Nielsen* v. *Johnson,* 279 U. S. 47. Then, the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum (*Griffin* v. *McCoach,* 313 U. S. 498, 506) must give way before the superior Federal policy evidenced by a treaty or international compact or agreement. *Santovincenzo* v. *Egan, supra,* 284 U. S. 30; *United States* v. *Belmont, supra.*

Enforcement of New York's policy as formulated by the *Moscow* case would collide with and subtract from the Federal policy, whether it was premised on the absence of extraterritorial effect of the Russian decrees, the conception of the New York branch as a distinct juristic personality, or disapproval by New York of the Russian program of nationalization.[9] For the *Moscow* case refuses to give effect or recognition in New York to acts of the Soviet Government which the United States by its policy of recognition agreed no longer to question. Enforcement of such state policies would indeed tend to restore some of the precise impediments to friendly relations which the President intended to remove on inauguration of the policy of recognition of the Soviet Government. In the

[9] In this connection it should be noted that § 977(b) of the New York Civil Practice Act provides for the appointment of a receiver to liquidate local assets of a foreign corporation where, *inter alia,* it has been dissolved, liquidated, or nationalized. Subdivision 19 of that section provides in part:

" . . . such liquidation, dissolution, nationalization, expiration of its existence, or repeal, suspension, revocation or annulment of its charter or organic law in the country of its domicile, or any confiscatory law or decree thereof, shall not be deemed to have any extra-territorial effect or validity as to the property, tangible or intangible, debts, demands or choses in action of such corporation within the state or any debts or obligations owing to such corporation from persons, firms or corporations residing, sojourning or doing business in the state."

first place, such action by New York, no matter what gloss be given it, amounts to official disapproval or non-recognition of the nationalization program of the Soviet Government. That disapproval or non-recognition is in the face of a disavowal by the United States of any official concern with that program. It is in the face of the underlying policy adopted by the United States when it recognized the Soviet Government. In the second place, to the extent that the action of the State in refusing enforcement of the Litvinov Assignment results in reduction or non-payment of claims of our nationals, it helps keep alive one source of friction which the policy of recognition intended to remove. Thus the action of New York tends to restore some of the precise irritants which had long affected the relations between these two great nations and which the policy of recognition was designed to eliminate.

We recently stated in *Hines* v. *Davidowitz,* 312 U. S. 52, 68, that the field which affects international relations is "the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority"; and that any state power which may exist "is restricted to the narrowest of limits." There, we were dealing with the question as to whether a state statute regulating aliens survived a similar federal statute. We held that it did not. Here, we are dealing with an exclusive federal function. If state laws and policies did not yield before the exercise of the external powers of the United States, then our foreign policy might be thwarted. These are delicate matters. If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power. Cf. *Chy Lung* v. *Freeman,* 92 U. S. 275, 279–280. Certainly, the conditions for "enduring friendship" between the nations, which the policy of recognition in this instance was de-

signed to effectuate,[10] are not likely to flourish where, contrary to national policy, a lingering atmosphere of hostility is created by state action.

Such considerations underlie the principle of *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302–303, that when a revolutionary government is recognized as a *de jure* government, "such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence." They also explain the rule expressed in *Underhill* v. *Hernandez*, 168 U. S. 250, 252, that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."

The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a State in our constitutional system. To permit it would be to sanction a dangerous invasion of Federal authority. For it would "imperil the amicable relations between governments and vex the peace of nations." *Oetjen* v. *Central Leather Co.*, *supra*, p. 304. It would tend to disturb that equilibrium in our foreign relations which the political departments of our national government had diligently endeavored to establish.

We repeat that there are limitations on the sovereignty of the States. No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, act-

[10] Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics, *supra* note 1, p. 20.

ing within its constitutional sphere, seeks enforcement of its foreign policy in the courts. For such reasons, Mr. Justice Sutherland stated in *United States* v. *Belmont, supra,* 301 U. S. at p. 331, "In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist."

We hold that the right to the funds or property in question became vested in the Soviet Government as the successor to the First Russian Insurance Co.; that this right has passed to the United States under the Litvinov Assignment; and that the United States is entitled to the property as against the corporation and the foreign creditors.

The judgment is reversed and the cause is remanded to the Supreme Court of New York for proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE REED and MR. JUSTICE JACKSON did not participate in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER:

The nature of the controversy makes it appropriate to add a few observations to my Brother DOUGLAS' opinion.

Legal ideas, like other organisms, cannot survive severance from their congenial environment. Concepts like "situs" and "jurisdiction" and "comity" summarize views evolved by the judicial process, in the absence of controlling legislation, for the settlement of domestic issues. To utilize such concepts for the solution of controversies international in nature, even though they are presented to the courts in the form of a private litigation, is to invoke a narrow and inadmissible frame of reference.

The expropriation decrees of the U. S. S. R. gave rise to extensive litigation among various classes of claimants to

funds belonging to Russian companies doing business or keeping accounts abroad. England and New York were the most active centers of this litigation. The opinions in the many cases before their courts constitute a sizeable library. They all derive from a single theme—the effect of the Russian expropriation decrees upon particular claims, in some cases before and in some cases after recognition of the U. S. S. R., either *de jure* or *de facto*. One cannot read this body of judicial opinions, in the Divisional Court, the Court of Appeal and the House of Lords, in the New York Supreme Court, the Appellate Division, and the Court of Appeals, and not be left with the conviction that they are the product largely of casuistry, confusion, and indecision. See Jaffee, Judicial Aspects of Foreign Relations, *passim*. The difficulties were inherent in the problems that confronted the courts. They were due to what Chief Judge Cardozo called "the hazards and embarrassments growing out of the confiscatory decrees of the Russian Soviet Republic," *Matter of People* (*Russian Reinsurance Co.*), 255 N. Y. 415, 420, 175 N. E. 114, 115, and to the endeavor to adjust these "hazards and embarrassments" to "the largest considerations of public policy and justice," *James & Co.* v. *Second Russian Insurance Co.*, 239 N. Y. 248, 256, 146 N. E. 369, 370, when private claims to funds covered by the expropriation decrees were before the courts, particularly at a time when non-recognition was our national policy.

The opinions show both the English and the New York courts struggling to deal with these business consequences of major international complications through the application of traditional judicial concepts. "Situs," "jurisdiction," "comity," "domestication" and "dissolution" of corporations, and other legal ideas that often enough in litigation of a purely domestic nature prove their limitations as instruments for solution or even as means for analysis, were pressed into service for adjudicating claims

whose international implications could not be sterilized. This accounts for the divergence of views among the judges and for such contradictory and confusing rulings as the series of New York cases, from *Wulfsohn* v. *Russian Republic,* 234 N. Y. 372, 138 N. E. 24, to the ruling now under review, *Moscow Fire Ins. Co.* v. *Bank of New York & Trust Co.,* 280 N. Y. 286, 20 N. E. 2d 758, accounts for *Russian Commercial & Industrial Bank* v. *Comptoir d'Escompte de Mulhouse,* [1925] A. C. 112, compared with *Lazard Brothers & Co.* v. *Midland Bank,* [1933] A. C. 289, and for the fantastic result of the decision in *Lehigh Valley R. Co.* v. *State of Russia,* 21 F. 2d 396, in which the Kerensky régime was, in accordance with diplomatic determination, treated as the existing Russian government a decade after its extinction.

Courts could hardly escape perplexities when citizens asserted claims to Russian funds within the control of the forum. But a totally different situation was presented when all claims of local creditors were satisfied and only the conflicting claims of Russia and of former Russian creditors were involved. In the particular circumstances of Russian insurance companies doing business in New York, the State Superintendent of Insurance took possession of the assets of the Russian branches in New York to conserve them for the benefit of those entitled to them. Liquidation followed, domestic creditors and policy holders were paid, and the Superintendent found a large surplus on his hands. As statutory liquidator, the Superintendent of Insurance took the ground that "in view of the hazards and uncertainties of the Russian situation, the surplus should not be paid to any one, but should be left in his hands indefinitely, until a government recognized by the United States shall function in the territory of what was once the Russian Empire." 255 N. Y. 415, 421, 175 N. E. 114, 115. So the Appellate Division decreed. 229 App. Div. 637, 243 N. Y. S. 35. But the Court of Appeals

reversed and the scramble among the foreign claimants was allowed to proceed. 255 N. Y. 415, 175 N. E. 114. The Court of Appeals held that the retention of the surplus funds in the custody of the Superintendent of Insurance until the international relations between the United States and Russia had been formalized "did not solve the problem. It adjourned it *sine die*." But adjournment, it may be suggested, is sometimes a constructive interim solution to avoid a temporizing and premature measure giving rise to new difficulties. Such I believe to have been the mischief that was bound to follow the rejection of the Superintendent's policy of conservation of the surplus Russian funds until recognition. Their disposition was inescapably entangled in recognition.

In the immediate case the United States sues, in effect, as the assignee of the Russian government for claims by that government against the Russian Insurance Company for monies in deposit in New York to which no American citizen makes claim. No manner of speech can change the central fact that here are monies which belonged to a Russian company and for which the Russian government has decreed payment to itself.

And so the question is whether New York can bar Russia from realizing on its decrees against these funds in New York after formal recognition by the United States of Russia and in light of the circumstances that led up to recognition and the exchange of notes that attended it. For New York to deny the effectiveness of these Russian decrees under such circumstances would be to oppose, at least in some respects, its notions as to the effect which should be accorded recognition as against that entertained by the national authority for conducting our foreign affairs. And the result is the same whether New York accomplishes it because its courts invoke judicial views regarding the enforcement of foreign expropriation decrees, or regarding the survival in New York of a Russian

business which according to Russian law had ceased to exist, or regarding the power of New York courts over funds of Russian companies owing from New York creditors. If this Court is not bound by the construction which the New York Court of Appeals places upon complicated transactions in New York in determining whether they come within the protection of the Constitution against impairing the obligations of contract, we certainly should not be bound by that court's construction of transactions so entangled in international significance as the status of New York branches of Russian companies and the disposition of their assets. Compare *Appleby* v. *City of New York*, 271 U. S. 364 and *Irving Trust Co.* v. *Day*, 314 U. S. 556. When the decision of a question of fact or of local law is so interwoven with the decision of a question of national authority that the one necessarily involves the other, we are not foreclosed by the state court's determination of the facts or of the local law. Otherwise, national authority could be frustrated by local rulings. See *Creswill* v. *Knights of Pythias*, 225 U. S. 246; *Davis* v. *Wechsler*, 263 U. S. 22.

It is not consonant with the sturdy conduct of our foreign relations that the effect of Russian decrees upon Russian funds in this country should depend on such gossamer distinctions as those by which courts have determined that Russian branches survive the death of their Russian origin. When courts deal with such essentially political phenomena as the taking over of Russian businesses by the Russian government by resorting to the forms and phrases of conventional corporation law, they inevitably fall into a dialectic quagmire. With commendable candor, the House of Lords frankly confessed as much when it practically overruled *Russian Commercial & Industrial Bank* v. *Comptoir d'Escompte de Mulhouse, supra,* saying through Lord Wright, "the whole matter has now to be reconsidered in the light of new evidence and of the historical evolution

of ten years." *Lazard Brothers & Co.* v. *Midland Bank,* [1933] A. C. 289, 300.

For we are not dealing here with physical property—whether chattels or realty. We are dealing with intangible rights, with choses in action. The fact that these claims were reduced to money does not change the character of the claims, and certainly is too tenuous a thread on which to determine issues affecting the relation between nations. Corporeal property may give rise to rules of law which, we have held, even in purely domestic controversies ought not to be transferred to the adjudication of impalpable claims such as are here in controversy. *Curry* v. *McCanless,* 307 U. S. 357, 363 *et seq.*

As between the states, due regard for their respective governmental acts is written into the Constitution by the Full Faith and Credit Clause (Art. IV, § 1). But the scope of its operation—when may the policy of one state deny the consequences of a transaction authorized by the laws of another—has given rise to a long history of judicial subtleties which hardly commend themselves for transfer to the solution of analogous problems between friendly nations. See *Huntington* v. *Attrill,* 146 U. S. 657; *Finney* v. *Guy,* 189 U. S. 335; *Milwaukee County* v. *White Co.,* 296 U. S. 268; *Pacific Ins. Co.* v. *Industrial Comm'n,* 306 U. S. 493, 502; *Pink* v. *A. A. A. Highway Express,* 314 U. S. 201.

For more than fifteen years, formal relations between the United States and Russia were broken because of serious differences between the two countries regarding the consequences to us of two major Russian policies. This complicated process of friction, abstention from friendly relations, efforts at accommodation, and negotiations for removing the causes of friction, are summarized by the delusively simple concept of "non-recognition." The history of Russo-American relations leaves no room for doubt that the two underlying sources of difficulty were

Russian propaganda and expropriation. Had any state court during this period given comfort to the Russian views in this contest between its government and ours, it would, to that extent, have interfered with the conduct of our foreign relations by the Executive, even if it had purported to do so under the guise of enforcing state law in a matter of local policy. On the contrary, during this period of non-recognition New York denied Russia access to her courts and did so on the single and conclusive ground: "We should do nothing to thwart the policy which the United States has adopted." *Russian Republic* v. *Cibrario,* 235 N. Y. 255, 263, 139 N. E. 259, 262. Similarly, no invocation of a local rule governing "situs" or the survival of a domesticated corporation, however applicable in an ordinary case, is within the competence of a state court if it would thwart to any extent "the policy which the United States has adopted" when the President reëstablished friendly relations in 1933.

And it would be thwarted if the judgment below were allowed to stand.

That the President's control of foreign relations includes the settlement of claims is indisputable. Thus, referring to the adhesion of the United States to the Dawes Plan, Secretary of State Hughes reported that "this agreement was negotiated under the long-recognized authority of the President to arrange for the payment of claims in favor of the United States and its nationals. The exercise of this authority has many illustrations, one of which is the Agreement of 1901 for the so-called Boxer Indemnity." (Secretary Hughes to President Coolidge, February 3, 1925, MS., Department of State, quoted in 5 Hackworth, Digest of Int. Law, c. 16, § 514.) The President's power to negotiate such a settlement is the same whether it is an isolated transaction between this country and a friendly nation, or is part of a complicated negotiation to restore normal relations, as was the case with Russia.

That the power to establish such normal relations with a foreign country belongs to the President is equally indisputable. Recognition of a foreign country is not a theoretical problem or an exercise in abstract symbolism. It is the assertion of national power directed towards safeguarding and promoting our interests and those of civilization. Recognition of a revolutionary government normally involves the removal of areas of friction. As often as not, areas of friction are removed by the adjustment of claims pressed by this country on behalf of its nationals against a new régime.

Such a settlement was made by the President when this country resumed normal relations with Russia. The two chief barriers to renewed friendship with Russia—intrusive propaganda and the effects of expropriation decrees upon our nationals—were at the core of our negotiations in 1933, as they had been for a good many years. The exchanges between the President and M. Litvinov must be read not in isolation but as the culmination of difficulties and dealings extending over fifteen years. And they must be read not as self-contained technical documents, like a marine insurance contract or a bill of lading, but as characteristically delicate and elusive expressions of diplomacy. The draftsmen of such notes must save sensibilities and avoid the explicitness on which diplomatic negotiations so easily founder.

The controlling history of the Soviet régime and of this country's relations with it must be read between the lines of the Roosevelt-Litvinov Agreement. One needs to be no expert in Russian law to know that the expropriation decrees intended to sweep the assets of Russian companies taken over by that government into Russia's control no matter where those assets were credited. Equally clear is it that the assignment by Russia meant to give the United States, as part of the comprehensive settlement, everything that Russia claimed under its laws against

Russians. It does violence to the course of negotiations between the United States and Russia, and to the scope of the final adjustment, to assume that a settlement thus made on behalf of the United States—to settle both money claims and to soothe feelings—was to be qualified by the variant notions of the courts of the forty-eight states regarding "situs" or "jurisdiction" over intangibles or the survival of extinct Russian corporations. In our dealings with the outside world, the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states.

MR. CHIEF JUSTICE STONE, dissenting:

I think the judgment should be affirmed.

As my brethren are content to rest their decision on the authority of the dictum in *United States* v. *Belmont,* 301 U. S. 324, without the aid of any pertinent decision of this Court, I think a word should be said of the authority and reasoning of the *Belmont* case and of the principles which I think are controlling here.

In the *Belmont* case, the United States brought suit in the federal court to recover a debt alleged to be due upon a deposit account of a Russian national with a New York banker. The complaint set up the confiscation of the account by decrees of the Soviet Government and the transfer of the debt to the United States by the Litvinov assignment, concurrently with our diplomatic recognition of that Government. It was not alleged, nor did it appear, that the New York courts had, subsequent to recognition, refused to give effect to the Soviet decrees as operating to transfer the title of Russian nationals to property located in New York. No such national or any adverse claimant was a party to the suit. In sustaining the complaint against demurrer, this Court said (p. 332): "In so holding,

we deal only with the case as now presented and with the parties now before us. We do not consider the status of adverse claims, if there be any, of others not parties to this action. And nothing we have said is to be construed as foreclosing the assertion of any such claim to the fund involved, by intervention or other appropriate proceeding. We decide only that the complaint alleges facts sufficient to constitute a cause of action against the respondents."

The questions thus explicitly reserved are presented by the case now before us. The courts of New York, in the exercise of the constitutional authority ordinarily possessed by state courts to declare the rules of law applicable to property located within their territorial limits, have refused to recognize the Soviet decrees as depriving creditors and other claimants representing the interests of the insurance company of their rights under New York law. Numerous individual creditors and other claimants, and the New York Superintendent of Insurance, who represents all claimants, are parties to the present suit and assert their claims to the exclusion of the United States.

It is true that this Court, in the *Belmont* case, indulged in some remarks as to the effect on New York law of our diplomatic recognition of the Soviet Government and of the assignment of all its claims against American nationals to the United States. Upon the basis of these observations it thought that the New York courts were bound to recognize and apply the Soviet decrees to property which was located in New York when the decrees were promulgated. But all this was predicated upon the mistaken assumption that by disregarding the decrees the New York courts would be giving an extraterritorial effect to New York law. These observations were irrelevant to the decision there announced and, for reasons shortly to be given, I think plainly inapplicable here. They were but *obiter dicta* which, so far as they have not been discredited by

our decision in *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, and so far as they now merit it "may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision." Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheat. 264, 399; Mr. Justice Sutherland in *Williams* v. *United States,* 289 U. S. 553, 568.

We have no concern here with the wisdom of the rules of law which the New York courts have adopted in this case or their consonance with the most enlightened principles of jurisprudence. State questions do not become federal questions because they are difficult or because we may think that the state courts have given wrong answers to them. The only questions before us are whether New York has constitutional authority to adopt its own rules of law defining rights in property located in the state, and, if so, whether that authority has been curtailed by the exercise of a superior federal power by recognition of the Soviet Government and acceptance of its assignment to the United States of claims against American nationals, including the New York property.

I shall state my grounds for thinking that the pronouncements in the *Belmont* case, on which the Court relies for the answer to these questions, are without the support of reason or accepted principles of law. No one doubts that the Soviet decrees are the acts of the government of the Russian state, which is sovereign in its own territory, and that in consequence of our recognition of that government they will be so treated by our State Department. As such, when they affect property which was located in Russia at the time of their promulgation, they are subject to inquiry, if at all, only through our State Department and not in our courts. *Underhill* v. *Hernandez,* 168 U. S. 250; *Oetjen* v. *Central Leather Co.,* 246 U. S. 297; *Ricaud* v. *American Metal Co.,* 246 U. S. 304, 308–10; *Salimoff & Co.* v. *Standard Oil Co.,* 262 N. Y. 220,

186 N. E. 679. But the property to which the New York judgment relates has at all relevant times been in New York in the custody of the Superintendent of Insurance as security for the policies of the insurance company, and is now in the Superintendent's custody as Liquidator acting under the direction of the New York courts. *United States* v. *Bank of New York Co.*, 296 U. S. 463, 478–79. In administering and distributing the property thus within their control, the New York courts are free to apply their own rules of law, including their own doctrines of conflict of laws, see *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78; *Griffin* v. *McCoach*, 313 U. S. 498; *Kryger* v. *Wilson*, 242 U. S. 171, 176, except insofar as they are subject to the requirements of the full faith and credit clause—a clause applicable only to the judgments and public acts of states of the Union and not those of foreign states. *Aetna Life Insurance Co.* v. *Tremblay*, 223 U. S. 185; cf. *Bank of Augusta* v. *Earle*, 13 Pet. 519, 589–90; *Bond* v. *Hume*, 243 U. S. 15, 21–22.

This Court has repeatedly decided that the extent to which a state court will follow the rules of law of a recognized foreign country in preference to its own is wholly a matter of comity, and that, in the absence of relevant treaty obligations, the application in the courts of a state of its own rules of law rather than those of a foreign country raises no federal question. *Rose* v. *Himely*, 4 Cranch 241; *Harrison* v. *Sterry*, 5 Cranch 289; *United States* v. *Crosby*, 7 Cranch 115; *Oakey* v. *Bennett*, 11 How. 33, 43–46; *Hilton* v. *Guyot*, 159 U. S. 113, 165–66; *Disconto Gesellschaft* v. *Umbreit*, 208 U. S. 570; cf. *Baglin* v. *Cusenier Co.*, 221 U. S. 580, 594–97; *United States* v. *Guaranty Trust Co.*, 293 U. S. 340, 345–47. This is equally the case when a state of the Union refuses to apply the law of a sister state, if there is no question of full faith and credit, *Kryger* v. *Wilson, supra*; *Finney* v. *Guy*, 189 U. S. 335, 340, 346; *Alropa Corp.* v. *Kirchwehm*, 313 U. S. 549; see *Milwaukee County*

v. *White Co.*, 296 U. S. 268, 272–73, or due process, *Home Ins. Co.* v. *Dick*, 281 U. S. 397. So clearly was this thought to be an appropriate exercise of the power of a forum over property within its territorial jurisdiction that this Court, in *Ingenohl* v. *Olsen & Co.*, 273 U. S. 541, 544–45, accepted as beyond all doubt the right of the British courts in Hong Kong to refuse recognition to the American alien property custodian's transfer of exclusive rights to the use of a trademark in Hong Kong, and the Court gave effect here to the Hong Kong judgment.

In the application of this doctrine, this Court has often held that a state, following its own law and policy, may refuse to give effect to a transfer made elsewhere of property which is within its own territorial limits. *Green* v. *Van Buskirk*, 5 Wall. 307, 311–12; *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664; *Security Trust Co.* v. *Dodd, Mead & Co.*, 173 U. S. 624; *Clark* v. *Williard*, 292 U. S. 112, 122; *Clark* v. *Williard*, 294 U. S. 211. So far is a state free in this respect that the full faith and credit clause does not preclude the attachment by local creditors of the property within the state of a foreign corporation, all of whose property has been previously transferred in the state of its incorporation to a statutory successor for the benefit of creditors. *Clark* v. *Williard, supra; Fischer* v. *American United Life Ins. Co.*, 314 U. S. 549. Due process under the Fifth Amendment, the benefits of which extend to alien friends as well as to citizens, *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, does not call for any different conclusion. *Disconto Gesellschaft* v. *Umbreit, supra*, 579–80.

At least since 1797, *Barclay* v. *Russell*, 3 Vesey, Jr., 424, 428, 433, the English courts have consistently held that foreign confiscatory decrees do not operate to transfer title to property located in England, even if the decrees were so intended, whether the foreign government has or has not been recognized by the British Government. *Lecouturier*

v. *Rey,* [1910] A. C. 262, 265. Cf. also *Folliott* v. *Ogden,* 1 H. Black. 123, 135–36, affirmed 3 T. R. 726, affirmed, 4 Brown's Cases in Parl., 111; and *Wolff* v. *Oxholm,* 6 M. & S. 92, both of which may have carried the doctrine of non-recognition of foreign confiscatory decrees even further. See Holdsworth, The History of Acts of State in English Law, 41 Columbia L. Rev. 1313, 1325–26. The English courts have applied this rule in litigation arising out of the Russian decrees, holding that they are not effectual to transfer title to property situated in Great Britain. *Sedgwick Collins & Co.* v. *Rossia Insurance Co.,* [1926] 1 K. B. 1, 15, affirmed, [1927] A. C. 95; *The Jupiter (No. 3),* [1927] P. 122, 144–46, affirmed, [1927] P. 250, 253–55; *In re Russian Bank for Foreign Trade,* [1933] 1 Ch. 745, 767–68. The same doctrine has prevailed in the case of the Spanish confiscatory decrees, *Banco de Vizcaya* v. *Don Alfonso,* [1935] 1 K. B. 140, 144–45, as well as with respect to seizures by the American alien property custodian. *Sutherland* v. *Administrator of German Property,* [1934] 1 K. B. 423; and see the decision of the British court for Hong Kong discussed in *Ingenohl* v. *Olsen & Co., supra,* and the Privy Council's decision in *Ingenohl* v. *Wing On & Co.,* 44 Patents Journal 343, 359–60. In no case in which there was occasion to decide the question has recognition been thought to have subordinated the law of the forum, with respect to property situated within its territorial jurisdiction, to that of the recognized state. Never has the forum's refusal to follow foreign transfers of title to such property been considered inconsistent with the most friendly relations with the recognized foreign government, or even with an active military alliance at the time of the transfer.

It is plain that under New York law the claimants in this case, both creditors and those asserting rights of the insurance company, have enforcible rights, with respect to the property located there, which have been recognized

though not created by the judgments of its courts. The conclusion is inescapable that, had there been no assignment and this suit had been maintained by the Soviet Government subsequent to recognition, or by a private individual claiming under an assignment from it, the decision of the New York court would have presented no question reviewable here.

The only question remaining is whether the circumstances in the present case, that the Russian decrees preceded recognition and that the assignment was to the United States, which here appears in the role of plaintiff, call for any different result. If they do, then recognition and the assignment have operated to give to the United States rights which its assignor did not have. They have compelled the state to surrender its own rules of law applicable to property within its limits, and to substitute rules of Russian law for them. A potency would thus be attributed to the recognition and assignment which is lacking to the full faith and credit clause of the Constitution. See *Clark* v. *Williard, supra; Fischer* v. *American United Life Ins. Co., supra.*

In deciding any federal question involved, it can make no difference to us whether New York has chosen to express its public policy by statute or merely by the common law determinations of its courts. *Erie R. Co.* v. *Tompkins, supra,* 304 U. S. 64; *Skiriotes* v. *Florida,* 313 U. S. 69, 79; *Hebert* v. *Louisiana,* 272 U. S. 312, 316. The state court's repeated declaration of a policy of treating the New York branch of the insurance company as a "complete and separate organization" would permit satisfaction of whatever claims of foreign creditors, as well as those of sister states, that New York deems provable against the local fund. But if my brethren are correct in concluding that all foreign creditors must be deprived of access to the fund, it would seem to follow—since the Soviet decrees have exempted no class of creditors—that the rights of

creditors in New York or in sister states, or any other rights in the property recognized by New York law, must equally be ousted by virtue of the extraterritorial effect given to the decrees by the present decision. For, statutory priorities of New York policyholders or New York lienholders, and the common law priorities and system of distribution which the judgment below endeavored to effectuate and preserve intact, must alike yield to the superior force said to have been imparted to the Soviet decrees by the recognition and assignment. Nothing in the Litvinov assignment or in the negotiations for recognition suggests an intention to impose upon the states discriminations between New York and other creditors which would sustain the former's liens while obliterating those of the latter. If the Litvinov assignment overrides state policies which protect foreign creditors, it can hardly be thought to do less to domestic creditors, whether of New York or a sister state.

I assume for present purposes that these sweeping alterations of the rights of states and of persons could be achieved by treaty or even executive agreement, although we are referred to no authority which would sustain such an exercise of power as is said to have been exerted here by mere assignment unratified by the Senate. It is true that, in according recognition and in establishing friendly relations with a foreign country, this Government speaks for all the forty-eight states. But it was never true that recognition alters the substantive law of any state or prescribes uniform state law for the nationals of the recognized country. On the contrary, it does not even secure for them equality of treatment in the several states, or equal treatment with citizens in any state, save as the Constitution demands it. *Patsone* v. *Pennsylvania,* 232 U. S. 138; *Terrace* v. *Thompson,* 263 U. S. 197; *Clarke* v. *Deckebach,* 274 U. S. 392 and cases cited. Those are ends which can be achieved only by the assumption of some

form of obligation expressed or fairly to be inferred from its words.

Recognition, like treaty making, is a political act, and both may be upon terms and conditions. But that fact no more forecloses this Court, where it is called upon to adjudicate private rights, from inquiry as to what those terms and conditions are than it precludes, in like circumstances, a court's ascertaining the true scope and meaning of a treaty. Of course, the national power may by appropriate constitutional means override the power of states and the rights of individuals. But, without collision between them, there is no such loss of power or impairment of rights, and it cannot be known whether state law and private rights collide with political acts expressed in treaties or executive agreements until their respective boundaries are defined.

It would seem, therefore, that in deciding this case some inquiry should have been made to ascertain what public policy or binding rule of conduct with respect to state power and individual rights has been proclaimed by the recognition of the Soviet Government and the assignment of its claims to the United States. The mere act of recognition and the bare transfer of the claims of the Soviet Government to the United States can, of themselves, hardly be taken to have any such effect, and they can be regarded as intended to do so only if that purpose is made evident by their terms, read in the light of diplomatic exchanges between the two countries and of the surrounding circumstances. Even when courts deal with the language of diplomacy, some foundation must be laid for inferring an obligation where previously there was none, and some expression must be found in the conduct of foreign relations which fairly indicates an intention to assume it. Otherwise, courts, rather than the executive, may shape and define foreign policy which the executive has not adopted.

We are not pointed to anything on the face of the documents or in the diplomatic correspondence which even suggests that the United States was to be placed in a better position, with respect to the claim which it now asserts, than was the Soviet Government and nationals. Nor is there any intimation in them that recognition was to give to prior public acts of the Soviet Government any greater extraterritorial effect than attaches to such acts occurring after recognition—acts which, by the common understanding of English and American courts, are ordinarily deemed to be without extraterritorial force, and which, in any event, have never before been considered to restrict the power of the states to apply their own rules of law to foreign-owned property within their territory. As we decided in *Guaranty Trust Co.* v. *United States, supra,* 304 U. S. at 143, and as the opinion of the Court now appears to concede, there is nothing in any of the relevant documents "to suggest that the United States was to acquire or exert any greater rights than its transferor or that the President by mere executive action purported or intended to alter or diminish the rights of the [New York] debtor with respect to any assigned claims, or that the United States, as assignee, is to do more than the Soviet Government could have done after diplomatic recognition—that is, collect the claims in conformity to local law."

Recognition opens our courts to the recognized government and its nationals, see *Guaranty Trust Co.* v. *United States, supra,* 140. It accepts the acts of that government within its own territory as the acts of the sovereign, including its acts as a *de facto* government before recognition, see *Underhill* v. *Hernandez, supra,* 168 U. S. 250; *Oetjen* v. *Central Leather Co., supra,* 246 U. S. 297; *Ricaud* v. *American Metal Co., supra,* 246 U. S. 304. But, until now, recognition of a foreign government by this Government has never been thought to serve as a full faith and

credit clause compelling obedience here to the laws and public acts of the recognized government with respect to property and transactions in this country. One could as well argue that by the Soviet Government's recognition of our own Government, which accompanied the transactions now under consideration, it had undertaken to apply in Russia the New York law applicable to Russian property in New York. Cf. *Ingenohl* v. *Olsen & Co., supra,* 273 U. S. 541; *Pacific Ins. Co.* v. *Industrial Comm'n,* 306 U. S. 493, 501–02.

In *Guaranty Trust Co.* v. *United States, supra,* this Court unanimously rejected the contention that the recognition of the Soviet Government operated to curtail or impair rights derived from the application of state laws and policy within the state's own territory. It was argued by the Government that recognition operated retroactively, for the period of the *de facto* government, to set aside rights acquired in the United States in consequence of this Government's prior recognition of the Russian Provisional Government. This argument, we said, p. 140, "ignores the distinction between the effect of our recognition of a foreign government with respect to its acts within its own territory prior to recognition, and the effect upon previous transactions consummated here between its predecessor and our own nationals. The one operates only to validate to a limited extent acts of a *de facto* government which by virtue of the recognition, has become a government *de jure.* But it does not follow that recognition renders of no effect transactions here with a prior recognized government in conformity to the declared policy of our own Government." Even though the two governments might have stipulated for alteration by this Government of its municipal law, and the consequent surrender of the rights of individuals, the substance of the Court's decision was that such an abdication of domestic law and policy is not a necessary or customary incident

of recognition or fairly to be inferred from it. No more can recognition be said to imply a deprivation of the constitutional rights of states of the Union, and of individuals arising out of their laws and policy, which are binding on the Federal Government except as the act of recognition is accompanied by some affirmative exercise of federal power which purports to set them aside.

Nor can I find in the surrounding circumstances or in the history of the diplomatic relations of the two countries any basis for saying that there was any policy of either to give a different or larger effect to recognition and the assignment than would ordinarily attach to them. It is significant that the account of the negotiations published by the State Department (Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics, Eastern European Series No. 1), and the report of subsequent negotiations for adjustment of the claims of the two countries submitted to Congress by the Secretary of State (H. Rep. No. 865, 76th Cong., 1st Sess.) give no intimation of such a policy. Even the diplomatic correspondence between the two countries, of January 7, 1937, to which the opinion of the Court refers, and which occurred long after the United States had entered the Moscow Fire Insurance Company litigation, merely repeated the language of the assignment without suggesting that its purpose had been to override applicable state law.

That the assignment after recognition had wide scope for application without reading into it any attempt to set aside our local laws and rights accruing under them is evident. It was not limited in its application to property alleged to be confiscated under the Soviet decrees. Included in the assignment, by its terms, were all "amounts admitted to be due or that may be found to be due it [the Soviet Government], as the successor of prior Governments of Russia, or otherwise, from American nationals." It included claims of the prior governments of

Russia, not arising out of confiscatory decrees, and also claims like that of the Russian Volunteer Fleet, growing out of our own expropriation during the war of the property of Russian nationals. The assignment was far from an idle ceremony if treated as transferring only the rights which it purports to assign. Large sums of money have already been collected under it, and other amounts are in process of collection, without overturning the law of the states where the claims have been asserted.[1]

At the time of the assignment, it was not known what position the courts of this country would take with respect to property here, claimed to have been confiscated by the Soviet decrees. But it must have been known to the two governments that the English courts notwithstanding British recognition of the Soviet Government, had refused to apply the Soviet decrees as affecting property located in England. *Sedgwick Collins & Co.* v. *Rossia Insurance Co., supra; The Jupiter (No. 3), supra; In re Russian Bank for Foreign Trade, supra.* It must also have been known that the similar views expressed by the New York courts before recognition with respect to property situated in New York raised at least a strong possibility that mere recognition would not alter the result in that state. *Sokoloff* v. *National City Bank,* 239 N. Y. 158, 167–69, 145 N. E. 917; *James & Co.* v. *Second Russian Ins. Co.,* 239 N. Y. 248, 257, 146 N. E. 369; *Joint Stock Co.* v. *National City Bank,* 240 N. Y. 368, 148 N. E. 552; *Petrogradsky M. K. Bank* v. *National City Bank,* 253 N. Y. 23, 29, 170 N. E. 479. The assignment plainly contemplated that this, like every other question affecting liability, was to be litigated in the courts of this country, since the

[1] By June 30, 1938, the sums collected by virtue of the Litvinov assignment amounted to $1,706,443. Report of the Attorney General for 1938, p. 122. Other claims are apparently still in litigation. See the Report for 1939, p. 99; also H. Rep. No. 865, 76th Cong., 1st Sess., p. 2.

assignment only purported to assign amounts admitted to be due or "that may be found to be due." It was only in the courts where the debtor or the property was located that the amounts assigned would normally be "found to be due." Cf. *United States* v. *Bank of New York Co., supra,* 296 U. S. 463.

By transferring claims of every kind, against American nationals, to the United States and leaving to it their collection, the parties necessarily remitted to the courts of this country the determination of the amounts due upon this Government's undertaking to report the amounts collected as "preparatory to a final settlement of the claims and counterclaims" asserted by the two governments. They thus ended the necessity of diplomatic discussion of the validity of the claims, and so removed a probable source of friction between the two countries. In all this, I can find no hint that the rules of decision in American courts were not to be those afforded by the law customarily applied in those courts. But if it was the purpose of either government to override local law and policy of the states and to prescribe a different rule of decision from that hitherto recognized by any court, it would seem to have been both natural and needful to have expressed it in some form of undertaking indicating such an intention. The only obligation to be found in the assignment and its acknowledgment by the President is that of the United States, already mentioned, to report the amounts collected. This can hardly be said to be an undertaking to strike down valid defenses to the assigned claims. Treaties, to say nothing of executive agreements and assignments which are mere transfers of rights, have hitherto been construed not to override state law or policy unless it is reasonably evident from their language that such was the intention. *Guaranty Trust Co.* v. *United States, supra,* 304 U. S. at 143; *Todok* v. *Union State Bank,* 281 U. S. 449, 454; *Rocca* v. *Thompson,* 223 U. S. 317, 329–34; *Disconto*

Gesellschaft v. *Umbreit, supra,* 208 U. S. at 582; *Pearl Assurance Co.* v. *Harrington,* 38 F. Supp. 411, 413–14; affirmed, 313 U. S. 549; *Patsone* v. *Pennsylvania,* 232 U. S. 138, 145–46; cf. *Liverpool Ins. Co.* v. *Massachusetts,* 10 Wall. 566, 568, 576–77. The practical consequences of the present decision would seem to be, in every case of recognition of a foreign government, to foist upon the executive the responsibility for subordinating domestic to foreign law in conflicts cases, whether intended or not, unless such a purpose is affirmatively disclaimed.

Under our dual system of government, there are many circumstances in which the legislative and executive branches of the national government may, by affirmative action expressing its policy, enlarge the exercise of federal authority and thus diminish the power which otherwise might be exercised by the states. It is indispensable to the orderly administration of the system that such alteration of powers and the consequent impairment of state and private rights should not turn on conceptions of policy which, if ever entertained by the only branch of the government authorized to adopt it, has been left unexpressed. It is not for this Court to adopt policy, the making of which has been by the Constitution committed to other branches of the government. It is not its function to supply a policy where none has been declared or defined and none can be inferred.

MR. JUSTICE ROBERTS joins in this opinion.

YOUNG *v.* UNITED STATES.

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

No. 86. Argued December 17, 1941.—Decided February 2, 1942.

1. On review of a conviction in a criminal case, the Government's confession of error, though entitled to great weight, does not relieve the Court of its duty to examine independently the errors confessed. P. 258.
2. The second proviso of § 6 of the Harrison Anti-Narcotic Act, as amended, which requires "any manufacturer, producer, compounder, or vendor (including dispensing physicians)" to keep a record of all sales, exchanges, or gifts of certain preparations and remedies, does not apply to physicians administering to patients whom they personally attend. P. 259.

119 F. 2d 399, reversed.

CERTIORARI, 314 U. S. 595, to review the affirmance of a conviction for violation of the Harrison Anti-Narcotic Act.

Mr. Fred Patterson submitted for petitioner.

Solicitor General Fahy, with whom *Assistant Attorney General Berge* and *Messrs. Oscar A. Provost, Louis B. Schwartz,* and *W. Marvin Smith* were on the brief, for the United States.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Petitioner, a practicing physician, was convicted on eight counts of an indictment charging violation of § 6 of the Harrison Anti-Narcotic Act, as amended.[1] That section, so far as here material, provides:

"That the provisions of this Act shall not be construed to apply to the manufacture, sale, distribution, giving

[1] 40 Stat. 1132, 26 U. S. C. Supp. V, § 2551 (a) and (b).

away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium . . . in one fluid ounce . . .: *Provided,* That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this Act: *Provided further,* That any manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies mentioned in this section lawfully entitled to manufacture, produce, compound, or vend such preparations and remedies, shall keep a record of all sales, exchanges, or gifts of such preparations and remedies . . ."

The evidence is undisputed that petitioner gave the preparations in the quantities charged in the indictment to patients whom he personally attended. He kept no records. His defense, that the second proviso of § 6 is not an independent and affirmative requirement but merely a condition precedent to the exemption created by that section, was rejected by the court below, which took the position that the second proviso is an unconditional requirement that all vendors of exempt preparations keep records.[2]

The Government confessed error and we brought the case here. 314 U. S. 595.

The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. But such a confession does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors

[2] 119 F. 2d 399.

confessed. See *Parlton* v. *United States,* 75 F. 2d 772. The public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding. That interest is entrusted to our consideration and protection as well as to that of the enforcing officers. Furthermore, our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties. Cf. *Rex* v. *Wilkes,* 4 Burr. 2527, 2551, 98 Eng. Rep. 327; *State* v. *Green,* 167 Wash. 266, 9 P. 2d 62.

The Government's confession of error was originally two-fold: first, that while the second proviso of § 6 was subject to two possible constructions, the administrative construction had been that it was not an independent penal provision, and therefore the ambiguity should be resolved in favor of petitioner; and, secondly, that the second proviso, even if it be regarded as an independent penal provision, does not apply to a physician who administers exempt preparations solely to patients whom he personally attends. Upon reconsideration the Government has withdrawn its first ground of confession of error. We put to one side that question, since we are of opinion that there must be a reversal on the second ground.

Assuming, without deciding, that the second proviso of § 6 is an independent penal provision, it requires that records be kept only by "any manufacturer, producer, compounder, or vendor (including dispensing physicians)." We think that Congress, by the use of the words "dispensing physicians," meant to exclude physicians administering to patients whom they personally attend.

That not all physicians are required to keep records is manifest from the use of the qualifying adjective "dispensing." And, the physician must be one who manufactures, produces, compounds, or vends, or possibly only one who vends if the parenthetical phrase applies only to "vendor," the drugs. These are not appropriate words to

describe the function of a physician who administers exempt preparations to patients whom he personally attends.

This construction is borne out by a consideration of the Act as a whole. The word "administer" more appropriately describes the activities of a doctor in personal attendance than does the word "dispense." Admittedly, the words "dispense" and "dispensing" are used in several senses in the Act, but Congress evidently was aware of the differentiation between "administer" and "dispense," for, when it wished to include all possible functions of physicians with respect to drug distribution, it used both terms in conjunction. Section 1 of the Act in defining those required to pay a special tax speaks of "physicians . . . lawfully entitled to distribute, dispense, give away, or administer," and makes it unlawful for any person "to purchase, sell, dispense or distribute" any drugs otherwise than in and from the original stamped package, excepting the "dispensing, or administration, or giving away of any of the aforesaid drugs to a patient" by a practitioner where "dispensed or administered to the patient for legitimate medical purposes."

Section 4 exempts from the prohibition of interstate shipments and deliveries of drugs by persons who have not registered and paid a special tax deliveries by "any person who shall deliver any such drug which has been prescribed or dispensed by a physician." The omission of the word "administer" indicates that Congress recognized that shipments and deliveries would ordinarily not be involved where the physician was administering while in personal attendance.

In § 2 (a), dealing with true narcotics, Congress unequivocally exempted physicians from record keeping where in personal attendance upon patients. It is difficult to perceive why a different requirement should obtain when a physician, under similar circumstances, administers

preparations containing only a limited amount of narcotics, such as the paregoric, cough syrup, etc., involved in this case. The word "dispense" is evidently used in § 2 (a) in a sense broad enough to include personal administration of drugs by an attending doctor, but the express exception of the personal attendance cases removes any ambiguity as to the scope of "dispense" in this context.

The construction of the parenthetical phrase "(including dispensing physicians)" as encompassing only doctors who would be covered by the word "vendor" does not imply that Congress was tautologic, but rather that it acted cautiously to preclude any contention that physicians selling drugs were not "vendors" because of their professional status.

The legislative history of the second proviso of § 6 supports the view that the words "dispensing physicians" were intended to apply only to physicians acting as dealers in the sale of drugs. The phrase "vendor (including dispensing physician)" was substituted for "the dealer who knowingly sells" exempt preparations.[3]

Upon the evidence in this case, petitioner was not a "dispensing physician" within the meaning of the second proviso of § 6. The judgment is reversed and the cause remanded to the United States District Court for the Territory of Hawaii for such further proceedings as may be required in the light of this opinion.

Reversed.

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

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[3] See 57 Cong. Rec. 771 and H. Rept. No. 1037, 65th Cong., 3d Sess., pp. 37, 87–88.

In offering the committee amendment which embodied the record-keeping requirement, Senator McCumber said:

"Before the committee there was a proposition made compelling druggists who compounded any of these habit-forming drugs also to keep a list of the persons to whom they furnished them, a list of the goods, and so forth." 57 Cong. Rec. 771.

GREAT NORTHERN RAILWAY CO. *v.* UNITED STATES.

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

No. 149. Argued January 13, 14, 1942.—Decided February 2, 1942.

1. The Right of Way Act of March 3, 1875, granting to railroads the right of way through public lands of the United States, grants an easement only, not a fee, and confers no right to oil and minerals underlying the right of way. Pp. 271, 279.
2. This construction of the Act is supported by its language, its legislative history, its early administrative interpretation, and the construction placed upon it by Congress in subsequent enactments. P. 277.
3. The general rule of construction that any ambiguity in a grant is to be resolved in favor of the sovereign grantor—nothing passes but what is conveyed in clear and explicit language—is applicable in the construction of the Act. P. 272.
4. The history of the times in which a statute was enacted may properly be considered in determining its meaning. P. 273.
5. *Rio Grande Ry.* v. *Stringham,* 239 U. S. 44, discussed and regarded as not controlling. P. 279.
6. Upon the record in this case, and in view of the state of the pleadings, the United States is entitled to judgment only as to the limited areas in respect of which it is shown by stipulation to have had title. P. 280.

119 F. 2d 821, modified and affirmed.

CERTIORARI, 314 U. S. 596, to review the affirmance of a decree, 32 F. Supp. 651, enjoining the railroad from drilling or removing oil, gas or minerals underlying its right of way.

Mr. F. G. Dorety for petitioner.

During and prior to the period of the grants, the term "railroad right of way" had only one accepted meaning in legislative enactments. It was never used as designating an easement, but rather to describe the narrow

strip of land owned by a railroad in fee, and upon which the tracks were constructed.

Judicial decisions support the same usage. In *Chicago & M. R. Co.* v. *Patchin,* 16 Ill. 198 (1854), the court indicated that the estate of the railroad was an absolute ownership in fee, and similar statements were made in *Prather* v. *Western Union Telegraph Co.,* 89 Ind. 501 (1883); *Yates* v. *Van De Bogert,* 56 N. Y. 526 (1874); *Buffalo Pipe Line Co.* v. *N. Y., L. E. & W. R. Co.,* 10 Abb. N. C. 107 (1882); *Ballard* v. *L. & N. R. Co.,* 9 Ky. 523 (1887). The only cases prior to 1875 which do not support the fee simple view are *Quinby* v. *Vermont Central R. Co.,* 23 Vt. 387, and *Blake* v. *Rich,* 34 N. H. 282, and there the courts implied that they stood alone and that other cases supported the fee simple estate.

The grants themselves indicate that Congress used the term "right of way" in the sense of strip of land. See Leavenworth City R. Grant, 14 Stat. 212; Green Bay & Lake Pepin Grant, 16 Stat. 588; Portland, Dalles & Salt Lake Grant, 17 Stat. 52; Central Pacific Grant, 18 Stat. 306; Hot Springs R. Grant, 19 Stat. 108; Western R. of Minnesota Grant, 21 Stat. 69.

The facts that the earlier grants were to the grantee and its "successors and assigns"; that the grant of right of way was "through" the public lands and not "over" them; that there were provisions to extinguish the Indian title where the grants passed through Indian lands; that the grants recite that they are made for the "public advantage and welfare," and provide for free transportation of troops and munitions, and give the Government the right of "preferred" transportation, all afford additional indications that Congress had no intention of reducing the granted estate to the minimum.

Use of the term "right of way" to designate the strip of land itself is still general in statutes and railroad conveyances, is common in private deeds, and is supported by dictionaries.

Statutes requiring fencing of the right of way strip, removing weeds therefrom, or providing for crossings for highways, canals, irrigation ditches, etc., seldom, if ever, use the term "strip of land occupied by tracks," but invariably use the term "right of way," although referring to the land itself and not an easement. See, for example, Revised Codes of Montana, 1935, §§ 6551, 6552, 7110.

Congress, as well as state legislatures, has used in the same statute "strip of land" and "right of way" referring to the same land. *E. g.,* 18 Stat. 306; Statutes of Indiana, 1863, p. 33, § 5.

A deed to a railroad of a strip of land designated as a right of way has often been regarded by the courts as a grant of the land in fee. *Ballard* v. *L. & N. R. Co.,* 9 Ky. 523 (1887); *Stevens* v. *Galveston R. Co.,* 212 S. W. 639; *Radetsky* v. *Jorgensen,* 70 Colo. 423; *Arkansas Improvement Co.* v. *Kansas City Southern Ry.,* 189 La. 921; *Johnson* v. *Valdosta R. Co.,* 169 Ga. 559; *Midstate Oil Co.* v. *Ocean Shore R. Co.,* 93 Cal. App. 704; *Marland* v. *Gillespie,* 168 Okla. 376.

To regard the grant as an easement would benefit no one; if the railroad can not remove minerals, no one else can. *Rio Grande Western Ry.* v. *Stringham,* 239 U. S. 44.

The rule that gratuitous public grants are to be strictly construed against the grantee and in favor of the sovereign, does not apply to grants of the right of way. *Great Northern Ry.* v. *Steinke,* 261 U. S. 119, 124; *Nadeau* v. *Union Pacific R. Co.,* 253 U. S. 442, 444.

The purpose of the grant was to get railroads built, by providing sites or locations for their construction across public lands. This purpose could be accomplished at least as well by grant of a strip in fee as by an easement.

If Congress had been seeking that form of grant which would give the absolute minimum estate to the railroads

and still make it possible for the roads to be built, it might have selected an easement. But from 1850 to 1870, while it was making right of way grants, it was also making lavish gifts of adjoining sections, including coal and iron lands. No disposition was shown to whittle down any part of the grant. The generous width of 200 feet, and 400 feet in the Northern Pacific grant, when 50 feet would have been sufficient at most points, proves this.

It was never the practice or policy of Congress to grant surface rights and reserve underlying minerals. The only purpose of reserving mineral lands was to make them available to mineral claimants, but there could be no such object in reserving minerals under the right of way, because mineral claimants could not enter the right of way to conduct mining operations.

Debates in the House of Representatives did not refer to the character of estate granted.

Twelve decisions of this Court and every decision of a state or lower federal court construing the right of way grants, except this decision below, over a period of more than 50 years, have held that the estate granted was a fee title, conditioned only upon continued railroad operation. *Joy* v. *St. Louis,* 138 U. S. 1; *New Mexico* v. *United States Trust Co.,* 172 U. S. 171; *Rio Grande Western R. Co.* v. *Stringham,* 239 U. S. 44; *Northern Pacific Ry.* v. *Townsend,* 190 U. S. 267; *Missouri, K. & T. Ry. Co.* v. *Roberts,* 152 U. S. 114; *Missouri, K. & T. Ry. Co.* v. *Oklahoma,* 271 U. S. 303, 308; *Noble* v. *Oklahoma City,* 297 U. S. 481, 494; *Clairmont* v. *United States,* 225 U. S. 551, 556; *Buttz* v. *Northern Pacific Ry.,* 119 U. S. 55, 66; *Choctaw R. Co.* v. *Mackey,* 256 U. S. 531, 538; *Noble* v. *Union River Logging R.,* 147 U. S. 165, 176; *Jamestown & N. R. Co.* v. *Jones,* 177 U. S. 125, 130; *United States* v. *Michigan,* 190 U. S. 379, 398; *Northern Pacific Ry. Co.* v. *Ely,* 197 U. S. 1, 6; *Stalker* v. *Oregon Short Line,* 225 U. S. 142, 146; *State* v. *Northern Pacific*

Ry. Co., 88 Mont. 529; *Denver & S. L. R.* v. *Pacific Lbr. Co.*, 86 Colo. 86; *Stepan* v. *Northern Pacific Ry.*, 81 Mont. 361; *Dugan* v. *Montoya*, 24 N. M. 102; *Union Pacific R.* v. *Davenport*, 102 Kan. 513; *Crandall* v. *Goss*, 30 Ida. 661; *Bowman* v. *McGoldrick Lbr. Co.*, 38 Ida. 30; *Northern Pacific Ry.* v. *Myers-Parr Mill Co.*, 54 Wash. 447; *Wilkinson* v. *Northern Pacific Ry.*, 5 Mont. 538.

The prohibition against alienation of the right of way does not apply to removal of oil. *Grand Trunk R. Co.* v. *Richardson*, 91 U. S. 454, 463; *Hartford Fire Ins. Co.* v. *Chicago, M. & St. P. Ry.*, 175 U. S. 91, 99; *Sioux City* v. *Missouri Valley Pipe Line Co.*, 46 F. 2d 819; *Northern Pacific R. Co.* v. *Northern American Telephone Co.*, 230 F. 347, 349; *Holland Co.* v. *Northern Pacific Ry. Co.*, 214 F. 920. See also, *Missouri K. & T. Ry.* v. *Oklahoma*, 271 U. S. 303; *Northern Pacific R. Co.* v. *Myers-Parr Mill Co.*, 54 Wash. 447.

Subsequent rulings of the Land Department and acts of Congress supporting the easement theory are self-serving declarations, and are in conflict with Supreme Court decisions, with the intent of the grants, and with admissions by the Government in this case.

The owner of a conditional fee estate is entitled to the underlying oil and minerals.

A grant, even though not in fee and limited to railroad purposes, would include the right to use materials or fuel within the bounds of the grant; and the injunction should be denied as to removal of oil for railroad fuel.

Mr. Vernon L. Wilkinson, with whom *Solicitor General Fahy*, *Assistant Attorney General Littell*, and *Mr. Richard S. Salant* were on the brief, for the United States.

The language of the 1875 Act shows that only an easement was granted. Section 1 refers to "the" right of way; § 2 refers to "use and occupancy"; and § 4 requires the

location of each right of way to be noted on the plats in the local land office, and provides that "thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way." As the court below remarked, "Apter words to indicate the intent to convey an easement would be difficult to find." Since "nothing passes but what is conveyed in clear and explicit language—inferences being resolved not against but for the Government," it seems patent that the 1875 Act did not convey to the railroads the underlying minerals for fuel or other purposes. *Caldwell* v. *United States,* 250 U. S. 14, 20–21.

The policy of granting land subsidies to the railroads was discontinued in 1871. Thereafter, the grants were restricted to a mere right of passage across the public domain,—a right which could be acquired in no other way while large blocks of land were held by a sovereign immune from suit. This shift in policy was formally crystallized by Congressional resolution in 1872. House Resolution of March 11, 1872, Cong. Globe, 42d Cong., 2d sess., 1585. And the debates preceding the enactment of the 1875 Act show clearly that the grant in the Act was consonant with the new policy of strict limitation and of granting easements rather than fees. Cf., 3 Cong. Rec. pt. 1, p. 407 (1875).

The subsequent administrative and legislative construction of the 1875 Act reinforce the conclusion that only an easement was granted.

Until this Court uttered a contrary dictum in *Rio Grande Ry.* v. *Stringham,* 239 U. S. 44 (1915), the administrative officers of the Government consistently construed the 1875 Act as granting an easement rather than a fee. The contemporaneous decisions of the Land Department likewise refer to the 1875 grant as a "mere easement" (19 L. D. 588, 590), as "an incorporeal here-

ditament, an easement and not the land" (20 L. D. 131, 132), as "in the nature of a mere easement" (32 L. D. 33, 34). Such contemporaneous construction of a statute should not be overturned except for cogent reasons, and unless clearly erroneous. *United States* v. *Johnston,* 124 U. S. 236, 253; *United States* v. *Moore,* 95 U. S. 760, 763; *Brewster* v. *Gage,* 290 U. S. 327, 336.

Departmental circulars and regulations are especially persuasive. *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378; *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315; *Swendig* v. *Washington Co.,* 265 U. S. 322, 331; *McFadden* v. *Mountain View Co.,* 97 F. 670, 677; *Taggart* v. *Great Northern Ry. Co.,* 208 F. 455, 460, aff'd 211 F. 288.

Congress, too, has construed the 1875 Act as granting an easement rather than a fee. For example, the Acts of June 26, 1906, c. 3550, 34 Stat. 482, and February 25, 1909, c. 191, 35 Stat. 647, declaring a forfeiture of unused rights of way, state that the lands covered thereby shall be "freed and discharged from such easement." Such clear-cut legislative pronouncements on the meaning of the 1875 Act are aids to the construction of that Act. *Tiger* v. *Western Investment Co.,* 221 U. S. 286, 309; *United States* v. *Freeman,* 3 How. 556, 564–565; *McFadden* v. *Mountain View Co., supra,* 677; *Northern Pacific Ry.* v. *Soderberg,* 188 U. S. 526, 533, 534.

Cases construing grants made prior to 1871 as vesting a fee in the railroads are therefore without force. These important differences between the 1875 Act and the earlier land grant acts were not called to this Court's attention in *Rio Grande Ry.* v. *Stringham,* 239 U. S. 44, a case in which the Government and private owners were not represented. Hence, the statement there made, by way of dictum, that the railroads have a "limited fee" in rights of way acquired under the 1875 Act should be reëxamined.

Administrative construction after 1915 can not be deemed binding upon the Department of the Interior, since it was impelled by the apparent compulsion of the *Stringham* case. *Hartley* v. *Commissioner,* 295 U. S. 216, 220; *Helvering* v. *Hallock,* 309 U. S. 106, 121. And in any event, earlier decisions, being more nearly contemporaneous with the 1875 statute and evidencing a long-continued and uniform construction until 1915, are a more reliable index of the legislative intent and are accordingly more persuasive. *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378; *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315.

A repudiation of the dictum in the *Stringham* case by a decision holding that the 1875 Act grants the railroads an easement rather than a fee will not disturb land titles; it will merely restore a rule of property which existed between 1875 and 1915, the period during which most of these rights of way were acquired.

But even if it be determined that the railroad has a "limited fee" in its right of way, it does not necessarily follow that such a "fee" includes the right to extract oil and other minerals. The purposes of Congress are accomplished if the grant is held to be a "fee" in the surface and so much of the subsurface as is necessary for support—a "fee" for a railroad thoroughfare exclusively. Cf. *Western Union Tel. Co.* v. *Pennsylvania R. Co.,* 195 U. S. 540, 570. Since such an interest would accomplish the purposes of Congress, this is the largest interest which the applicable rules of construction will permit to pass under the Act. *Caldwell* v. *United States,* 250 U. S. 14, 20–21. Under such a construction the railroad is restricted in the use of the land except as a railroad thoroughfare. The right to use and extract minerals is a use of the land not permitted to the railroad. Cf. *Union Missionary Baptist Church* v. *Fyke,* 179 Okla. 102; *Jordan* v. *Goldman,* 1 Okla. 406, 453.

MR. JUSTICE MURPHY delivered the opinion of the Court.

We are asked to decide whether petitioner has any right to the oil and minerals underlying its right of way acquired under the general right of way statute, Act of March 3, 1875, c. 152, 18 Stat. 482.

The United States instituted this suit to enjoin petitioner from drilling for or removing gas, oil and other minerals so situated, and alleged in its complaint substantially that petitioner, in 1907, acquired from the St. Paul, Minneapolis and Manitoba Railway all of the latter's property, including rights of way granted it under the Act of March 3, 1875, a portion of which crosses Glacier County, Montana; that petitioner acquired neither the right to use any portion of such right of way for the purpose of drilling for or removing subsurface oil and minerals, nor any right, title or interest in or to the deposits underlying the right of way, but that the oil and minerals remained the property of the United States; and, that although no lease had been issued to petitioner under the Act of May 21, 1930, 46 Stat. 373, petitioner claimed ownership of the oil and minerals underlying its right of way and threatened to use the right of way to drill for and remove subsurface oil.

Petitioner admitted certain allegations of fact, denied the allegation that title to the oil and minerals was in the United States, and asserted that it proposed to drill three separate oil wells—the oil from the first to be sold commercially, that from the second to be refined, the more volatile parts to be sold and the residue to be used on petitioner's locomotives, and that from the third to be used in its entirety by petitioner as fuel.

Pursuant to a motion therefor by the United States, judgment was rendered on the pleadings and petitioner was enjoined from "using the right of way granted under

the Act of March 3, 1875, 18 Stat. 482, for the purpose of drilling for or removing oil, gas and minerals underlying the right of way." The Circuit Court of Appeals affirmed. 119 F. 2d 821. The importance of the question and an asserted conflict with *Rio Grande Western Ry. Co.* v. *Stringham*, 239 U. S. 44, moved us to grant certiorari. 314 U. S. 596.

The Act of March 3, 1875, from which petitioner's rights stem, clearly grants only an easement, and not a fee. Section 1 indicates that the right is one of passage since it grants "the," not a, "right of way through the public lands of the United States." Section 2 adds to the conclusion that the right granted is one of use and occupancy only, rather than the land itself, for it declares that any railroad whose right of way passes through a canyon, pass or defile "shall not prevent any other railroad company from the *use and occupancy* of the said canyon, pass, or defile, for the purposes of its road, *in common* with the road first located." [1]

Section 4 is especially persuasive. It requires the location of each right of way to be noted on the plats in the local land office, and "thereafter all such lands *over* which such right of way shall pass shall be disposed of *subject to* such right of way." [2] This reserved right to dispose of the lands subject to the right of way is wholly inconsistent with the grant of a fee. As the court below pointed out, "Apter words to indicate the intent to convey an easement would be difficult to find." That this was the precise intent of § 4 is clear from its legislative history.[3] While § 4 pro-

[1] Emphasis added.

[2] Emphasis added.

[3] This clause first appeared in a special right of way statute, Portland, Dalles, and Salt Lake Act of April 12, 1872, 17 Stat. 52. Congressman Slater reported that bill for the Public Lands Committee, and, in discussing the reason for the clause, said:

"Mr. SLATER. The point [of this clause] is simply this: the land over which this right of way passes is to be sold subject to the right

vides a method for securing the benefits of the Act in advance of construction,[4] no adequate reason is advanced for believing that it does not illumine the nature of the right granted. The Act is to be interpreted as a harmonious whole.

The Act is to be liberally construed to carry out its purposes. *United States* v. *Denver & R. G. Ry. Co.*, 150 U. S. 1, 14; *Nadeau* v. *Union Pacific R. Co.*, 253 U. S. 442; *Great Northern Ry. Co.* v. *Steinke*, 261 U. S. 119. But the Act is also subject to the general rule of construction that any ambiguity in a grant is to be resolved favorably to a sovereign grantor—"nothing passes but what is conveyed in clear and explicit language"—*Caldwell* v. *United States*, 250 U. S. 14, 20–21, and cases cited. Cf. *Great Northern Ry. Co.* v. *Steinke, supra.* Plainly, there is nothing in the Act which may be characterized as a "clear and explicit" conveyance of the underlying oil and minerals. The Act was designed to permit the construction of railroads through the public lands and thus enhance their value and hasten their settlement. The achievement of that purpose does not compel a construction of the right of way grant as conveying a fee title to the land and the underlying minerals; a railroad may be operated though its right of way be but an easement.[5]

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of way. It simply provides that this right of way shall be an incumbrance upon the land for one hundred feet upon each side of the line of the road; that those who may afterward make locations for settlement shall not interfere with this right of way.

"Mr. SPEER, of Pennsylvania. It grants no land to any railroad company?

"Mr. SLATER. No, sir." [Cong. Globe, 42d Cong., 2d Sess., 2137 (1872).]

[4] The right of way may be located by construction. Dakota Central R. Co. *v.* Downey, 8 L. D. 115; *Jamestown & Northern R. Co.* v. *Jones*, 177 U. S. 125; *Stalker* v. *Oregon Short Line R. Co.*, 225 U. S. 142.

[5] In *Railway Co.* v. *Alling*, 99 U. S. 463, and *Smith* v. *Townsend*, 148 U. S. 490, statutory rights of way were held to be but easements. And,

But we are not limited to the lifeless words of the statute and formalistic canons of construction in our search for the intent of Congress. The Act was the product of a period, and, "courts, in construing a statute, may with propriety recur to the history of the times when it was passed." *United States* v. *Union Pacific R. Co.*, 91 U. S. 72, 79. And see *Winona & St. Peter R. Co.* v. *Barney*, 113 U. S. 618, 625; *Smith* v. *Townsend*, 148 U. S. 490, 494; *United States* v. *Denver & R. G. Ry. Co.*, 150 U. S. 1, 14.

Beginning in 1850, Congress embarked on a policy of subsidizing railroad construction by lavish grants from the public domain.[6] This policy incurred great public disfavor,[7] which was crystallized in the following resolution adopted by the House of Representatives on March 11, 1872:

"*Resolved,* That in the judgment of this House the policy of granting subsidies in public lands to railroads and

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it has been held that railroads do not have a fee in those portions of their rights of way acquired by eminent domain proceedings. See *East Alabama Ry. Co.* v. *Doe*, 114 U. S. 340; *Quick* v. *Taylor*, 113 Ind. 540, 16 N. E. 588; *Missouri, K. & N. W. R. Co.* v. *Schmuck*, 69 Kan. 272, 76 P. 836; *Keown* v. *Brandon*, 206 Ky. 93, 266 S. W. 889; *Hall* v. *Boston & Maine Railroad*, 211 Mass. 174, 97 N. W. 914; *Roberts* v. *Sioux City & P. R. Co.*, 73 Neb. 8, 102 N. W. 60; *Washington Cemetery* v. *Prospect Park & C. I. R. Co.*, 68 N. Y. 591.

[6] Typical were the Illinois Central Grant, Act of September 20, 1850, c. 61, 9 Stat. 466; Union Pacific Grant of July 1, 1862, c. 120, 12 Stat. 489; Amended Union Pacific Grant, Act of July 2, 1864, c. 216, 13 Stat. 356; and Northern Pacific Grant, Act of July 2, 1864, c. 217, 13 Stat. 365. This last grant was the largest, involving an estimated 40,000,000 acres. In view of this lavish policy of grants from the public domain it is not surprising that the rights of way conveyed in such land-grant acts have been held to be limited fees. *Northern Pacific Ry. Co.* v. *Townsend*, 190 U. S. 267. Cf. *Missouri, K. & T. Ry. Co.* v. *Roberts*, 152 U. S. 114.

[7] See "Land Grants," 9 Encyclopedia of the Social Sciences (1933), p. 35; "Land Grants to Railways," 3 Dictionary of American History (1940), p. 237.

other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law." Cong. Globe, 42d Cong., 2d Sess., 1585 (1872). After 1871 outright grants of public lands to private railroad companies seem to have been discontinued.[8] But, to encourage development of the Western vastnesses, Congress had to grant rights to lay track across the public domain, rights which could not be secured against the sovereign by eminent domain proceedings or adverse user. For a time special acts were passed granting to designated railroads simply "the right of way" through the public lands of the United States.[9] That those acts were not intended to convey any land is inferable from remarks in Congress by those sponsoring the measures. For example, in reporting a bill granting a right of way to the Dakota Grand Trunk Railway (17 Stat. 202), the committee chairman said: "This is merely a grant of the right of way." [10] Likewise, in reporting a right of way bill for the New Mexico and Gulf Railway Company (17 Stat. 343), Mr. Townsend of Pennsylvania, the same Congressman who sponsored the Act of 1875, observed: "It is nothing but a grant of the right of way." [11]

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[8] *Ibid.* And see H. Rept. No. 10, 43d Cong., 2d Sess. (1874), p. 1 (Ser. No. 1656) recommending that a bill to grant lands to aid in the construction of a railroad not pass. See also the remarks of Mr. Dunnell in reporting a special right of way bill for the Public Lands Committee, Cong. Globe, 42d Cong., 2d Sess., 2543 (1872), and those of Mr. Townsend, who was in charge of the bill which became the Act of 1875, in reporting to the House the Senate bill and the House substitute. Cong. Rec., 43d Cong., 2d Sess., Vol. 3, pt. 1, 404 (1875).

[9] The Forty-second and Forty-third Congresses (1871–1875) passed at least fifteen such acts.

[10] Cong. Globe, 42d Cong., 2d Sess., 3913 (1872).

[11] Cong. Globe, 42d Cong., 2d Sess., 4134 (1872). See also p. 2543.

The burden of this special legislation moved Congress to adopt the general right of way statute now before this Court. Since it was a product of the sharp change in Congressional policy with respect to railroad grants after 1871, it is improbable that Congress intended by it to grant more than a right of passage, let alone mineral riches. The presence in the Act of § 4, which, as has been pointed out above, is so inconsistent with the grant of a fee, strongly indicates that Congress was carrying into effect its changed policy regarding railroad grants.[12]

Also pertinent to the construction of the Act is the contemporaneous administrative interpretation placed on it by those charged with its execution. Cf. *United States* v. *Johnston,* 124 U. S. 236, 253; *United States* v. *Moore,* 95 U. S. 760, 763; *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315. The first such interpretation, the general right of way circular of January 13, 1888, was that the Act granted an easement, not a fee.[13] The same position was taken in the regulations of March 21, 1892, 14 L. D. 338, and those of November 4, 1898, 27 L. D. 663. While the first of these circulars followed the Act by 13 years, the weight to be accorded them is not dependent on strict contemporaneity. Cf. *Swendig* v. *Washington Co.,* 265 U. S. 322. This early administrative gloss received indirect Congressional approval when Congress repeated the language of the Act in granting canal and reservoir companies rights of way by the Act of March 3, 1891, c. 561, 26 Stat.

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[12] See note 3, *ante.*

[13] "The act of March 3, 1875, is not in the nature of a grant of lands; it does not convey an estate in fee, either in the 'right of way' or the grounds selected for depot purposes. It is a right of use only, the title still remaining in the United States. . . .

"All persons settling on public lands to which a railroad right of way has attached, take the same subject to such right of way and must pay for the full area of the subdivision entered, there being no authority to make deductions in such cases." 12 L. D. 423, 428.

1101, and when Congress made the Act of 1875 partially applicable to the Colville Indian Reservation by Act of March 6, 1896, c. 42, 29 Stat. 44. Cf. *National Lead Co.* v. *United States*, 252 U. S. 140, 146.

The circular of February 11, 1904, 32 L. D. 481, described the right as a "base or qualified fee." This shift in interpretation was probably due to the description in *Northern Pacific Ry. Co.* v. *Townsend*, 190 U. S. 267, 271, of a right of way conveyed in a land-grant act (13 Stat. 365) as a "limited fee, made on an implied condition of reverter." [14] But the earlier view was reasserted in the departmental regulations of May 21, 1909, 37 L. D. 787.[15] After 1915, administrative construction bowed to the case of *Rio Grande Western Ry. Co.* v. *Stringham*, 239 U. S. 44, which applied the language of the *Townsend* case to a right of way acquired under the Act of 1875. We do not regard this subsequent interpretation as binding on the Department of the Interior since it was impelled by what we regard as inaccurate statements in the *Stringham* case. Cf. *Helvering* v. *Hallock*, 309 U. S. 106, 121.

Congress itself in later legislation has interpreted the Act of 1875 as conveying but an easement. The Act of June 26, 1906, c. 3550, 34 Stat. 482, declaring a forfeiture of unused rights of way, provides in part that: "the United States hereby resumes the full title to the lands covered thereby [by the right of way] freed and discharged from such easement." This language is repeated in the forfeiture act of February 25, 1909, c. 191, 35 Stat. 647. Also on June 26, 1906, an act [16] was passed confirming the rights of way which certain railroads had acquired under

[14] See note 6, *ante*.

[15] The decisions of the Lands Department construing the 1875 Act are in accord. Fremont, E. & M. V. Ry. Co., 19 L. D. 588; Mary G. Arnett, 20 L. D. 131; John W. Wehn, 32 L. D. 33; Grand Canyon Ry. Co. *v.* Cameron, 35 L. D. 495.

[16] 34 Stat. 481.

the 1875 Act in the Territories of Oklahoma and Arizona. The House committee report on this bill said: "The right as originally conferred and as proposed to be protected by this bill simply grants an easement or use for railroad purposes. Under the present law wherever the railroad passes through a tract of public land the entire tract is patented to the settler or entryman, subject only to this easement." [17] It is settled that "subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309. See also *Cope* v. *Cope*, 137 U. S. 682; *United States* v. *Freeman*, 3 How. 556. These statutes were approximately contemporaneous with petitioner's acquisition of the rights of way of the St. Paul, Minneapolis and Manitoba Railway.

That petitioner has only an easement in its rights of way acquired under the Act of 1875 is therefore clear from the language of the Act, its legislative history, its early administrative interpretation and the construction placed upon it by Congress in subsequent enactments.

Petitioner, seeking to obviate this result, relies on several cases in this Court stating that railroads have a "limited," "base," or "qualified" fee in their rights of way.[18] All of those cases, except *Rio Grande Western Ry. Co.* v. *Stringham*, 239 U. S. 44, 47; *Choctaw, O. & G. R. Co.* v. *Mackey*, 256 U. S. 531; and *Noble* v. *Oklahoma City*, 297

[17] H. Rept. No. 4777, 59th Cong., 1st Sess., p. 2 (Ser. No. 4908); cf. S. Rept. No. 1417, 59th Cong., 1st Sess., p. 2 (Ser. No. 4904).

[18] *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55; *Clairmont* v. *United States*, 225 U. S. 551; *Missouri, K. & T. Ry. Co.* v. *Roberts*, 152 U. S. 114; *Missouri, K. & T. Ry. Co.* v. *Oklahoma*, 271 U. S. 303; *New Mexico* v. *United States Trust Co.*, 172 U. S. 171; *Northern Pacific Ry.* v. *Townsend*, 190 U. S. 267; *United States* v. *Michigan*, 190 U. S. 379; *Northern Pacific Railway Co.* v. *Ely*, 197 U. S. 1; *Rio Grande Western Ry. Co.* v. *Stringham*, 239 U. S. 44; *Choctaw, O. & G. R. Co.* v. *Mackey*, 256 U. S. 531; *Noble* v. *Oklahoma City*, 297 U. S. 481.

U. S. 481, deal with rights of way conveyed by land-grant acts before the shift in Congressional policy occurred in 1871. For that reason they are not controlling here.[19] When Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is little reason to suppose that it intended to give only an easement in the right of way granted in the same act. And, in none of those acts was there any provision comparable to that of § 4 of the 1875 Act that "lands over which such right of way shall pass shall be disposed of subject to such right of way." None of the cases involved the problem of rights to subsurface oil and minerals.

In the *Stringham* case, it was said that a right of way under the Act of 1875 is "neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee." The railroad had brought suit to quiet title to a portion of its right of way. Stringham asserted title to that portion by virtue of a purported purchase of surface rights from a placer mine claimant. The Supreme Court of Utah reversed the judgment of the trial court and remanded the case, directing the entry of "a judgment awarding to the plaintiff title to a right of way over the lands in question." 38 Utah 113, 110 P. 868. The railroad again appealed, asserting that it should have been adjudged "owner in fee simple of the right of way over the premises." The Supreme Court of Utah affirmed the judgment of the trial court on the ground that the railroad's proper remedy was by petition for rehearing of the first appeal. 39 Utah 236, 115 P. 967. Both judgments were brought to this Court by writ of

[19] See note 6, *ante*.

error. It was held that the second judgment presented nothing reviewable. The first judgment was affirmed since it "describes the right of way in the exact terms of the right-of-way act, and evidently uses those terms with the same meaning they have in the act."

The conclusion that the railroad was the owner of a "limited fee" was based on cases arising under the land-grant acts passed prior to 1871, and it does not appear that Congress' change of policy after 1871 was brought to the Court's attention.[20] That conclusion is inconsistent with the language of the Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation. We therefore do not regard it as controlling. Statements in *Choctaw, O. & G. R. Co.* v. *Mackey,* 256 U. S. 531, and *Noble* v. *Oklahoma City,* 297 U. S. 481, that the 1875 Act conveyed a limited fee are dicta based on the *Stringham* case, and entitled to no more weight than the statements in that case. Far more persuasive are two cases involving special acts granting rights of way, passed after 1871 and rather similar to the general act of 1875.[21] *Railway Co.* v. *Alling,* 99 U. S. 463, characterized the right so granted as "a present beneficial easement," and *Smith* v. *Townsend,* 148 U. S. 490, referred to it as "simply as an easement, not a fee." We think that the Act of 1875 is to be similarly construed.

Since petitioner's right of way is but an easement, it has no right to the underlying oil and minerals. This result does not freeze the oil and minerals in place. Petitioner is free to develop them under a lease executed pursuant to the Act of May 21, 1930, 46 Stat. 373.

During the argument before this Court, it was fully developed that the judgment was rendered on the plead-

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[20] No brief was filed by the defendant or the United States.

[21] 17 Stat. 339; 23 Stat. 73.

ings, in which petitioner denied the allegation of title in the United States, and there was no proof or stipulation that the United States had any title. On this state of the record, the United States was not entitled to any judgment below. However, we permitted the parties to cure this defect by a stipulation showing that the United States has retained title to certain tracts of land over which petitioner's right of way passes, in a limited area,[22] and that petitioner intended to drill for and remove the oil underlying its right of way over each of those tracts. Accordingly, the judgment will be modified and limited to the areas described in the stipulation. As so modified, it is

Affirmed.

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

MacGREGOR, EXECUTOR, *v.* STATE MUTUAL LIFE ASSURANCE CO.

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

No. 179. Argued February 2, 3, 1942.—Decided February 16, 1942.

In the absence of any relevant decision by the state courts, this Court accepts in this cause an interpretation of local law by the Federal District Court in the State and by three Circuit Judges whose circuit includes it. P. 281.

119 F. 2d 148, affirmed.

CERTIORARI, 314 U. S. 591, to review the affirmance of a judgment against the petitioner in a suit to recover the amount of a premium paid on an annuity contract.

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[22] Lots 1, 2 and 3, Sec. 12; lots 1, 4, 5, 9 and 10, Sec. 13, T. 29 N., R. 15 W., Montana Meridian, all being within the exterior boundaries of the Glacier National Park; NW¼ SE¼ Sec. 28; NW¼ Sec. 29; NE¼ NW¼ Sec. 30; NE¼ Sec. 34, T. 32 N., R. 24 E., Montana Meridian.

Mr. William B. Giles for petitioner.

Mr. Wm. Marshall Bullitt for respondent.

PER CURIAM.

Petitioner brought this action to recover the premium of a life annuity contract purchased by his decedent. The suit was begun in a state court of Michigan, but was removed, because of diversity of citizenship, to the United States District Court for the Eastern District of Michigan. Petitioner's claim is founded on the applicability of Michigan legislation regulating the conduct of insurance business in Michigan. The District Court held that "the contract involved herein having been executed outside the State of Michigan, the statutes of the State of Michigan relied upon by the plaintiff are not applicable." Accordingly judgment went against petitioner. This judgment was affirmed by the Circuit Court of Appeals. 119 F. 2d 148.

No decision of the Supreme Court of Michigan, or of any other court of that State, construing the relevant Michigan law has been brought to our attention. In the absence of such guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan.

Affirmed.

NATIONAL LABOR RELATIONS BOARD *v.* AUTOMOTIVE MAINTENANCE MACHINERY CO.

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

No. 188. Argued February 3, 1942.—Decided February 16, 1942.

Findings of the Labor Board sustained as supported by substantial evidence. P. 282.

116 F. 2d 350, reversed.

CERTIORARI, 314 U. S. 596, to review a judgment setting aside an order of the National Labor Relations Board, 13 N. L. R. B. 338, ordering the company to cease and desist from unfair labor practices; to cease giving effect to a contract with an "inside" union; to withdraw recognition from, and to disestablish, that union; to reinstate with back-pay three discharged employees; and to post notices, etc. A provision of the order for reimbursement of certain Government relief agencies was abandoned by the Board.

Mr. Ernest A. Gross, with whom *Solicitor General Fahy* and *Messrs. Archibald Cox, Robert B. Watts,* and *Morris P. Glushien* were on the brief, for petitioner.

Mr. John Harrington for respondent.

PER CURIAM.

Upon examination of the record, the Court concludes that the Board's findings are supported by substantial evidence. *Labor Board* v. *Link-Belt Co.,* 311 U. S. 584; *Westinghouse Electric & Mfg. Co.* v. *Labor Board,* 312 U. S. 660. The judgment is therefore reversed with directions to enforce the Board's order in full, but with the modification proposed by the Board to conform to the decision in *Republic Steel Corp.* v. *Labor Board,* 311 U. S.

7. The CHIEF JUSTICE and MR. JUSTICE ROBERTS are of opinion that the order as modified should be enforced except with respect to the alleged discriminatory discharges of Warner, Jr., and Jordan, which they think are without the support of substantial evidence.

Reversed.

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

STEWART, ADMINISTRATOR, *v.* SOUTHERN RAILWAY CO.*

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

No. 161. Argued January 8, 1942.—Decided February 16, 1942.

Evidence, in a railway accident case, *held* insufficient to sustain a finding on the issue whether the coupling mechanism between two freight cars was such as to comply with the Federal Safety Appliance Act. P. 286.

119 F. 2d 85, reversed.

CERTIORARI, 314 U. S. 591, to review a judgment which reversed a recovery by the administrator of a deceased railway employee in an action against the railway company for personal injuries and death. See also 115 F. 2d 85.

Messrs. William H. Allen and *Charles M. Hay* for petitioner.

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*On petition for rehearing, it appearing that the parties had settled the case, the judgment of the Court in this case was vacated, that of the Court of Appeals reversed, and the case remanded to the District Court with directions that it be dismissed as moot, *post*, p. 784.

Mr. Sidney S. Alderman, with whom *Messrs. Wilder Lucas, Arnot L. Sheppard, Walter N. Davis, H. O'B. Cooper,* and *S. R. Prince* were on the brief, for respondent.

Mr. Justice Roberts delivered the opinion of the Court.

This action was brought by the administratrix of Stewart's estate to recover for his death in consequence of a violation of the Safety Appliance Act.[1] The crew of which the intestate was a member was engaged in coupling freight cars. Stewart was on the engineer's side of the train. He gave a back-up signal with which the engineer complied and then a stop signal which was obeyed. The engineer saw him go between the ends of the last car of the train and the car that was to be coupled to it. While the train was stationary, this car drifted into collision with the end car of the train. Persons who responded to Stewart's cries found him with his arm crushed between the couplers, both of which were closed. His arm was amputated and a few days later he died.

The administratrix, pursuant to leave of a state probate court, executed a release in consideration of $5,000 paid her. Subsequently she alleged in that court that she had been fraudulently induced to settle the case, and sought authority to rescind the release. The court decided against her after full hearing.

In the present action the plaintiff offered testimony as to the circumstances of the accident. The respondent relied upon the release; offered evidence to prove death was due to causes other than the injury, but introduced no testimony as to what occurred at the time of Stewart's

[1] 45 U. S. C. § 2.

injury, or as to the condition of the couplers. The trial court ruled that the decision of the probate court on the issue of fraud in procuring the release was not *res judicata,* and submitted to the jury all issues, including that of the validity of the release. A verdict was rendered for petitioner for $17,500. It does not appear whether this sum was intended to be in addition to the $5,000 theretofore received by the administratrix. The judgment entered was for the amount of the verdict without credit for that sum.

The respondent appealed to the Circuit Court of Appeals. The petitioner was substituted for the administratrix, who had died. Judgment *non obstante veredicto* was denied but the judgment was reversed and the cause remanded for a new trial, for errors in the charge to the jury.[2] On motion of both parties a rehearing was accorded. The court then held there was no substantial evidence to sustain the verdict, and reversed and remanded with directions to enter a judgment for the respondent.[3] This Court granted certiorari.

The record contains no direct evidence as to any defect in the coupler mechanisms of the cars involved in the accident. Each was equipped with an automatic coupler having a "pin lifter," whereby the pin in the coupler can be lifted so as to allow the jaw of the coupler to swing into the open position. The purpose of the device is to permit a switchman to open the coupler into the position where it will engage with the coupler of the other car upon impact without the operator going between the ends of the cars. The engineer, a witness for petitioner, testified that he did not see the intestate attempt to use the pin lifter, but did see him go between the cars. The foreman of the crew, also a witness for the petitioner, testified

[2] 115 F. 2d 317.

[3] 119 F. 2d 85.

that when he arrived the jaws of both couplers were closed and decedent's arm had been crushed between them. He testified that after the accident he coupled the cars in question by going between the cars and opening the jaw of the coupler by hand. He stated that he tried to use the pin lifter on the car at the end of the train, which would be the one available on the side of the train on which he was working. He also testified that if the coupler was in working order it could be set by the use of the pin lifter. He was not asked, and did not state, what effort he made to operate the pin lifter. Neither party asked him any further questions as to the working condition of the pin lifter or coupler.

The petitioner insists that, in the absence of evidence on behalf of the respondent, as to the condition of the coupler, the jury were entitled to infer that the pin lifter was not in working order, otherwise the foreman, an experienced man, would not have gone between the cars and opened the coupler jaw by hand. The court below held the jury was not entitled to draw this inference in the absence of testimony by the foreman with respect to his efforts to use the pin lifter and as to its condition.

We hold that, on this record, neither party is entitled to prevail. If the issue as to the condition of the coupler mechanism was determinative, a new trial should have been ordered so that this issue might have been resolved in the light of a full examination of the foreman, the witness who could have given further testimony on the subject.

The judgment must be reversed and the cause remanded to the court below for further proceedings. We express no opinion on other errors assigned in the Circuit Court of Appeals which may affect the disposition of the cause by that court.

Reversed.

MR. JUSTICE BLACK, dissenting:

The jury found from the evidence before it that the railroad had, contrary to the Federal Safety Appliance Act, used cars "not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." 45 U. S. C. § 2. The trial judge, who alone of the judges in the several proceedings below had the opportunity to see and hear the witnesses as well as to observe a coupling apparatus brought into the court room as an exhibit, made it clear that he regarded the evidence as sufficient to support the jury's verdict both by submitting the issues to it and by denying a new trial. The Circuit Court of Appeals took the same position in its first opinion. 115 F. 2d 317. Solicitude for the right to trial by jury on issues of fact prompted the adoption of the Seventh Amendment as part of the Bill of Rights.[1] Respect for the institution of trial by jury should, in my judgment, prompt us to leave undisturbed the jury's finding in this case that the coupler was defective.

Because it must rely on the written page rather than living words, an appellate court can never fully appreciate the effect of testimony heard by a jury of local citizens. Even in the written record, however, I can find support for the jury's finding which convinces me that it should stand. The transcript shows the following:

If a pin lifter functions properly, there will be automatic coupling of the cars, making it unnecessary for a workman to go between them. Stewart was an experi-

[1] Amendment VII: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

enced workman. Besides being his duty, it was conducive to his safety for him to use the pin lifter to bring about coupling. On the day he was found with his arm crushed between the couplers, he had successfully handled the coupling of other cars.

The crew foreman who shortly after the accident undertook the coupling of the particular cars between which Stewart was crushed testified as follows:

"Q. Now, after this accident, when you coupled the cars, which I presume you did, did you couple the cars after the accident?

"A. I did.

"Q. How did you open the knuckle?

"A. I opened it with my hand.

"Q. Let me ask you, Mr. Stogner, if the coupler is working automatically, or the pin lifter, is it necessary to go in between the cars to open with your hands then?

"A. No, sir."

And in the course of cross examination by the company's attorney, whose questions indicated he accepted the fact that Stogner had tried without success to use the pin lifter, Stogner was asked: "Now, which knuckle did you try to open, or which pin lifter did you try to use?" His reply—"The one on the north side"—designated the one connected with the coupler which had caused Stewart's death.

Had Stogner's attempts with the pin lifter been successful, he would not have had to go between the cars to couple them. But that was what he testified he did after trying to raise the pin lifter. True, Stogner did not say how many attempts he made, nor how much force he applied in the effort. But the jury could reasonably have inferred that the company's foreman, a worker of many years of experience, applied such force as would have raised a pin lifter which was not defective. Moreover, since there was a statutory duty not to continue using

this particular pin lifter if it was defective, we can reasonably assume that the railroad's inspectors made some examination of it. Yet no inspector nor anyone else was called by the railroad to give testimony on the condition of the pin lifter immediately after the accident.[2] Under these circumstances, reasonable jurors are not to be denied the right to make inferences which other reasonable people would make: that Stogner tried in the usual way to couple the cars; that his efforts were unsuccessful; and that he was therefore compelled to go between the cars to effect a coupling. And they could therefore have concluded that the pin lifter was defective. The jury's finding of this fact should not have been disturbed.

MR. JUSTICE REED, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY join in this dissent.

UNITED STATES *v.* BETHLEHEM STEEL CORPORATION ET AL.*

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

No. 8. Argued December 9, 1941.—Decided February 16, 1942.

1. Contracts made in the emergency of war between the Fleet Corporation and a shipbuilding company, for the construction of ships for the United States, provided that the price to be paid the builder should include the actual cost of the ships and two elements of profit, (1) a fixed amount calculated on an agreed

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[2] Cf. *Ridge* v. *Norfolk Southern R. Co.*, 167 N. C. 510, 521, 83 S. E. 762; *Kirby* v. *Tallmadge*, 160 U. S. 379, 383; *Interstate Circuit* v. *United States*, 306 U. S. 208, 225–226.

*Together with No. 9, *United States Shipping Board Merchant Fleet Corporation* v. *Bethlehem Shipbuilding Corporation, Ltd.*, also on writ of certiorari, 311 U. S. 632, to the Circuit Court of Appeals for the Third Circuit.

estimate of cost and (2) a "bonus for savings," of one-half the amount by which the actual cost turned out lower than the estimate; but no obligation of the builder to make special effort to effect such savings by increasing its efficiency was expressed in the contracts. *Held:*

(1) There is no ground to imply such an obligation. P. 297.

(2) The savings clause was a non-severable part of the contract. P. 298.

2. Whether a number of promises constitute one contract or more than one is to be determined by inquiring whether the parties assented to all the promises as a whole, so that there would have been no bargain whatever if any promise or set of promises were struck out. P. 298.

3. With respect to contracts for the building of ships, entered into by the Fleet Corporation, on behalf of the Government, and a shipbuilding company while the country was at war, and which netted the company a very large profit partly by reason of the clause granting it the right to one-half of the amounts by which the cost of construction should be lower than the liberal estimate provided by the contracts, *held:*

(1) The Government's present claim that in the negotiations the officials acting for the Fleet Corporation were subjected to pressure amounting to duress by the representatives of the company, so that they accepted the price stipulations against their will, is without support in the evidence. P. 300.

(2) The circumstances that the Government stood in great need of the ships and that it was obliged to rely upon the company's capacity to produce them, could not have coerced the Fleet Corporation's representatives to make the contracts, since the Fleet Corporation could have compelled the shipbuilding company to undertake the work at a price set by the President, with the burden of going to court if it considered the compensation unreasonably low; and since the Fleet Corporation had the power to commandeer the shipbuilding company's plants and facilities, in accordance with authority delegated by the President pursuant to the Acts of Congress; and it is not to be assumed that the company or its trained organization would have been unwilling to serve the Government in the plants if the power to take them over were exercised. P. 303.

(3) Under its powers to raise and support armies, to provide and maintain a navy, and to make all laws necessary and proper

to carry these powers into execution, Congress has authority to draft business organizations to support the fighting men in war. P. 305.

4. A policy of granting the measures of profits common at the time, adopted by the Fleet Corporation when letting contracts for the construction of ships under authority delegated by the President in accordance with an Act of Congress, is not subject to be in effect nullified by the courts by refusals to enforce such contracts on the ground that the profits granted are too high. P. 308.

113 F. 2d 301, affirmed.

CERTIORARI, 311 U. S. 632, to review judgments affirming two judgments of the District Court. See 23 F. Supp. 676; 26 *id.* 259.

No. 8 was a suit in equity brought by the United States against Bethlehem Steel Corporation, Bethlehem Shipbuilding Corporation et al., for an accounting and to recover sums paid under contracts for construction of ships. The District Court dismissed the bill.

In No. 9, which was an action at law by the Bethlehem Shipbuilding Corporation against the Fleet Corporation, the former recovered a balance found due under "bonus for savings" clauses in the contracts.

Solicitor General Fahy argued the cause (*Attorney General Jackson, Solicitor General Biddle, Assistant Attorney General Shea,* and *Messrs. Warner W. Gardner, Melvin H. Siegel, Frederick Bernays Wiener, Oscar H. Davis,* and *Paul D. Page, Jr.* were on the brief; and *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Melvin H. Siegel, Robert L. Stern,* and *Paul D. Page, Jr.* were on the reply brief) for petitioners.

Mr. Frederick H. Wood, with whom *Mr. Alfred McCormack* was on the brief, for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

These two cases arise from a dispute between Bethlehem Shipbuilding Corporation, Ltd., and the Government about the amount of profits claimed by Bethlehem under thirteen war-time contracts for building ships. The contracts were negotiated and executed in 1917 and 1918, when Germany's destructive warfare against our ocean shipping essential to the successful prosecution of the war made it necessary for the United States to build the greatest possible number of ships in the shortest possible time. They are typical products of a system of procurement heavily relied upon by the United States Shipping Board Emergency Fleet Corporation and other government purchasing agencies at the time.

On June 15, 1917, Congress gave to the President sweeping war powers, 40 Stat. 182, including (1) the power to commandeer shipbuilding plants and facilities, (2) the power to purchase ships at what he deemed a reasonable price with a provision for subsequent revision by the courts in the event the seller regarded the price set as unfair, and (3) the power to purchase or contract for the building of ships at prices to be established by negotiation. Acting under authority delegated to it by the President with Congressional approval, the Fleet Corporation declined to seek utilization of the first and second methods but chose, under the third alternative, to make purchases through ordinary business bargaining.

The "actual cost" to Bethlehem of building the ships over which this dispute arises was about $109,000,000. The generously inclusive formula[1] for determining "ac-

[1] Included in the detailed and comprehensive itemization of "actual cost" were the following and "items similar thereto in principle":

"The net costs . . . of labor (including compensation of labor by way of bonuses), and materials, machinery, equipment, and sup-

tual cost," not challenged by the Government here, was not peculiar to these contracts. It was based on the standard formula used by the Fleet Corporation in its contracts with other shipbuilders. And, as in practically all contracts of this type, there was no risk of loss.[2] The total profits claimed under the contracts by Bethlehem, and

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plies . . . and other direct charges, such as insurance on the vessels, etc.

"A proper proportion of running expenses, including ordinary rentals, . . . repairs, and maintenance, light, heat, power, insurance, management, salaries (including compensation by way of bonuses), and other indirect charges . . .

"A proper proportion of interest accrued . . . on bonds or other debts or loans existing or contracted for prior to the date of this contract and the proceeds of which shall be used, or shall have been or shall be invested in plant, equipment, etc., that shall be used, in the performance of the work under this contract.

"A proper proportion of taxes of all kinds accrued during the taxable year with respect to the business or property, except any Federal taxes.

"A proper proportion of physical losses actually sustained within the taxable year in connection with the construction of the vessels under this contract, including losses from fire, flood, storm, riot, vandalism, any acts of God, acts of war, or other casualties and not compensated for by insurance or otherwise.

"A reasonable allowance, according to the condition, for depreciation of values of the property and plant of the Contractor used in connection with the work under this Contract."

Neither in the contracts nor under any relevant statutory provision was there any restriction on salaries and bonuses to be paid to executives of the shipbuilder or its affiliates. Cf. Sections 505 (c) and 805 (c) of the Merchant Marine Act of 1936, 49 Stat. 1985, 1999, 2013.

[2] Even in the case of lump sum contracts with the Government, it is generally recognized that the real risk of loss is negligible. It is usual in this kind of contract to set prices high enough to cover, or otherwise specifically to provide against, unforeseen contingencies. And where loss does occur contrary to the expectation of both parties, Congress often passes special bills making the contractors whole.

allowed by both courts below, were about $24,000,000[3] or a little more than 22% of the computed cost.[4] This figure of $24,000,000 does not include such profits as may have been made by Bethlehem Steel Company, Bethlehem's parent, which sold it at the maximum prices established by the War Industries Board, 43,000 tons of steel used in these ships.[5] The percentage of profits in relation to the actual investment and working capital devoted by Bethlehem to the building of the ships was not found by either of the courts below.[6]

In No. 8, the Government filed a bill in equity against Bethlehem and others. The bill alleged that the Gov-

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[3] These ships apparently cost the Government at least a large part of still another $4,825,415. The Government paid this amount to Bethlehem to aid in expansion of plant facilities to build the ships—facilities which were turned over to Bethlehem after the war. The Government's money was contributed under a contract commonly in use whereby the contractor was given the option of purchasing the additional facilities at a depreciated value. Whether the Government, upon conveyance of the property, received any compensation at all does not clearly appear.

[4] While profits on individual contracts ranged above and below 22%, both in the proceedings below and in this Court the whole series of contracts was regarded as a unit. The Government has made no separate argument with respect to the individual contracts in which more than the average profit was realized, nor has Bethlehem with respect to the contracts in which the amount due under the half-savings clause proved to be small. The only finding of the Master in which any separation of contracts is made shows that the profits realized on contracts in which the estimated costs were checked by the Fleet Corporation were higher than those on contracts in which the Fleet Corporation accepted Bethlehem's estimates without check.

[5] Compare the statutory method of restricting profits of affiliates embodied in § 803 of the Merchant Marine Act of 1936, 49 Stat. 1985, 2012.

[6] The contracts contained a provision, usual in Fleet Corporation contracts, under which the Government agreed "to provide the cash funds necessary to pay for work already done and materials already furnished and for carrying on the work under this contract."

ernment had been induced to enter into the contracts by fraudulent representations of Bethlehem's agents; and as an independent ground for relief, that it had been the duty of Bethlehem to perform the contracts fairly, honestly, and economically "in the shortest practicable time" for no more than "a fair and reasonable profit" and that any provisions in the contract for payment of more are "void and unenforceable." The prayer was for an accounting and a decree requiring Bethlehem to refund all amounts previously paid to it by the Government in excess of what the court should find to be just and reasonable compensation for building the ships. Bethlehem filed an answer and a counterclaim for damages based on alleged breach of contract by the Fleet Corporation.

In No. 9, Bethlehem brought suit at law against the Fleet Corporation, claiming damages for breach of the same contracts. In an affidavit of defense and counterclaim the Fleet Corporation repeated the allegations made by the Government in No. 8 and sought the same relief.

The two actions were jointly referred by the District Judge to a Master who held hearings and made findings. In No. 8, the Master recommended that the Government's bill be dismissed, and on the authority of *Nassau Smelting Works* v. *United States,* 266 U. S. 101, further recommended the Bethlehem's counterclaim be dismissed for want of jurisdiction, the amount claimed being in excess of $10,000. In No. 9, he recommended that judgment be entered for Bethlehem for $5,272,075 [7] with interest at 2% from September 1, 1922. The District Judge declined to allow any interest, applying the law of Pennsylvania as he thought our decision in *Erie R. Co.* v.

[7] The Government concedes "that $1,514,995 of the judgment awarded . . . in the action at law is . . . due under contracts other than those now under attack."

Tompkins, 304 U. S. 64, required. In all other respects he followed the Master's recommendations and rendered judgment accordingly. 23 F. Supp. 676; 26 *id.* 259. The Circuit Court of Appeals affirmed. 113 F. 2d 301. On application of the United States and the Fleet Corporation, we granted certiorari. 311 U. S. 632.

As the case reaches us, the controversy revolves primarily around the section of the contracts which sets out what is to be paid to Bethlehem. In all the contracts, that section contains substantially the following provisions:

"The price to be paid for each vessel to be constructed and furnished in accordance with the terms of this contract . . . shall be the actual cost, plus the definite sum for profit hereinafter in this Article provided for, based upon an estimated actual cost to the Contractor . . . Should the actual cost be less than the estimated . . . cost . . . the Contractor shall be allowed as profit on each vessel in addition to said fixed sum for profit . . . one-half the amount by which such actual cost of each vessel falls short of the estimated cost . . ."

Thus, a high estimated cost would increase the probability of "savings" to be divided between Bethlehem and the Government. And the more the estimated cost exceeded actual cost, the greater would be Bethlehem's share. It can be seen, therefore, that the estimated cost agreed upon by the parties is a pivotal figure.

I

The Government charged Bethlehem with fraud in submitting estimated cost figures which were adopted in the contracts. It was alleged that Bethlehem's agents made two false representations: (1) that it was impracticable to estimate closely what the cost would be and (2) that the estimates Bethlehem submitted, and which the Fleet Corporation accepted, were fair and reasonable under the

circumstances. The Master found that there was no evidence to support this charge of fraud. The District Judge approved this finding as did the Circuit Court of Appeals, which said that it had "carefully considered the record in the light of this contention [of fraud]" and concluded that "the estimates submitted by Bethlehem and prepared for it by its representative Brown were fairly and honestly made and as accurate as could be expected under the uncertain conditions then prevailing." And in this Court the petitioner accepts these findings. Therefore, in considering other attacks upon Bethlehem's right to recover, we must do so on the assumption that there was no fraud in Bethlehem's negotiations with the Government.

II

The Government contends that even in the absence of fraud, Bethlehem is entitled to nothing by virtue of the half-savings clauses.

One argument is that the contracts gave Bethlehem the benefits of participating in the savings only if Bethlehem by special efforts increased its efficiency and brought actual costs below the estimates agreed to in the contracts.

Neither the specific language of the half-savings provision nor its context supports this contention. On its face, the provision contains an unconditional promise to pay Bethlehem one-half of the difference between the actual and estimated cost of the ships in question. That such a method of computation would tend to discourage careless expenditures and encourage vigorous attempts at realizing economies in building the ships is hardly debatable. But the half-savings clause does not impose any positive obligations upon the builder. The Master found, upon consideration both of the terms of the contracts and testimony on the understanding of the parties, that a showing of savings, without more, obligated the Government to share them with Bethlehem. It cannot be main-

tained that this finding, accepted by both courts below, is without ample support.

Nothing in the negotiations between the parties as revealed in the record indicates that they had a contrary understanding of the contracts. Bethlehem held out against the Fleet Corporation's early insistence upon lump sum contracts. It continually asserted that uncertainties about final cost due to rapidly rising prices would require it to protect itself by insisting upon a figure too high for the Fleet Corporation's acceptance and therefore itself proposed the cost-plus-fixed-fee-plus-half-savings method of determining compensation. While there seems to have been recognition that this method might induce greater efforts at efficiency, which would be to the advantage of both parties, there is not the smallest hint that either Bethlehem or the Government regarded the substitution of this method as imposing any positive obligations upon Bethlehem in addition to those it would have had under lump sum contracts.

In the alternative, the Government urges that the half-savings clauses are severable, and that if the contracts imposed upon Bethlehem no obligation of special effort to effect savings, these clauses were unsupported by consideration, and are therefore unenforceable. The Master and the courts below, however, treated these clauses as non-severable; to do otherwise would call for departure from accepted principles of the law of contract. Whether a number of promises constitute one contract or more than one is to be determined by inquiring "whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out." Williston on Contracts (rev. ed.) § 863 and cases there cited. The record makes it clear that each of the contracts here was assented to as a single whole, and that consummation of a bargain between the parties depended upon inclusion of

the half-savings clause. Furthermore, we know of no federal or state statute or established rule of law in any jurisdiction inconsistent with the elementary proposition that a promise to build ships is good consideration for a promise to pay a sum of money whether fixed in amount or depending upon the relationship between actual and estimated cost.[8] Cf. *Dayton Airplane Co.* v. *United States,* 21 F. 2d 673, 682–683.

III

The Government further argues that if the half-savings clauses must be taken as permitting Bethlehem to participate in savings however caused, the contracts are invalid because unconscionable. Without specifying that it relies on the law of any particular jurisdiction, the petitioner rests its argument on an asserted general doctrine of unconscionability at common law. Since there is no governing constitutional or federal statutory provision, if these were contracts between private individuals, the law of some locality would be controlling. *Erie R. Co.* v. *Tompkins, supra.* Whether the same rule would apply to government contracts in general or to the contracts of the Fleet Corporation [9] in particular, we need not decide. Nor, assuming the applicability of the

[8] Of the cases called to our attention by the Government, only in *Burke & James, Inc.* v. *United States,* 63 Ct. Cls. 36, was a bonus for savings clause held severable and invalid although regarded as "part and parcel of the original . . . contract." We agree, as did both courts below, with the Master's statement that the *Burke* case is not applicable here because "the facts upon which the decision of that case was based are so different."

[9] The District Court treated the contracts as governed by the law of Pennsylvania. The Circuit Court of Appeals treated them as governed by the law either of Pennsylvania or the District of Columbia, but did not decide which. The Fleet Corporation was organized under the laws of the District of Columbia. Although wholly owned and controlled by the Government it has been held subject to suit in

Tompkins case to the contracts before us, would we have to determine whether the law of the District of Columbia or of some particular state is decisive. For, in invoking the asserted doctrine of unconscionability claimed to be applicable here, the Government relies entirely upon the alleged existence of two elements: duress, and profits grossly in excess of customary standards. And for reasons we shall set out, neither of these two elements exists here.

Duress. The word duress implies feebleness on one side, overpowering strength on the other. Here it is suggested that feebleness is on the side of the Government of the United States, overpowering strength on the side of a single private corporation. Although there are many cases in which an individual has claimed to be a victim of duress in dealings with government, *e. g., Union Pacific R. Co.* v. *Public Service Comm'n,* 248 U. S. 67, this, so far as we know, is the first instance in which government has claimed to be a victim of duress in dealings with an individual.

The argument by which the petitioner seeks to establish that the contracts were made under duress is essentially this: Germany's submarine warfare made it imperative that the Government secure the greatest possible number of ships in the shortest possible time; there was a scarcity of ships and shipbuilding facilities in the United States; Bethlehem, the largest shipbuilder in the world, not only had shipbuilding facilities available, but also a trained organization; at a time when Bethlehem's facilities and trained organization were vital to the prosecution of the war, it declined to accept terms proposed by the Government, but insisted upon prices which some of

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either state or federal courts. *Sloan Shipyards Corp.* v. *U. S. Fleet Corp.,* 258 U. S. 549; *U. S. Shipping Board Merchant Fleet Corp.* v. *Harwood,* 281 U. S. 519.

the Government's representatives thought too high; although Congress had authorized the Executive to commandeer shipbuilding facilities if necessary, Bethlehem's organization was also needed and the Government was without power to compel performance by an unwilling organization; the Government therefore had to accept contracts on whatever terms Bethlehem proposed or, doing without the ships which Bethlehem could produce, run the risk of military defeat.

Two basic propositions underlie this argument: (1) The Government's representatives involuntarily accepted Bethlehem's terms. (2) The circumstances permitted the Government no other alternative.

Upon reviewing the negotiations between the representatives of the Government and the representatives of Bethlehem, we cannot find support for the first proposition. The Master found, and the courts below agreed, that "the contracts resulted from negotiations in which both parties were represented by intelligent, well informed and experienced officers whose sole object was to make the best trade possible, under conditions which included the uncertainties of war-time contingencies, the results from which were not and could not have been known at the time the contracts were made." Two of the three principal negotiators for the Fleet Corporation have testified in the proceedings before the Master. It is abundantly clear from their testimony that, during the course of the negotiations, they did not consider themselves compelled to accept whatever terms the other side proposed. In the disposition of the two main differences between the negotiators, there is no evidence of that state of overcome will which is the major premise of the petitioner's argument of duress. Cf. *French* v. *Shoemaker*, 14 Wall. 314, 332.

One of the differences was settled by the Government's abandonment of its earlier insistence upon a lump sum arrangement together with a guaranteed date of delivery.

In view of the rising prices and unpredictable labor supply of the time, Bethlehem's reluctance to enter into contracts on such terms does not seem unreasonable.[10] And if the Government's abandonment of its position is to be regarded as evidence of compulsion, we should have to find compulsion in every contract in which one of the parties makes a concession to a demand, however reasonable, of the other side.

The other major difference between the negotiators was on the matter of price. There is evidence that some of the Fleet Corporation's representatives considered Bethlehem's demands high, but we cannot conclude that the figure finally accepted by the Fleet Corporation was accepted because its representatives felt themselves powerless to refuse. On the contrary, Bethlehem by letter voluntarily offered to accept contracts on terms to be fixed by the Fleet Corporation's general manager. This offer was rejected, one of the Fleet Corporation's negotiators testifying that it preferred to make contracts rather than assume the attitude of dictating terms. Moreover, the general manager of the Fleet Corporation, in whom final authority was vested and who approved these contracts, was of the opinion that high estimated cost figures would be advantageous to the Government because "care must be exercised that they be not placed at too low a figure, for if they are, the probabilities are that the contractor will lose interest in keeping the cost down." And one of the negotiators for the Fleet Corporation has given testimony that he was not so much concerned with cost as with speed of production, since "legislation was already in the offing in the form of war profit taxes . . . to take care of extreme

[10] Cf.: "Obviously no sane man would bid on a lump-sum contract under such conditions, unless perchance he should treat the matter as a pure gamble and include an excessive margin in his proposal for unforeseen contingencies." Report of Chief of Construction Division, War Department Annual Reports (1919) 4147.

cases." We must therefore conclude that the negotiations do not show that Bethlehem forced the Government's representatives to accept contracts against their will.

If the negotiations do not establish duress, the Government finds it in the circumstances themselves. The petitioner concedes that the Government could have commandeered Bethlehem's plants, but it contends that, if the plants had been commandeered, Bethlehem's organization would have been unwilling to serve the Government in them. Heavy reliance is placed on an observation in the Master's report that "the Government did not have power to compel performance by an unwilling organization." We shall later consider the alleged lack of power. We now point out that the alleged unwillingness is an assumption unsupported by findings or evidence. Since the possibility of commandeering appears not even to have been suggested to Bethlehem, we have no basis for knowing what its reaction would have been. We cannot assume that, if the negotiations failed to produce contracts acceptable to both sides, Bethlehem would have refused to contribute to the war effort except under legal compulsion. We cannot lightly impute to Bethlehem's whole organization, composed as it was of hundreds of people, such an attitude of unpatriotic recalcitrance in the face of national peril.

But even if we were to assume, as we do not, an initial attitude of unwillingness, we do not think that the Government was entirely without means of overcoming it. For, the representatives of the Fleet Corporation, an agent of the United States, came to Bethlehem armed with bargaining powers to which those of no ordinary private corporation can be compared. If it chose to, the Fleet Corporation could have foregone all negotiation over price, compelling Bethlehem to undertake the work at a price set by the President, with the burden of going to court if it considered the compensation unreasonably low. And the

power to commandeer Bethlehem's entire plant and facilities, in accordance with authority specifically delegated by the President, provided the Fleet Corporation with an alternative bargaining weapon difficult for any company to resist.

The Government nevertheless urges that the circumstances here are analogous to those under which courts of admiralty have held contracts to be unenforceable. In particular, it points to the principle that courts of admiralty "will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit." *Post* v. *Jones*, 19 How. 150, 160. We think this principle has no real relevance to the case before us.

In the first place, if there was a "traffic of profit" here, it was not the unanticipated result of an accident as in the salvage cases. When Congress authorized the procurement of ships through ordinary commercial negotiations, it must have known that the purchases could not be made in a market of open competition, because existing shipbuilding facilities would be overtaxed by the construction program. See Department of Commerce, Government Aid to Merchant Shipping (rev. ed. 1923) 433; Hearings before House Committee on the Merchant Marine and Fisheries on H. R. 10500, 64th Cong., 1st Sess., *passim*. And Congress must have anticipated that, in the contracts agreed upon, profits would be expected, and that the self-interest inherent in commercial transactions would make itself felt. Therefore, in seeking to establish duress from the circumstances in which these contracts were made, the Government is relying on the identical circumstances which were in existence at the time Congress chose the policy of authorizing procurement of ships through com-

mercial negotiation. We cannot now invalidate contracts made pursuant to a Congressionally selected policy, on the sole ground of the coercive effect of circumstances which Congress clearly contemplated. To do so we should have to repudiate legislative power exercised in proper constitutional sphere.

In the second place, the captain of a ship in distress on the high seas who is completely at the mercy of his salvor cannot be likened to a sovereign power dealing with an individual contractor. We cannot regard the Government of the United States at war as so powerless that it must seek the organization of a private corporation as a helpless suppliant. The Constitution grants to Congress power "to raise and support Armies," "to provide and maintain a Navy," and to make all laws necessary and proper to carry these powers into execution. Under this authority Congress can draft men for battle service. *Selective Draft Law Cases*, 245 U. S. 366. Its power to draft business organizations to support the fighting men who risk their lives can be no less.

Profits. The general common law rule of unconscionability on which the petitioner relies is said to deny enforcement to contracts when the profits provided for are grossly in excess of a standard established by common practice. Whether there is such a rule, what is its scope, and whether it is part of the body of law governing these contracts, we need not decide. For, high as Bethlehem's 22% profit seems to us, we are compelled to admit that so far as the record or any other source of which we can take notice discloses, it is not grossly in excess of the standard established by common practice in the field in which Congress authorized the making of these contracts. And in particular, it may be added, the Master found that the ships built by Bethlehem cost the Government less than comparable ships built by other shipbuilders. The Gov-

ernment made no attempt to establish, nor is there any indication in the record, that the profits realized by other shipbuilders were any less than Bethlehem's.

To establish a standard of customary profits, the petitioner points to the experience of the Navy and War Departments and other branches of the Government in connection with straight cost-plus contracts. Because 10% was the profit specified in many such contracts, the Government asserts that it is an appropriate figure here, and urges that the profits on these contracts, tested by such a standard, cannot be allowed. The relevance of experience with cost-plus contracts to the contracts here is not clear. The Shipping Board deliberately chose to avoid cost-plus contracts where possible, having found them unsatisfactory in practice. Moreover, the record shows that the total cost to the Government of comparable ships under cost-plus contracts was higher than the total cost of the ships Bethlehem built under the contracts here in question. And experience in many fields has demonstrated that the percentage of profit actually realized under cost-plus contracts is likely to be far more than the percentage specified. As stated in 1918 by Charles E. Hughes, later Chief Justice, in his report to the Attorney General on the aircraft industry, "contracts of this sort lead to waste, foster abuses, and impose an almost intolerable burden of cost accounting, in itself a hindrance to rapid production." Report to the Attorney General on the Aircraft Inquiry (1918) 134. See also, Expenditures in the War Department—Camps, House Report No. 816, 66th Cong., 2d Sess., 49–53. The 10% which the petitioner derives by reference to the cost-plus contracts of certain governmental departments cannot be taken as a standard of common practice. It is an illusory figure without basis in the realities of business experience.

If profits earned under Government contracts in general are taken as the standard of comparison, the 22%

claimed here is overshadowed in too many instances for it to be regarded as extraordinary. The Hughes report referred to above, for example, points out (pp. 136–146) that most of the airplane production during the last war was under contracts providing for much higher profits. To take an example of the profits made on food products, the Federal Trade Commission determined that, in 1917, profits on the sales of salmon canneries, a major portion of whose output was purchased by the Government, ranged from 15 to 68% of cost, averaging 52%.[11] Federal Trade Commission, Report on Canned Salmon (1918) 63. In the shipbuilding industry itself, even in peace times, profits were found by a special committee of the Senate, which investigated the munitions industry, to have been from 25% to 37% on the cruisers built in 1927, about 22% in 1929, and of like range for other years. Senate Report No. 944, 74th Cong., 1st Sess., 4.

If the comparison is made with industrial profits, not limited to profits on Government contracts alone, the 22% asked for here likewise loses all claim to distinction. An exhibit, the accuracy of which the Government has not challenged, incorporated into the record of this case, indicates that in terms of profit on gross sales, the largest American steel company made 49, 58, and 46% during the years 1916, 1917, and 1918. As computed by the Federal Trade Commission, net earnings in 1917 of the same company on all its business were 25% of total investment, and the Commission cites instances of other steel companies whose earnings thus measured ranged from 30 to 320%. Federal Trade Commission, Letter on Profiteering (1918) 9. Profits of lumber producers, again in terms of return

[11] The Federal Trade Commission Report does not give separate figures on sales to the Government, but points out (p. 7) that the Government had announced its intention to purchase 80% of the 1918 pack.

on investment, ranged as high as 121%; and of producers of petroleum products, as high as 122%, over half of the industry earning more than 20%. *Id.* 12, 13. During the first six months of 1917, one of the two major sulphur producers in the country sold its product at an average price of $18.11 per ton, more than 200% above cost, which was $5.73 per ton; the other major producer earned 236% on its investment during the first eleven months of the same year. *Id.* 11. The Federal Trade Commission's collection of data for various other industries, a collection which the Commission stated was "by no means a complete catalog," affords many additional examples of the same kind. But further confirmation should be unnecessary for a conclusion no businessman would question: that the profits claimed here, seen in their commercial environment, cannot be considered exceptional.

The profits claimed here arise under contracts deliberately let by the Fleet Corporation under authority delegated by the President in accordance with an act of Congress. Neither Congress nor the President restricted the freedom of the Fleet Corporation to grant measures of profits common at the time. And the Fleet Corporation's chosen policy was to operate in a field where profits for services are demanded and expected. The futility of subjecting this choice of policy to judicial review is demonstrated by this case, coming to this Court as it does more than twenty years after the ships were completed. In any event, we believe the question of whether or not this policy was wise is outside our province to decide. Under our form of government we do not have the power to nullify it, as we believe we should necessarily be doing, were we to declare these contracts unenforceable on the ground that profits granted under Congressional authority were too high. The profits made in these and other contracts entered into under the same system may justly arouse indignation. But indignation based on the no-

tions of morality of this or any other court cannot be judicially transmuted into a principle of law of greater force than the expressed will of Congress.[12]

IV

The problem of war profits is not new. In this country, every war we have engaged in has provided opportunities for profiteering and they have been too often scandalously seized. See Hearings before the House Committee on Military Affairs on H. R. 3 and H. R. 5293, 74th Cong., 1st Sess., 590–598. To meet this recurrent evil, Congress has at times taken various measures. It has authorized price fixing. It has placed a fixed limit on profits, or has recaptured high profits through taxation. It has expressly reserved for the Government the right to cancel contracts after they have been made. Pursuant to Congressional authority, the Government has requisitioned existing production facilities or itself built and operated new ones to provide needed war materials. It may be that one or some or all of these measures should be utilized more comprehensively, or that still other measures must be devised. But if the Executive is in need of additional laws by which to protect the nation against war profiteering, the Constitution has given to Congress, not to this Court, the power to make them.

Affirmed.

The CHIEF JUSTICE and MR. JUSTICE JACKSON, who as former Attorneys General actively participated in the prosecution of these cases, take no part in this decision. MR. JUSTICE ROBERTS also takes no part in the decision.

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[12] Cf.: "It would be very dangerous, indeed, to the best interests of the government . . . if . . . this [Court] should . . . render decrees on the crude notions of the judges of what is or would be morally right between the government and the individual." *Smoot's Case,* 15 Wall. 36, 45–46.

MR. JUSTICE MURPHY, concurring:

I concur in the opinion of the Court insofar as it relates to duress and coercion and the non-severability of the "bonus for savings" clauses, but desire to add a brief further statement of my views.

In voting for affirmance of the judgment, I do not wish to be understood as expressing approval of an arrangement like the one now under review, by which a company engaged in doing work for the Government in time of grave national peril—or any other time—is entitled to a profit of 22 per cent. under contracts involving little or no risk and grossing many millions of dollars. Such an arrangement not only is incompatible with sound principles of public management, but is injurious to public confidence and public morale. The fact that such cases were common during the last war, as evidenced by the circumstances recited in the opinion of the Court, provides no justification to my mind for such a practice then or now. No man or set of men should want to make excessive profits out of the travail of the Nation at war, and government officials entrusted with contracting authority, and the Congress bestowing such authority, should be alert to prevent it.

The question before the Court for decision, however, is not whether an arrangement like the one presented for review accords with our conceptions of business morality or with correct administration of the public business. Having made a bargain, the Government should be held to it unless there are valid and appropriate reasons known to the law for relieving it from its obligations. It is the duty and responsibility of the courts, not to re-write contracts according to their own views of what is practical and fair, but to enforce them in accordance with the evidence and recognized principles of law.

In my opinion the elements of duress and coercion have not been established in this case. The doctrine that

"necessitous men are not free men," a doctrine evolved by the English courts of chancery in the eighteenth century for the protection of harassed debtors,[1] is not applicable to the Government of the United States, armed as it is with both an actual and a potential arsenal of powers adequate to protect its interests in dealings with private persons.

I am also of opinion that the "bonus for savings" clauses are integral parts of the contracts in question and part of the entire consideration moving to Bethlehem in exchange for its promise to build ships. To characterize these clauses as severable and supported by consideration only if Bethlehem promised to increase its efficiency is ingenious, but requires us to close our eyes to the actualities of the record before us and to ignore fundamental contract law.

Nor can I accept the proposition that the "bonus for savings" clauses are properly interpreted as meaning that Bethlehem was to receive one-half of the "savings" only insofar as Bethlehem could prove that the "savings" were due to its increased efficiency. Such an interpretation, it is true, would prevent Bethlehem from benefiting by reason of purely fortuitous "savings." However, in the absence, as here, of fraud, mistake, or that overreaching which we label "duress" and "coercion," contracts should be interpreted as they are written, not as they might or should have been written in the light of after-thought and subsequent experience. The language of the "savings" clauses does not limit Bethlehem's participation in "savings" to those attributable only to its own efforts. The Master found that "Bethlehem was to participate in savings however earned." The suggested interpretation, ignoring the language of the contracts and the expressed

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[1] *Vernon* v. *Bethell,* 2 Eden 110, 113. And see *Wood* v. *Abrey,* 3 Maddock's Chan. 216; *Underhill* v. *Horwood,* 10 Ves. Jr. 209.

understanding of the parties, gratuitously rewrites the contracts to accord with notions of fairness acquired in the light of subsequent developments.

It is understandable that one may be indignant at Bethlehem's claim, but such indignation does not justify the distortion of established legal principles to relieve the Government of its approval of a hard bargain. It cannot be left out of consideration that the Government entered into the agreements with full understanding of their terms. Surely there is much to be said in favor of the Government's standing behind obligations, even though quite onerous, which it incurred with knowledge of the circumstances. The possibility that the Government may be relieved of bargains twenty-four years after agreeing to them is not conducive to mutual trust and confidence between citizens and their government.

The judgment should be affirmed.

MR. JUSTICE FRANKFURTER, dissenting:

The Founders divided our government into three branches, partly to prevent autocratic concentration of power and partly to achieve appropriate division of labor in the difficult task of government. The President has his duties, the Congress its duties, and we ours. What powers the Congress should give the President in order to obtain the most effective production of war supplies, how the President should exercise those powers, whether a system of private contracts for war materials is conducive to unjustifiable waste and profiteering, or whether government production of necessary war supplies is a wiser course—these and like matters are not our business and upon them we should neither express nor intimate views. However circumscribed the judicial area may be, we had best remain within it. But the function of the judiciary is not so limited that it must sanction the use of the federal courts as instruments of injustice in dis-

regard of moral and equitable principles which have been part of the law for centuries. I am compelled, therefore, to dissent from the judgment of the Court.

In the summer of 1917 the United States was at war with Germany. The enemy's submarine was taking terrific toll of our shipping. The immediate threat to our national security had to be met promptly. Congress enacted the Emergency Shipping Fund Act of June 15, 1917, 40 Stat. 182, conferring vast powers upon the President. He was authorized to place orders for such ships or material as "the necessities of the Government" may require; to modify, suspend, cancel or requisition contracts for the building, production, or purchase of ships or material; and to take over any plants and ships constructed or in the process of construction. If any person owning any ship, plant, or material refused to build or sell ships or material ordered by the Government "at such reasonable price as shall be determined by the President," he was empowered to take possession of the ships, material, or plant of such person.

On July 11, 1917, the President delegated all the authority vested in him by this Act to the United States Shipping Board Emergency Fleet Corporation. A stupendous task was thereby imposed upon the Fleet Corporation. "The program of construction, as well as operation was gigantic. It involved an expenditure of more than three and a half billion dollars, a sum greater than any expended by any corporation in a similar period of time. Many of the officials and board members were without experience in either shipbuilding or operation. No adequate organization existed at the beginning. A complete organization to carry out its large program had to be created. There was a shortage of shipbuilding skill as well as shipbuilding facilities. The need for ships was imperative and constantly increased during the combat period." Report of the Select Committee on U. S. Ship-

ping Board Operations, H. Rep. No. 1399, 66th Cong., 3d Sess., p. 24.

Bethlehem was the largest shipbuilding company in the world. Its five subsidiaries and their plants were experienced shipbuilders, with efficient and well-equipped organizations. As the Master in this case found, "it was understood by all parties concerned that the Fleet Corporation shipbuilding program would call for capacity production at each of Bethlehem's shipyards." Of course the Government had the power to take over Bethlehem's shipyards and plants. But the United States was at war. It needed ships—and it needed them at once. The shipyards and plants of a recalcitrant shipbuilder would not produce the necessary tonnage, at least not in the needed time, without an organization able to operate them at maximum efficiency. The Master found that "A failure to induce Bethlehem to undertake the shipbuilding program covered by these contracts, followed by the taking possession by the Fleet Corporation of the Bethlehem plants, could not have accomplished the desired result. It was Bethlehem's organization that was necessary to insure success to the shipbuilding program of the Fleet Corporation and, as the Government did not have power to compel performance by an unwilling organization, if Bethlehem demanded its price on the basis of substantial commercial profits rather than contribute such services on a patriotic basis, the Government was obliged to take the contracts on such basis or not at all."

Bethlehem does not deny that in these negotiations the Government's legal power to requisition its shipyards was, for purposes of bargaining, an empty weapon. "It is also true," Bethlehem admits, "that, although the Fleet Corporation had the power to take over Bethlehem's yards, what it really required for the carrying out of its program was the use of Bethlehem's organization—its knowledge of how to build ships." The representatives

of both Bethlehem and the Fleet Corporation knew that the Government did not regard its power to requisition plants and shipyards as a satisfactory alternative to making contracts with private shipbuilders for the construction of ships.[1] It is not for us to say that the Government should not have determined upon such a policy. It is enough that when these contracts were made, none of the parties believed that there was open to the Government the feasible alternative which now, twenty-five years later, this Court says was open to it.

This was the setting in which the contracts in suit were made. Bethlehem was represented throughout the negotiations by Joseph W. Powell, its vice president and operating manager, and Harry Brown, its technical manager, described by the Master as "two of the ablest and most experienced shipbuilders and estimators of shipbuilding costs in the United States." On behalf of the Fleet Corporation the active negotiators were Admiral E. T. Bowles, manager of its division of steel ship construction, and G. S. Radford, manager of its contract

[1] Whatever the scope and importance of the Government's requisitioning power in other situations (compare Baruch, American Industry in War, p. 77, with Sen. Rep. No. 944, 74th Cong., 1st Sess., pt. 2, pp. 4–5, 111–15), it was without significance in the Fleet Corporation's shipbuilding program. The reports of the Shipping Board show that the exercise of the power was limited to the acquisition of vessels which had been built or were being constructed; the power does not seem to have been employed to take over the shipyards of recalcitrant private contractors. Indeed, the policy of the Government, based upon its wartime needs, was to encourage, financially and otherwise, the construction and maintenance of shipyards by private interests. See 1st Annual Report of the U. S. Shipping Board (1917) pp. 12–15; 2d Annual Report (1918) pp. 33–36, 120–22; Report of Director General Charles Piez to the Board of Trustees of the U. S. Shipping Board Emergency Fleet Corporation (April 30, 1919) pp. 13–14, 78, 123; Report of the President of the U. S. Shipping Board Emergency Fleet Corporation to the Board of Trustees (August 1, 1919) pp. 25–26.

division. The Master characterized Bowles and Radford as "equally competent shipbuilding experts." However, they were not empowered to conclude contracts on behalf of the Fleet Corporation. That ultimate authority belonged to Charles Piez, the vice-president and general manager of the Fleet Corporation. Piez was a business man who had had no previous shipbuilding experience, and the Master found that "At the time of the negotiations relating to the contracts in controversy, the relations between Powell and Piez were very close. Piez, as Powell knew, had had no shipbuilding experience whatsoever, had implicit confidence in Powell's integrity and shipbuilding ability and experience, and was accustomed to look to him for information and assistance with respect to matters of shipbuilding."

Following a conference in Washington on June 15, 1917, attended by Powell and other shipbuilders, the General Manager of the Fleet Corporation requested Bethlehem to submit formal proposals for the construction of ships. Throughout the entire negotiations which followed, the Fleet Corporation tried to persuade Bethlehem to enter into "lump-sum" contracts. Powell refused, insisting upon the so-called "half-savings" form of contract which he had originated. He set forth his proposals in his letter of December 13, 1917, to the Fleet Corporation: "Because of the unprecedented conditions surrounding the Labor and Material market, it is impracticable to estimate within a reasonable percentage what will be the actual cost of construction, and it is therefore impossible to submit fixed prices for any of these vessels, except upon a basis so far above estimated cost that any figure acceptable to this Company would not be acceptable to the Emergency Fleet Corporation. It is proposed, however, that they be constructed on the basis of actual cost plus a fee, with an agreed upon probable cost, this Company to be paid in addition to the fee one-half of any saving that may be

made below this cost figure, and with the further provision that the estimated cost figure will be increased due to any increase in rates of wages that may be approved by the Emergency Fleet Corporation."

After further conferences, Powell submitted a proposal, dated December 19, 1917, specifying the estimated costs and fixed fees of the vessels to be constructed. On the morning of January 3, 1918, before the Fleet Corporation had expressed any views on the proposal of December 19, Powell handed Piez a letter, dated January 3, 1918, offering to construct a greater number of vessels than was specified in his earlier proposal. The letter concluded "that while this company cannot undertake any capital expenditures at its expense, if the terms in our proposal do not otherwise meet with the Emergency Fleet Corporation's approval, we are prepared to accept the order to construct these vessels on such terms as may be personally determined by Mr. Charles Piez, the Vice President and General Manager, and strongly urge there be no delay in placing this order, as we are making this offer because of our knowledge of the vital emergency now confronting this nation in connection with the requirements for additional merchant vessels."

Upon receipt of this letter, Piez arranged a conference between Powell, Brown, Bowles, and Radford, which occurred on the afternoon of January 3. But Bowles and Radford did not know, and neither was informed, before or during the conference, of the offer made to Piez in Powell's letter of January 3. It can hardly be said, therefore, that this letter, neither addressed to nor made known to the real negotiators for the Government, was a factor in their negotiations.

At the conference, which lasted about five hours, Bowles again attempted to persuade Powell to undertake the construction upon a lump-sum basis. Powell was adamant, however, and Bowles had to acquiesce in the half-savings

form of contract in order to reach any agreement. Powell insisted that the estimates previously submitted by Bethlehem were fair and reasonable. Neither Bowles nor Radford submitted any estimates or counter-proposals, "their criticism being limited to the opinion expressed by Bowles that the original and reduced estimates submitted by Powell were too high." Powell made several reductions in the estimates, and in response to Bowles' inquiry, Brown assured him that the estimates were about as accurate as could be made under the circumstances. Bowles and Radford thereupon agreed to the prices, subject to confirmation by Piez. On the same day they handed Piez the following memorandum:

"We hand you herewith the Bethlehem Shipbuilding Corporation's proposal dated December 19, for additional construction at their various plants, amounting in all to 19 vessels, exclusive of tugs. It may be noted that, with the exception of three ships, the vessels in question are troop ships and tankers—ships of a type that only real shipbuilders can produce satisfactorily. As is well known, we have been having difficulty in placing such vessels.

"We wish to place on record the fact that the Bethlehem Shipbuilding Corporation's representatives have insisted on comparatively high prices for these vessels; that they have only with difficulty been persuaded to quote us on the types of ships referred to; and, that their attitude has been characterized by an arbitrary refusal to guarantee or stand behind delivery dates. In other words, it was difficult to persuade them to quote even a tentative delivery date, and they refused positively to accede to a bonus and penalty clause for delivery.

"The letter herewith, addressed to the Bethlehem Shipbuilding Corporation, in reply to their proposal, has been prepared for your signature and is now presented with the recommendation that it be signed. While the prices we have agreed to, with representatives of the Bethlehem

Shipbuilding Corporation, are not satisfactory to us, nevertheless, they represent a material reduction from the prices quoted by that Corporation. Realizing that the Nation will need these vessels, we have been actuated by the belief that further delay in placing the contracts should be eliminated and we believe that we have made the best compromise possible under very difficult conditions."

As a consequence of these negotiations, the thirteen contracts here in controversy were executed, seven on February 1, 1918, and six thereafter.

The provisions of these contracts demand careful analysis. The contract marked No. 183, calling for the construction by Bethlehem of three steel tank vessels each weighing about 9,100 tons, is typical.

In order to provide the sums necessary for carrying on the work under the contract, the Fleet Corporation agreed to deposit in advance "such sums as may be necessary to constitute and to keep constituted a fund from which to finance the work, to provide for payments to be made for materials, and for wages and salaries of persons employed upon the work hereunder." The Fleet Corporation agreed also to assist Bethlehem "to secure with the utmost practicable expedition and at the minimum cost consistent with the existing conditions, the facilities, utilities, parts, materials and supplies required for the work under this contract." The price to be paid for each vessel was defined to include (a) the "actual cost," plus (b) a fixed fee of $185,000, plus (c) one-half the amount by which the actual cost of each vessel should fall short of an estimated cost of $1,865,000.

It would be difficult to draft a more inclusive definition of "cost" than that contained in this contract. "Actual cost" was defined to include the following items, as well as "items similar thereto in principle": (a) the net costs of labor (including bonuses), materials, machinery, equipment, and supplies furnished by Bethlehem, and all other

direct charges, such as insurance on the vessels, etc.; (b) a "proper proportion" of running expenses, including rentals, cost of repairs and maintenance, light, heat, power, insurance, management, salaries (including bonuses), and all other indirect charges; (c) a "proper proportion" of interest accrued on bonds, loans, or other debts existing or previously made, the proceeds of which "shall be used, or shall have been or shall be invested in plant, equipment, etc., that shall be used," in the performance of the contract; (d) a "proper proportion" of taxes of all kinds, except federal taxes, with respect to the business or property; (e) a "proper proportion" of physical losses sustained in connection with the construction of the vessels under the contract, including losses from fire, flood, storm, riot, vandalism, acts of God, acts of war, or other casualties; and (f) a "reasonable" allowance for depreciation of property and plants used in connection with the construction under the contract.

The Master found that, under the "half-savings" clause, Bethlehem was entitled to receive one-half the difference between the estimated cost and the actual cost, regardless of how this difference was achieved. Bethlehem was therefore not required to show that the "savings" were attributable to its efforts to increase efficiency.

Since the estimated costs of construction specified in the contracts are crucial in fixing the extent of Bethlehem's profits, it is necessary to consider how they were determined. According to the explanation furnished by Bethlehem, Brown prepared the estimated costs specified in Bethlehem's letter of December 19, 1917, as follows: As the basis of his estimate he took the cost of constructing Hull 253, a 9,100 ton tanker which had recently been completed at the Fore River yard. The cost of the material in Hull 253 was about $389,000, consisting of $150,000 for the steel structure and $239,000 for the remaining material. Brown estimated that the cost of the material

in a similar tanker to be constructed in 1918 would be $817,000, including $399,000 for the steel structure and $418,000 for the remainder. His estimate assumed an increase in freight rates and costs of delivery of 42%. The next item was the cost of labor, which on Hull 253 amounted to 38.75 cents per hour. Brown assumed that wage scales would rise to 50 cents per hour, an increase of 29%, and that efficiency would decrease about 30%. Therefore, he estimated a total labor cost of $548,000, as compared with the actual labor cost upon Hull 253 of $326,000. Similarly, the estimates of plant operating expenses were computed on the basis of equally large assumed increases. The total estimated cost of material, labor, operating expenses, and overhead amounted to $1,694,000, to which Brown added a flat 10% allowance to cover items such as armed guard equipment and "to make allowance for other contingencies," making a total estimated cost of $1,863,000, or approximately $205 per ton. To this figure Powell added an additional $10 per ton because, as he testified, "there was an item of increased cost of steel, which represented a contract for very high-priced steel that we had to use in connection with this program, and which amounted to about $2.50 a ton spread over the program that we expected to undertake. That was a very rough figure. Whatever else I put on I put on because I knew I was going to have to trade the final contract out with Admiral Bowles and I knew I would not get what I asked for, and if I did not ask for more than I expected I would not get out where I wanted to be." Brown testified that "He [Powell] took the figures that I gave him and added $10 a ton to it" for some reason which he could not recall.

The estimated cost finally specified in the contract for the construction of the three vessels was $1,865,000; the estimated cost of such vessels proposed in Powell's letter of December 19, 1917, was $1,983,800, a difference of $118,800, or less than 6% of the proposed estimate.

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The Master found that, during the negotiations, the Fleet Corporation was uninformed as to the probable cost of materials and labor, Bethlehem's overhead and operating expenses, and depreciation and similar charges. Consequently, at the conference of January 3, 1918, from which emerged the contracts in controversy, the representatives of the Fleet Corporation did not submit any counter-offers to Bethlehem; they merely insisted that Bethlehem's estimates were too high. Brown's testimony is illuminating as to the nature of the bargaining at the conference:

"Q. Now I am asking you whether with respect to those vessels Admiral Bowles submitted any price of his own?

"A. No, sir.

"Q. Did he ask you how your estimates were made up?

"A. No, sir.

"Q. Did he ask you to justify your estimates in any way?

"A. No, sir.

"Q. He just objected to them repeatedly and said they were too high?

"A. Yes, sir.

"Q. But did not ask you to justify them?

"A. No, sir.

"Q. Until Powell finally came down to a figure which Bowles was willing to accept?

"A. Well, I should put it this way; to a figure which Mr. Powell refused to go below."

The total estimated costs of construction in the thirteen contracts in controversy amounted to $119,750,000. The total actual costs, as defined in the contracts, were $92,990,521. The estimated costs therefore exceeded the actual costs by $26,759,479, or, to put it another way, the estimated costs were almost 29% greater than actual costs. Nowhere in the long record, as the Master found, is there any explanation or justification for the tremendous dis-

parity between the estimated costs submitted by Bethlehem, or those specified in the contracts, and the actual costs.

Bethlehem's profits under these contracts amount to approximately $24,000,000, or about 22% of actual costs including extra work. In two of these contracts, Nos. 191 and 226, its profits exceed 34% and 32%, respectively. Moreover these figures do not include the profits made by Bethlehem Steel Company, an affiliate, on the sales to Bethlehem at the maximum prices permitted by the War Industries Board of 43,000 tons of steel used in the construction of ships under these contracts.

To speak of Bethlehem's profits as only 22% is in any event misleading. The profits are 22% of "cost," and not 22% of what might fairly be described as Bethlehem's capital investment in these contracts. For under these contracts Bethlehem took absolutely no risk of loss; in addition, the Government agreed to advance all sums necessary to finance the construction of the vessels. Even in usurious transactions the lender takes the risk of the borrower's insolvency. Here Bethlehem took no risks at all.

Bethlehem has already received from the Government the total costs of construction (including items for wage increases and extra work), plus fixed profits of $11,962,400 (representing about 11% of the actual costs including extra charges), plus bonuses of $8,093,157 under the half-savings clause (over 7% of costs). It has thus received total profits of more than $20,000,000 under these contracts. In the present suits it is seeking additional sums of more than $7,500,000, of which about $3,800,000 represents bonuses under the contracts in question. In sustaining the judgments of the lower courts, this Court is awarding Bethlehem further profits of about 4% on these contracts.

The Master expressly found that it was essential that Bethlehem undertake to build the vessels provided for in

the contracts, and that, since the Government needed Bethlehem's organization, it had no satisfactory alternative. It had to make the contracts on Bethlehem's terms or not at all. He concluded, nevertheless, that since "the Fleet Corporation made the contracts with open eyes, although resenting the commercial attitude of Bethlehem and condemning Bethlehem for demanding its 'pound of flesh'," the contracts were enforceable by Bethlehem in the absence of any proof of fraud.

The District Court concurred in the proposition that the absence of fraud made the contracts invulnerable. But its conclusion is contradicted by its findings: "The managers for the contractor adopted the famous Rob Roy distinction who admitted he was a robber but proudly proclaimed that he was no thief. The contractor boldly and openly fixed the figures in the estimated cost so high as to give them the promise of large bonus profits. The managers for the Fleet Corporation knew that the estimate was high and why it was made high and so protested it. The reply of the contractor's managers was, 'We will take the contract with this promise of bonus profits incorporated in it but not otherwise. You take it or leave it'. Whatever wrong there was in this may have been the wrong in a daylight robbery but there was no element of deception in it." 23 F. Supp. 676, 679.

Similarly, the affirmance of the Circuit Court of Appeals appears to have been based upon the assumption that the Government's failure to show fraud was fatal: "It is of course obvious that these negotiations took place in time of war when the need of the Government for ships was extremely urgent and the necessity of reaching an agreement with Bethlehem, therefore, vital. It is equally clear that Bethlehem insisted upon assuring itself a margin of profit which in view of the necessities of the Government was so large as to indicate an attitude of commercial greed but little diluted with patriotic feeling. There is no doubt

that this attitude on the part of Bethlehem was deeply resented by the Government representatives but the latter were faced with the alternative of either agreeing to Bethlehem's terms or taking possession of its shipyards and having the Government itself construct the vessels. We think the record clearly indicates that the Government representatives felt that the latter course could not have accomplished the shipbuilding program with the speed which was essential. It was Bethlehem's existing shipbuilding organization that was necessary to insure success to the program of the Fleet Corporation. Consequently the Government representatives, feeling as they did that Bethlehem's organization was necessary to their program, were obliged to accept the terms offered by Bethlehem. This they did with full knowledge, as we have said, that the estimated cost figures included in the contracts did not represent close approximations but were so prepared as to assure to Bethlehem substantial additional profits by way of the bonus for savings. It follows that while Bethlehem may be condemned for having taken advantage of the Nation's necessities to secure inordinate profits it cannot be charged with having misrepresented the facts to the Government's representatives." 113 F. 2d 301, 305–06.

Thus, not less than six times did the Circuit Court of Appeals declare that the unconscionable terms of this contract were forced upon the Government by the dire necessities of national self-preservation. Nevertheless the Court found itself impotent to resist the demand that the courts themselves become the means of realizing these "inordinate profits." But law does not subject courts to such impotence. Courts need not be the agents of a wrong that offends their conscience if they heed the commands of law.

In England prior to 1285 (Statute of Westminster II, 13 Edw. I, c. 50) suitors were frequently "obliged to depart from the Chancery without getting writs, because there are none which will exactly fit their cases, although these cases

fall within admitted principles." Maitland, Forms of Action at Common Law, Lect. IV (1936 ed.) p. 51. Today it is held that because the circumstances of this case cannot be fitted into a neatly carved pigeonhole in the law of contracts, "daylight robbery," exploitation of the "necessities" of the country at war, must be consummated by this Court. It is said that familiar principles would be outraged if Bethlehem were denied recovery on these contracts. But is there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice? Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other?

These principles are not foreign to the law of contracts. Fraud and physical duress are not the only grounds upon which courts refuse to enforce contracts. The law is not so primitive that it sanctions every injustice except brute force and downright fraud. More specifically, the courts generally refuse to lend themselves to the enforcement of a "bargain" in which one party has unjustly taken advantage of the economic necessities of the other. "And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them." *Vernon* v. *Bethell,* 2 Eden 110, 113. So wrote Lord Chancellor Northington in 1761.

The fact that the representatives of the Government entered into the contracts "with their eyes wide open" does not mean that they were not acting under compulsion. "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a

choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." Holmes, J., in *Union Pacific R. Co.* v. *Public Service Comm'n,* 248 U. S. 67, 70. In that case a state unconstitutionally exacted a fee for a certificate of authority to issue railroad bonds. A railroad which had paid the fee and obtained a certificate, rather than run the risk of subsequent invalidation of its bonds and imposition of serious penalties, was held to have been coerced into making the payments. In *Swift Company* v. *United States,* 111 U. S. 22, 29, the taxpayer's only alternatives were "to submit to an illegal exaction, or discontinue its business." The payment of the tax in these circumstances was held to be under duress. See also *Ward* v. *Love County,* 253 U. S. 17, 23. The courts generally regard the dilemma of the taxpayer who must either pay the taxes or incur serious business losses as a species of duress. E. g., *Morgan* v. *Palmer,* 2 Barn. & C. 729; *Ripley* v. *Gelston,* 9 Johns. 201; *Scottish U. & N. Ins. Co.* v. *Herriott,* 109 Iowa 606, 80 N. W. 665; see Notes, 64 A. L. R. 9, 84 A. L. R. 294.

Underlying all these cases is the law's recognition of a basic psychological truth. In *Atkinson* v. *Denby,* 7 Hurlst. & N. 934, 936, Cockburn, C. J., said that "where the one person can dictate, and the other has no alternative but to submit, it is coercion." See also Abbott, C. J., in *Morgan* v. *Palmer,* 2 Barn. & C. 729, 735: "But if one party has the power of saying to the other, 'that which you require shall not be done except upon the conditions which I choose to impose,' no person can contend that they stand upon anything like an equal footing." And these were decisions in days when law was supposed to be much more rigid and more respectful of forms than we now ordinarily deem just.

The fundamental principle of law that the courts will not enforce a bargain where one party has unconscionably

taken advantage of the necessities and distress of the other has found expression in an almost infinite variety of cases. See *Lonergan* v. *Buford,* 148 U. S. 581, 589–91; *Snyder* v. *Rosenbaum,* 215 U. S. 261, 265–66. Perhaps the most familiar is the situation of the mortgagor who under the pressure of financial distress conveys his equity of redemption to the mortgagee. The courts will scrutinize the transaction very carefully, *Villa* v. *Rodriguez,* 12 Wall. 323, 339, and if it appears that the mortgagee has taken unfair advantage of the other's position, the conveyance will not be enforced. Compare *Vernon* v. *Bethell,* 2 Eden 110; *Close* v. *Phipps,* 7 M. & G. 586; *Richardson* v. *Barrick,* 16 Iowa 407.

Similarly, an heir or remainderman who is compelled by financial circumstances to sell his expectancy for a song may recover it if the vendee has unduly exploited the other's distress. *Wood* v. *Abrey,* 3 Maddock's Chan. 216, 219 (where the Vice-Chancellor, Sir John Leach, said: "If a man who meets his purchaser on equal terms, negligently sells his estate at an under value, he has no title to relief in equity. But a Court of Equity will inquire whether the parties really did meet on equal terms; and if it be found that the vendor was in distressed circumstances, and that advantage was taken of that distress, it will avoid the contract."); *Underhill* v. *Horwood,* 10 Ves. Jr. 209; *M'Kinney* v. *Pinckard,* 29 Va. 149; *Butler* v. *Duncan,* 47 Mich. 94, 10 N. W. 123; *Brown* v. *Hall,* 14 R. I. 249. In *Administrators of Hough* v. *Hunt,* 2 Ohio 495, 502, a person heavily in debt, in order to obtain a further loan with which to meet debts falling due, agreed to buy land at more than double its value. The court found that the lender had unjustly taken advantage of the borrower's necessities and therefore rescinded the contract: "The rule in chancery is well established. When a person is incumbered with debts, and that fact is known to a person with whom he contracts, who avails himself of it to exact an

unconscionable bargain, equity will relieve upon account of the advantage and hardship." This was written in 1826. To the same effect are *Vyne* v. *Glenn,* 41 Mich. 112, and *Bither* v. *Packard,* 115 Maine 306, 98 A. 929.

Another class of cases in which this principle has been applied arises where a customer of a gas or electric company pays charges which he asserts he is not obligated to pay, rather than have his service disconnected. Payments made in such circumstances are regarded as coerced. See *Boston* v. *Edison Electric Illuminating Co.,* 242 Mass. 305, 310, 136 N. E. 113; *Westlake & Button* v. *St. Louis,* 77 Mo. 47; Note, 34 A. L. R. 185.

Cobb v. *Charter,* 32 Conn. 358, illustrates another type of controversy in which the courts have given effect to the historic principle of duress which is now seemingly rejected as an innovation. The defendant there had possession of a chest of tools belonging to the plaintiff, a mechanic. He refused to give up the chest, which the plaintiff needed in order to ply his trade, unless the latter would pay a bill for which he denied responsibility. The plaintiff's payment of the bill in these circumstances was held to have been made under duress. Accord: *Lonergan* v. *Buford,* 148 U. S. 581, 589–91; *Fenwick Shipping Co.* v. *Clarke Bros.,* 133 Ga. 43, 65 S. E. 140; *Stenton* v. *Jerome,* 54 N. Y. 480; *Harmony* v. *Bingham,* 12 N. Y. 99.

In *Stiefler* v. *McCullough,* 97 Ind. App. 123, 174 N. E. 823, a merchant who had to obtain a loan in order to remain in business agreed to pay the president of a bank an exorbitant sum in consideration for his services in procuring a loan. The court refused to enforce this agreement as unconscionable. Similarly, in *Niedermeyer* v. *Curators of State University,* 61 Mo. App. 654, a student paid tuition fees which he regarded as excessive, and which he did not believe he was required to pay under his contract with the university, only because he feared expulsion for non-payment. This payment was held to have been made

under duress and hence recoverable. Cf. *Baldwin* v. *Sullivan Timber Co.*, 20 N. Y. Supp. 496; *Kelly* v. *Caplice*, 23 Kan. 474.

Strikingly analogous to the case at bar are the decisions that a salvor who takes advantage of the helplessness of the ship in distress to drive an unconscionable bargain will not be aided by the courts in his attempts to enforce the bargain. *Post* v. *Jones*, 19 How. 150, 160; *The Tornado*, 109 U. S. 110, 117; *The Elfrida*, 172 U. S. 186, 193–94. In *Post* v. *Jones*, *supra*, it was said that the courts "will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit." These cases are not unlike the familiar example of the drowning man who agrees to pay an exorbitant sum to a rescuer who would otherwise permit him to drown. No court would enforce a contract made under such circumstances.[2]

To deny the existence of duress in a Government contract by ironic reference to the feebleness of the United States as against the overpowering strength of a single private corporation is an indulgence of rhetoric in disregard of fact. The United States with all its might and majesty never makes a contract. To speak of a contract by the United States is to employ an abstraction. We must not allow it to become a blinding abstraction. Contracts are made not by 130 million Americans but by some official on their behalf. Because the national interest is represented

[2] The books are full of cases in which courts have refused to lend themselves as collecting agencies of contracts made under circumstances offensive to the conscience. See, for example, in addition to the cases cited in the text, *Johnson* v. *Ford*, 147 Tenn. 63, 245 S. W. 531; *Harris* v. *Cary*, 112 Va. 362, 71 S. E. 551; *Northwestern Mutual Life Ins. Co.* v. *Barker*, 241 Ky. 490, 497, 44 S. W. 2d 292; *Caivano* v. *Brill*, 171 Misc. 298, 11 N. Y. S. 2d 498.

not by the power of the nation but by an individual professing to exercise authority of vast consequence to the nation, action by Government officials is often not binding against the Government in situations where private parties would be bound.[3] The contracts here were not made by an abstraction known as the United States or by the millions of its citizens. For all practical purposes, the arrangement was entered into by two persons, Bowles and Radford. And it was entered into by them against their better judgment because they had only Hobson's choice—which is no choice. They had no choice in view of the circumstances which subordinated them and by which they were governed, namely, that ships were needed, and needed quickly, and Bethlehem was needed to construct them quickly. The legal alternative—that the Government take over Bethlehem—was not an actual alternative, and Bethlehem knew this as well as the representatives of the Government.

The suggestion is made that Bethlehem's profits under these contracts were not exceptional when compared with the profits made under similar contracts, and that the enormous profits claimed by Bethlehem under these contracts cannot be regarded as supporting the inference that Bethlehem took advantage of the Government's distress. But the only contracts before us are those involved in this litigation. There is nothing in this record which enables us to say that although these contracts are unconscionable, all contracts made by the Government during the same period were no less unconscionable. And

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[3] E. g., the right to recover money paid under mistake of law, *Wisconsin Central R. Co.* v. *United States*, 164 U. S. 190, 212, and the unavailability against the Government of the defenses of laches or neglect of duty, *United States* v. *Kirkpatrick*, 9 Wheat. 720, 735, and estoppel based on unauthorized acts of its agents, *Lee* v. *Munroe*, 7 Cranch 366; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 408–09.

even if this were so, it would be no argument that this Court should give its sanction to these contracts by making itself the instrument for realizing the unconscionable profits. What little light the record does cast upon contemporary contracts gives no justification for regarding these contracts as typical. The policy of Charles M. Schwab, Director General of the Fleet Corporation, was to make contracts providing for a maximum profit of 10%, out of which all federal taxes would have to be paid. See Letter of Oct. 2, 1918, to Edward N. Hurley, Chairman of the Shipping Board, relating to contracts with the American Shipbuilding Company.

If we are to go outside the record, the evidence is confusing and unreliable. It must be borne in mind that Bethlehem took no risk of loss, that under the contracts it was protected from the risks of rising costs of labor, materials, transportation, etc., that under the contracts it was not required to make any capital expenditures, that the Government agreed to advance all sums that should be necessary for the performance of the contracts. It is idle to compare the profits made by Bethlehem under these contracts with profits made by industrial concerns of various types under different types of contracts. Such figures are statistical quicksand unless we are told also that in each case the contractor was not required to make any capital investment, that he was insured against normal business risks, and that he was guaranteed a profit, regardless of any change in circumstances.

We know that the policy of the Navy Department with respect to so-called straight cost-plus shipbuilding contracts was to allow profits of 10% of actual cost. See Annual Report of the Secretary of the Navy (1917) p. 33; Annual Report (1918) p. 685; Annual Report (1919) pp. 572–76; Annual Report (1920) pp. 147–48. We know that, similarly, the policy of the War Department with respect to cost-plus contracts for the construction of can-

tonments was to allow profits not exceeding 10% of cost. See Annual Report of the Secretary of War (1917) vol. 1, p. 28; Annual Report (1918) vol. 1, p. 1319; Annual Report (1919) pp. 4138–42. See also Crowell, Government War Contracts, p. 85 (in "emergency building contracts" a sliding scale of profits was employed, ranging from cost plus 7% on contracts less than $100,000 to cost plus 2½% on contracts more than $10,000,000). Similarly, contracts for the construction of buildings to house war workers were let on the basis of cost plus 2½% on contracts over $1,000,000, and 3½% on contracts under $1,000,000. See testimony of Otto M. Eidlitz, President of the U. S. Housing Corporation, Hearings before the subcommittee of the Senate Committee on Public Buildings and Grounds pursuant to S. Res. 371, 65th Cong., 3d Sess., p. 35.

These statistics obviously do not tell the whole story of Government contracts in the last war. But they indicate plainly enough that this Court should not accept, as a basis for decision in this case, the premise that Bethlehem's profits were conventional when compared with profits made in comparable transactions.

It is said, further, that even if these contracts are unenforceable when measured by standards of justice and equity enforced by the courts for centuries, nevertheless this Court must enforce the contracts now before us because Congress and the President specifically authorized such a traffic in profits. The suggestion is not consistent with historical fact.

The legislative history of the Emergency Shipping Fund Act furnishes no support for the contention that, in conferring upon the President authority to enter into contracts for the construction of ships, Congress thereby commanded the courts to enforce all contracts that were made, without regard to their provisions and the circumstances under which they were negotiated. On the contrary, the

debates contain many indications that Congress expected that the shipbuilders of the nation would provide their services for a reasonable compensation, and that the power conferred upon the President to take over shipyards would not be exercised. See remarks of Senator Knox, 55 Cong. Rec. 2518; Senator Calder, 55 *id.* 2529; Rep. Fitzgerald, 55 *id.* 3018. Indeed, the Act itself specified that ships should be built "at such reasonable price as shall be determined by the President." 40 Stat. 182, 183.

The National Defense Act, 39 Stat. 166, 213, specifically provided that "The compensation to be paid to any individual, firm, . . . for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just." There can be no clearer indication that Congress did not authorize or approve any policy of trafficking in profits. The fact that Congress took care to ascertain whether the war agencies were letting contracts under which excessive profits were being made, see Hearings before subcommittee of the House Committee on Appropriations on H. R. 3971, 65th Cong., 1st Sess., especially pp. 15–17, shows very plainly that Congress in no way countenanced exploitation for exorbitant private profit of the necessities of the Government.

Authority given to make contracts does not imply authority to make unconscionable contracts. Suppose that Congress in authorizing the contracts in question had written into its legislation: *"Provided,* that no agency of government shall be authorized to enter into unconscionable contracts." Can it be that because Congress did not expressly provide that "unconscionable contracts" are unauthorized it impliedly sanctioned the making of "unconscionable contracts"? Or suppose the estimated costs in the contracts were so inflated by Bethlehem that its profits were 200% rather than 22%. Would this Court still be bound to enforce these contracts on the ground that

Congress had commanded their enforcement? Surely, Congress did not impliedly repeal historic legal principles and prohibit this Court from exercising its duty to withhold relief when the particular circumstances disclose an unconscionable arrangement in the making of which the Government's contracting officers had no practical choice.

The suggestion that President Wilson authorized a "traffic in profit" is refuted, if explicit proof be needed, by his utterances. For example, addressing a meeting of mine operators and manufacturers on July 12, 1917, he spoke as follows:

"I hear it insisted that more than a just price, more than a price that will sustain our industries, must be paid; that it is necessary to pay very liberal and unusual profits in order to 'stimulate production'; that nothing but pecuniary rewards will do it—rewards paid in money, not in the mere liberation of the world.

"I take it for granted that those who argue thus do not stop to think what that means. Do they mean that you must be paid, must be bribed, to make your contribution, a contribution that costs you neither a drop of blood nor a tear, when the whole world is in travail and men everywhere depend upon and call to you to bring them out of bondage and make the world a fit place to live in again, amidst peace and justice?

"Do they mean that you will exact a price, drive a bargain, with the men who are enduring the agony of this war on the battlefield, in the trenches, amidst the lurking dangers of the sea, or with the bereaved women and the pitiful children, before you will come forward to do your duty and give some part of your life, in easy, peaceful fashion, for the things we are fighting for, the things we have pledged our fortunes, our lives, our sacred honor to vindicate and defend—liberty and justice and fair dealing and the peace of nations? Of course you will not.

"It is inconceivable. Your patriotism is of the same self-denying stuff as the patriotism of the men dead or maimed on the fields of France, or else it is no patriotism at all.

"Let us never speak, then, of profits and of patriotism in the same sentence, but face facts and meet them.

"Let us do sound business, but not in the midst of a mist. Many a grievous burden of taxation will be laid on this Nation, in this generation and in the next, to pay for this war. Let us see to it that for every dollar that is taken from the people's pockets it shall be possible to obtain a dollar's worth of the sound stuffs they need." Public Papers of Woodrow Wilson, Vol. 3, pp. 75–6; 55 Cong. Rec. 4995.

Mr. Justice Holmes has said that "Men must turn square corners when they deal with the Government." *Rock Island, A. & L. R. Co.* v. *United States,* 254 U. S. 141, 143. His admonition has particular relevance when this Court is called upon to enforce agreements made with the Government at war for the production of supplies essential to the prosecution of the war. During wartime the bargaining position of Government contracting officers is inherently weak, no matter how conscientious they may be. If they are to deal on equal terms with private contractors, particularly where the subject matter of contracts is so intricate and so specialized as the building of ships, they must have available to them not only detailed information but also the time within which to study the data and the freedom to exercise a real choice. In the last war, at least, this was not generally true. See Sen. Rep. No. 944, 74th Cong., 1st Sess., pt. 4, p. 30. It is not difficult in these days to appreciate the position of negotiators for the Government in time of war and to realize how much the pressures of war deprive them of equality of bargaining power in situations where bargaining with private contractors is the only practicable means of securing necessary war supplies.

Because the Government is in such a dependent position, and because those who deal with it on a cost-plus arrangement, or some similar basis, are assured of a profit, it is wholly consistent with practicalities and makes no unduly idealistic demand for the law to judge the arrangements of such wartime contractors by standards not unlike those by which a fiduciary's conduct is judged. Those upon whom the Nation is dependent for its supplies in the defense of its life would hardly wish to be judged by lower standards.

The modes are vast and varied by which the Nation obtains its war supplies. What will best supply war needs in amplest measure in the quickest time and least wastefully—whether by private letting and, if so, under what restrictions and safeguards; under what circumstances the Government should do its own supplying either by taking over old plants or building new ones or a combination of the two; to what extent and through what means peacetime habits and traditions may be displaced and disregarded—these are questions of policy for the wisdom and responsibility of the Congress and the Executive. The very limited scope of inquiry to which a litigation on a particular transaction is confined is hardly the basis for judgment on such far-flung issues. If the history of this Court permits one generalization above all others, it is the unwisdom of entering the domain of policy outside the very narrow legal limits presented by the record of a particular litigation. Such intrusion into the executive and legislative domains is not conducive to the just disposition of the immediate controversy. We are much less likely to go wrong if we do not depart from the well-grooved path of judicial competence.

This Court should not permit Bethlehem to recover these unconscionable profits, and thereby "make the court the instrument of this injustice." *Thomas* v. *Brownville, Ft. K. & P. R. Co.*, 109 U. S. 522, 526.

[Over.]

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MR. JUSTICE DOUGLAS:

On the point of duress and coercion I thoroughly agree with the views expressed by MR. JUSTICE BLACK and join in the opinion of the Court. For the reasons stated by MR. JUSTICE BLACK, the claim that Bethlehem's profits were unconscionable in the legal sense would likewise fail.

There is, however, one aspect of the case on which I take a somewhat different view.

The United States does not contest here the right of Bethlehem to retain its "fixed fee" of approximately $12,000,000 for the construction of the ships. The dispute revolves around an additional sum of $12,000,000 which Bethlehem claims under the so-called "bonus-for-savings" provision of the contracts. That provision in the several contracts was the same except for the amount of the fixed fee. Thus a typical contract provided: "Should the actual cost be less than the estimated . . . cost . . . the Contractor shall be allowed as profit on each vessel in addition to said fixed sum for profit of . . . $210,000 one-half the amount by which such actual cost of each vessel falls short of the estimated cost . . ."

I agree that the consummation of the bargain depended upon the inclusion of this "savings" clause and that in each instance there was but one contract, not several. My view, however, is that each contract was divisible or severable. ". . . the essential feature of such a contract is that a portion of the price is by the terms of the agreement set off against a portion of the performance and made payable for that portion, so that when an apportioned part of the performance has been rendered a debt for that part immediately arises." Williston on Contracts, § 861 (Rev. Ed.). In other words, the whole performance of each contract was divided "into two sets of partial performances, each part of each set being the agreed exchange

for a corresponding part of the set of performances to be rendered by the other promisor." *Id.*, § 860A. (1) The promise of the Fleet Corporation to pay the actual cost plus the fixed fee was exchanged for Bethlehem's undertaking to construct the ships. (2) The promise of the Fleet Corporation to pay one-half the amount by which the actual cost fell short of the estimated cost was exchanged for Bethlehem's promise (which is implied) to effect the savings by increasing efficiency.

Although I am clear that the contracts would not have been made but for the inclusion of the "savings" provision, I do not believe that there is a "necessary dependency" between these two sets of promises within the rule of *Philadelphia, W. & B. R. Co.* v. *Howard,* 13 How. 307, 339. And see *Pollak* v. *Brush Electric Assn.,* 128 U. S. 446, 455; *Fullmer* v. *Poust,* 155 Pa. 275, 278, 26 A. 543; Restatement, Contracts, § 266 (3). Precedents, to be sure, are of little aid since each case turns on its special circumstances. But the construction of divisibility seems warranted by the facts, though here as in other cases considerable reliance must be placed on implications.

Bethlehem's argument against divisibility rests on such testimony of Piez, who represented the Fleet Corporation, as follows: "The price had to be placed for actual cost, if we knew the cost, plus an allowance for contingencies, plus an allowance for incentive, plus the fee. So we start out with the bare cost; then in order to meet any contingencies that may happen, add some allowance for contingencies; in order to give a proper incentive, add an incentive allowance; and then add the fee." That is to say the "savings" clause was deemed to be valuable from the Fleet Corporation's viewpoint as an "incentive" to keep the costs down and to expedite the work. And Powell, the author of the "savings" clause in this case and the representative of Bethlehem, testified that the savings to be obtained would

be sufficient to "wipe out the excess profits taxes," so that the fixed fee would be "net" to Bethlehem.

But Powell's testimony also indicated that while the "savings" clause was an "incentive," Bethlehem was to earn the "savings":

"Q. Then I take it that one of your great problems, as the driving force of this organization, was to improve your labor conditions, or first to prevent labor conditions from getting worse and then to try to improve them?

"A. Yes.

"Q. Over what they were in December of 1917?

"A. Yes.

"Q. And if you were able to do that, then there was a possibility of some profit in these contracts under the half savings clause?

"A. Yes.

"Q. Was there any likelihood, or did you at that time foresee any likelihood, of any substantial saving in your material items?

"A. No, I should not have expected at that time to make any saving of any amount in the materials.

"Q. So that, if Bethlehem was to make any money out of these contracts in excess of the fixed fee, it was your judgment that the only way to do it was by increasing the efficiency of the yards?

"A. Exactly."

Powell also testified:

"The estimate was a figure which we had to shoot at that in my judgment gave us a reasonable profit or a chance of making a substantial saving. To make that saving, we had to operate more efficiently than what we might say was average efficiency under conditions that then existed. If we were going to make that saving, we had to overcome any increased cost due to decreased efficiency, and increase efficiency beyond what it was at that time."

And Piez testified that the provision was to give the shipbuilders an "incentive" to "use their ingenuity to make a larger profit."

The Special Master found that the estimates designated as "base prices" in the contracts "would afford Bethlehem a reasonable opportunity to effect 'savings' as a result of its efforts and ability to increase efficiency of management and labor as compared with average efficiency then existing." He also found that "it was understood that participation in 'savings' was supposed to represent a bonus or additional compensation to be earned by Bethlehem as consideration for its special efforts and ability to reduce cost by increasing efficiency of management and labor as compared with efficiency then existing." Yet he further found that "Bethlehem was to participate in savings however earned, but expected to produce savings by increased efficiency."

My difficulty is with that last finding. If Bethlehem was to share half of the savings "however earned," then its right to receive the bonus might well depend on a wholly fortuitous circumstance or it might accrue as petitioner suggests "simply as a reward for the inaccuracy of its estimate of actual costs." Under that view Bethlehem would be entitled to $12,000,000 additional compensation merely because the wholesale price index fell. Yet that would be tantamount to a gift by public officers of property of the United States. The same result would follow if the clause be read as containing merely a "best efforts" provision. The contract already provided that Bethlehem "in all its acts hereunder, shall use its best efforts to protect and subserve the interest of the Owner." Even in the absence of such a provision, one would be implied. *United States* v. *A. Bentley & Sons Co.*, 293 F. 229, 235; *United States* v. *George A. Fuller Co.*, 296 F. 178, 180. Hence it is difficult for me to imply that this additional $12,000,000 was offered as a reward for performing an obligation which the

law would impose on the contractor in any event. *Burke & James, Inc.* v. *United States,* 63 Ct. Cls. 36, 57. That, too, would be a grant of public funds for which the United States would receive no *quid pro quo.*

Hence it seems more reasonable to imply that Bethlehem was to render an additional performance for the additional compensation of $12,000,000. Such a construction of the contracts avoids the difficulties I have mentioned, as it gives the United States a *quid pro quo* for its promise to pay an additional $12,000,000. Cf. *Dayton Airplane Co.* v. *United States,* 21 F. 2d 673, 682–683. And it is supported by the testimony of the representatives of the two contracting parties who negotiated the contracts.

In that view of the matter, Bethlehem would be put to its proof that it effected the savings which it now claims. Mere guesswork would not be enough. *J. J. Preis & Co.* v. *United States,* 58 Ct. Cls. 81, 86. Precise proof of each dollar saved might not be possible. But a reasonable approximation of Bethlehem's contribution to the savings would be necessary. Such burden of proof has been sustained in other cases involving similar contracts. *Cohen, Endel & Co.* v. *United States,* 60 Ct. Cls. 513; *F. Jacobson & Sons* v. *United States,* 61 Ct. Cls. 420. The Circuit Court of Appeals stated that there was "some evidence tending to show that savings resulted, in part at least, from increased efficiency." 113 F. 2d 301, 307. But there was no clear showing that special efforts were made to reduce costs and that the savings which resulted were traceable to such efforts. The necessary findings on that issue were not made.

RILEY ET AL., EXECUTORS, *v.* NEW YORK TRUST CO., ADMINISTRATOR, ET AL.

CERTIORARI TO THE SUPREME COURT OF DELAWARE.

No. 81. Argued December 16, 1941.—Decided February 16, 1942.

1. Consistently with the Full Faith and Credit Clause of the Federal Constitution, when a state court in probating a will and issuing letters testamentary, in a proceeding to which all distributees were parties, expressly finds that the domicile of the testator at the time of his death was in that State, the adjudication of domicile does not bind one who is subsequently appointed as domiciliary administrator c. t. a. in a second State in which he will be called upon to deal with the claims of local creditors, including the claim of the State itself for taxes, and who was not a party to the proceeding in the first State; and in this situation, the courts of a third State, when disposing of local assets claimed by both the personal representatives, are free to determine the question of domicile in accordance with their own law. Pp. 348 *et seq.*
2. In the absence of a contrary ruling by the courts of Delaware, *held* that, by the law of that State, cases cited and relied on in an opinion of the highest court of another State—which opinion is properly in the record—may be considered as evidence of the law of such other State. P. 351.

16 A. 2d 772, affirmed.

CERTIORARI, 313 U. S. 555, to review a decree determining the disposition of property belonging to an estate, which was claimed by each of two personal representatives appointed in other States.

Mr. Dan MacDougald, with whom *Messrs. James A. Branch, Robert S. Sams,* and *Aaron Finger* were on the brief, for petitioners.

In redetermining the question of decedent's domicile, the Delaware courts failed to give full faith and credit to the Georgia judgment. *Thormann* v. *Frame,* 176 U. S. 350; *Overby* v. *Gordon,* 177 U. S. 214; *Tilt* v. *Kelsey,* 207 U. S. 43; *Burbank* v. *Ernst,* 232 U. S. 162; *Baker* v. *Baker, Eccles*

& Co., 242 U. S. 394; s. c. 162 Ky. 683; *Thomas* v. *Morrisett*, 76 Ga. 384; *In re Fischer's Estate*, 118 N. J. Eq. 599; *In re Willett's Appeal*, 50 Conn. 330.

The Georgia courts had before them all possible distributees of the decedent's estate, and hence it was possible to have a single controlling decision upon the succession. See *Baker* v. *Baker, Eccles & Co., supra.*

The Georgia judgment was binding upon the New York administrator. When decedent's husband, himself a party to the Georgia litigation, and during the progress of the Georgia litigation, had the administrator appointed in New York in *ex parte* proceedings, he could not thereby in effect nullify, in other States, the decision of the Georgia courts upon the factual question of domicile that was in issue and upon which the jurisdiction of the Georgia courts depended. The administrator acquired no interest in the succession above and unrelated to the interest of any possible distributee. A creditor or tax claimant is not entitled to be heard on the probate of a will; and hence, after the succession has been determined, can not dispute the title or right of possession of the personal representative whose title has been established in the probate proceeding. *Hooks* v. *Brown*, 125 Ga. 122; *Dunsmuir* v. *Scott*, 217 F. 200; *Tilt* v. *Kelsey*, 207 U. S. 43; Schouler on Wills, Vol. 2, p. 846, § 746.

Since the Georgia judgment is binding upon all possible distributees, including Hungerford, because he was a party to and participated in the Georgia litigation, it is also binding upon the New York administrator, the same person in law as Hungerford. See *Chicago, Rock Island & Pacific Ry. Co.* v. *Schendel*, 270 U. S. 611.

The Georgia judgment determined that the Georgia administration was domiciliary and general and not ancillary or local. Such a judgment is conclusive where all persons interested in the distribution of the estate are parties. *Thormann* v. *Frame*, 176 U. S. 350; *Overby* v. *Gordon*, 177

U. S. 214; *Tilt* v. *Kelsey,* 207 U. S. 43; *Burbank* v. *Ernst,* 232 U. S. 162; *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394; *Thomas* v. *Morrisett,* 76 Ga. 384; *In re Fischer's Estate,* 118 N. J. Eq. 599; *In re Willett's Appeal,* 50 Conn. 330.

The effect of the Delaware decision is that a dissatisfied litigant in such a proceeding may go into another State, have an administrator appointed in *ex parte* proceedings, and, ignoring the previous adjudication, have the question of domicile litigated all over again in a contest between the two sets of representatives in a third State where property of the decedent is located.

Mr. Marion Smith, with whom *Messrs. Hiram C. Todd, Clarence A. Southerland, Daniel O. Hastings,* and *J. Richard Bowden* were on the brief, for respondent.

Mr. Mortimer M. Kassell for the State Tax Commission of New York, as *amicus curiae,* by special leave of Court.

Mr. Justice Reed delivered the opinion of the Court.

Coca-Cola International Corporation, incorporated in Delaware, filed a bill of interpleader in a Delaware Court of Chancery against Julian Riley and Hughes Spalding, petitioners here, the Executors of Mrs. Julia M. Hungerford, with letters testamentary issued by the Court of Ordinary of Fulton County, Georgia, and against The New York Trust Company, the respondent, a New York corporation, as temporary administrator (afterward administrator c. t. a.) of the same decedent, appointed by the Surrogate's Court for New York County, New York.

The Georgia executors and the New York administrator each claim the right to have transferred to them, in their representative capacity, stock in the Coca-Cola Corporation now on its books in the name of the decedent. The outstanding certificates are in Georgia, in the hands of the Georgia executors. The parties are agreed, and it

is therefore assumed, that Delaware is the situs of the stock. In accordance with the prayer of the bill, the Delaware court directed the adversary claimants to interplead between themselves as to their respective claims.

The Georgia executors assert that original domiciliary probate of Mrs. Hungerford's will in solemn form was obtained by them in Georgia, with all beneficiaries and heirs at law of testatrix, including her husband, Robert Hungerford, actual parties by personal service. These, it is conceded, were all the parties under the law of Georgia entitled to be heard on the probate of the will. The respondent administrator c. t. a. was not a party. The record of probate includes a determination by special finding, over the objection of the caveator, the husband, that the testatrix was domiciled in Georgia. The special finding was specifically approved as an essential fact to determine the jurisdiction of the Court of Ordinary by the highest court of Georgia in its affirmance of the probate. *Hungerford* v. *Spalding*, 183 Ga. 547, 189 S. E. 2.

These facts were alleged by petitioners in their statement of claim to the stock filed below in response to the decree of interpleader. Exemplified copies of the probate record of the several Georgia courts were pleaded and proven, as were the applicable Georgia statutes governing domiciliary probate. From the facts alleged, petitioners inferred the conclusive establishment of the place for domiciliary distribution against "all persons," and prayed the issue to them of new certificates. An offer was made to pay all Delaware taxes or charges on the stock. At the trial, petitioners relied upon Article IV, § 1, of the Federal Constitution,[1] the full faith and credit clause, as determinative of their right to the new certificates. The

[1] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

pleading and trial contention adequately raised the Constitutional question. *Tilt* v. *Kelsey*, 207 U. S. 43, 50.

Respondent admitted that all parties entitled under the law of Georgia to be heard in opposition to probate were actually before the Georgia courts. It denied that Mrs. Hungerford was domiciled in Georgia or that the Georgia judgment of domicile and probate was binding on it, and averred testatrix's domicile at death was New York. It further averred that there were New York creditors of the estate interested in the proper and lawful administration of the estate, and that New York had certain claims for inheritance and estate taxes. Its own subsequent appointment by the Surrogate's Court of New York County, New York, on the suggestion of testatrix's husband and the State Tax Commission, was pleaded with applicable provisions of New York probate and estate tax law. By stipulation it was established that petitioners and the heirs and beneficiaries of testatrix, except her husband, who was an actual party, were notified of the New York proceedings for probate only by publication or substituted service of the citation in Georgia, and did not appear. As a domiciliary administrator c. t. a., the respondent prayed the issue to it of new certificates for the stock in controversy.

The trial court concluded from the evidence adduced at the hearings that the testatrix was domiciled in Georgia. It was therefore, as the court stated, unnecessary for it to consider the binding effect of the Georgia judgment.[2] The Supreme Court of Delaware reversed this finding of fact, determined that New York was testatrix's domicile and denied petitioners' contention that Article IV, § 1, of the Constitution required the award of the certificates of stock to the Georgia executors. The Coca-Cola

[2] *Coca-Cola International Corp.* v. *New York Trust Co.*, 2 A. 2d 290, 8 A. 2d 511.

Corporation was directed to issue its stock certificate to the respondent, the New York administrator c. t. a. *New York Trust Co.* v. *Riley,* 16 A. 2d 772. Because of the importance of issues previously undecided by this Court, certiorari was granted to review the alleged error, to wit, the asserted denial of full faith and credit to the Georgia judgment. 313 U. S. 555.

The constitutional effect of the Georgia decree on a claim in his own name in another state by a party to the Georgia proceedings is not here involved.[3] The question we are to decide is whether this Georgia judgment on domicile conclusively establishes the right of the Georgia executors to demand delivery to them of personal assets of their testatrix which another state is willing to surrender to the domiciliary personal representative,[4] when another representative, appointed by a third state, asserts a similar domiciliary right. For the purpose of this review, the conclusion of Delaware that the testatrix was in fact domiciled in New York is accepted. The answer to the question lies in the extent to which Article IV, § 1, of the Constitution, as made applicable by R. S. § 905,[5] nevertheless controls Delaware's action.

This clause of the Constitution brings to our Union a useful means for ending litigation. Matters once decided between adverse parties in any state or territory are at rest. Were it not for this full faith and credit provision,

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[3] The Supreme Court of Delaware was of this opinion. It said: We are not "called upon to consider the operation of a judgment in a probate proceeding in one jurisdiction as an estoppel against one who, although a party to that proceeding, undertakes, in a proceeding in another jurisdiction affecting the same decedent's estate, to raise again the question of the decedent's domicile." 16 A. 2d 772, 788.

[4] Cf. Page, Wills (3d Ed.) § 727.

[5] "And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." 28 U. S. C. § 687.

so far as the Constitution controls the matter, adversaries could wage again their legal battles whenever they met in other jurisdictions. Each state could control its own courts but itself could not project the effect of its decisions beyond its own boundaries. Cf. *Pennoyer* v. *Neff*, 95 U. S. 714, 722. That clause compels that controversies be stilled, so that, where a state court has jurisdiction of the parties and subject matter, its judgment controls in other states to the same exent as it does in the state where rendered. *Roche* v. *McDonald*, 275 U. S. 449, 451. This is true even though the cause of action merged in the judgment could not have been enforced in the state wherein the enforcement of the judgment is sought. *Christmas* v. *Russell*, 5 Wall. 290, 302; *Fauntleroy* v. *Lum*, 210 U. S. 230, 236.[6] By the Constitutional provision for full faith and credit, the local doctrines of *res judicata*, speaking generally, become a part of national jurisprudence, and therefore federal questions cognizable here.

The Constitution does not require, *M'Elmoyle* v. *Cohen*, 13 Peters 312, 328; *Milwaukee County* v. *White Co.*, 296 U. S. 268, 276, nor does Delaware provide, that the judgments of Georgia have the force of those of her own courts. A suit in Delaware must precede any local remedy on the Georgia judgment. Subject to the Constitutional requirements, Delaware's decisions are based on Delaware jurisprudence. Her sovereignty determines personal and property rights within her territory. Subject to Constitutional limitations, it was her prerogative to distribute the property located in Delaware or to direct its transmission to the domiciliary representative of the deceased. *Iowa* v. *Slimmer*, 248 U. S. 115, 121. The full faith and credit clause allows Delaware, in disposing of local assets, to determine the question of domicile anew for any inter-

[6] There are limitations on the generality of the statement. *Pacific Ins. Co.* v. *Commission*, 306 U. S. 493, 502, and cases there cited.

ested party who is not bound by participation in the Georgia proceeding. *Thormann* v. *Frame,* 176 U. S. 350, 356; *Overby* v. *Gordon,* 177 U. S. 214, 227; *Burbank* v. *Ernst,* 232 U. S. 162; *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394, 400. It must be admitted that this reëxamination may result in conflicting decisions upon domicile, but that is an inevitable consequence of the existing federal system, which endows its citizens with the freedom to choose the state or states within which they desire to carry on business, enjoy their leisure or establish their residences. *Worcester County Co.* v. *Riley,* 302 U. S. 292, 299.[7] But, while allowing Delaware to determine domicile for itself, where any interested party is not bound by the Georgia proceedings, the full faith and credit clause and R. S. § 905, note 5, *supra,* do require that Delaware shall give Georgia judgments such faith and credit "as they have by law or usage" in Georgia.

We note, but need not discuss at length, the respondent's contention that our application of Georgia law is limited to the statutes, decisions and usages of that state pleaded or proven in the Delaware proceedings,[8] and that

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[7] A collection of cases dealing with this topic may be found in 121 A. L. R. 1200.

[8] *Adam* v. *Saenger,* 303 U. S. 59, 62, 63; *Gasquet* v. *Lapeyre,* 242 U. S. 367; *Tilt* v. *Kelsey,* 207 U. S. 43, 57; *Chicago & Alton Railroad* v. *Wiggins Ferry Co.,* 119 U. S. 615, 622; *Hanley* v. *Donoghue,* 116 U. S. 1, 6.

Del. Rev. Code (1935) § 4695—"Statutes of Other States:—Printed copies of Statutes of any other of the United States, if purporting to be published under the authority of their respective governments, or if commonly admitted and read as evidence in their courts, shall be prima facie evidence of such law."

Del. Rev. Code (1935) § 4696—"Common Law of Other States:—The common, or unwritten, law of any other of the United States, may be proved as facts by parole evidence; and the reports of cases adjudged in their courts, and published by authority, may also be admitted as evidence of such law."

for such further rules of law, as may be needed to reach a conclusion here, we must necessarily, in reviewing a Delaware judgment, rely upon the law which, in the absence of proof of other Georgia law, properly guided the state courts, that is, the Delaware law.[9] At any rate, the cases relied upon by petitioners to establish the Georgia law, *Tant* v. *Wigfall,* 65 Ga. 412, and *Wash* v. *Dickson,* 147 Ga. 540, 94 S. E. 1009, are cited in the opinion of the Supreme Court of Georgia pleaded in these proceedings. We think they may be considered by us under the Delaware law. No objection below was made by respondent to the citations. The opinion of the Georgia Supreme Court was properly in the record and, in the absence of a contrary ruling by Delaware, we are of the view that they may be properly considered here.[10]

In 1899 the Superior Court clearly stated the rule: "It is a general rule of law that whenever a foreign statute is relied upon it must be pleaded, and this court will not take judicial notice of the laws of our sister states or of a foreign country." *Thomas* v. *Grand Trunk Ry. Co.,* 1 Pennewill 593, 596, 42 A. 987, 988. This rule has been quite strictly applied in subsequent cases. *Wolf* v. *Keagy,* 3 W. W. Harr. 362, 136 A. 520 (Super. Ct. 1927); *Mackenzie Oil Co.* v. *Omar Oil & Gas. Co.,* 4 W. W. Harr. 435, 154 A. 883 (Super. Ct. 1929); *Nye Odorless Incinerator Corp.* v. *Felton,* 5 W. W. Harr. 236, 162 A. 504 (Super. Ct. 1931); *Royal Ins. Co.* v. *Simon,* 20 Del. Ch. 297, 174 A. 444 (1934); *Holland* v. *Universal Life Co.,* 7 W. W. Harr. 39, 180 A. 328 (Super. Ct. 1935); *Silverman* v. *National Assets Corp.,* 12 A. 2d 389 (Del. Ch. 1940).

[9] *Bouree* v. *Trust Francais,* 14 Del. Ch. 332, 127 A. 56. Of this law, we take judicial knowledge. *Owings* v. *Hull,* 9 Pet. 607, 624; *Bowen* v. *Johnston,* 306 U. S. 19, 23.

[10] Cf. *Elsner* v. *United American Utilities, Inc.,* 21 Del. Ch. 73, 75, 180 A. 589, 590, affirmed 12 A. 2d 389,—

"On the brief filed by the solicitor for the claimant there are quotations from *sections* 181, 208 and 209 of the *New York Tax Law.* Whether these sections are a part of *article* 9 (*section* 180 *et seq.*) or of *article* 9–*A* (*section* 208 *et seq.*) of the statute referred to in the notice of claim, I do not know. No point has been made by the solicitors for the receivers to the effect that the New York statute has not been

We find nothing in either of these cases, however, which would lead to the conclusion that, in Georgia, the New York administrator c. t. a. was in privity, so far as the sequestration of assets for the payment of death taxes or indebtedness of decedent or her estate is concerned, with any parties before the Georgia court, or that the New York representative could not take steps in Georgia courts which might result in its getting possession of any assets which under the Georgia law of administration would be properly deliverable to a foreign domiciliary administrator. In the *Tant* case, Georgia refused to permit a collateral attack on a judgment of probate allegedly entered without jurisdiction of the subject matter. It was held that such attack must be made in the court where judgment was rendered. The effect of a judgment entered without jurisdiction of the persons whose rights were purportedly affected was not discussed. In the *Wash* case, there was simply a ruling that a judgment of the Court of Ordinary could not be collaterally attacked by parties or privies, unless the record negatived the existence of necessary "jurisdictional facts." Whom the court would classify as "privies" to a judgment *in personam* does not appear, and the opinion of the court below makes it amply plain that there was no privity under Delaware law. Hence, if the Georgia judgment is to bind the New York administrator, it can be considered to do so only *in rem*.

By § 113–602, Georgia Code of 1933, set up by petitioner as a basis for his contention as to the finality of the Georgia judgment in Delaware, it is provided that the Court of Ordinary is given exclusive jurisdiction over the probate of wills and that "such probate is conclusive upon

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properly pleaded and introduced in evidence. I shall assume then that the quotations in the brief filed in behalf of the State of New York are correct extracts from the New York statute and that by tacit agreement they may be considered as though they were properly in the record."

all the parties notified, and all the legatees under the will who are represented in the executor." All the parties entitled to be heard in opposition to the probate, including Mr. Hungerford, were actually before the Court of Ordinary. It may be assumed that the judgment of probate and domicile is a judgment *in rem* and therefore, as "an act of the sovereign power," "its effects cannot be disputed" within the jurisdiction.[11] But this does not bar litigation anew by a stranger, of facts upon which the decree *in rem* is based.[12] Hence it cannot be said, we think, that because respondent would have no standing in Georgia to contest the probate of a will and, we assume, the preliminary determination of domicile, held necessary in *Hungerford* v. *Spalding,* 183 Ga. 547, 550, 189 S. E. 2, 3, thereafter respondent could not file a claim in Delaware, dependent upon domiciliary representation of testatrix, for assets in the latter state. While the Georgia judgment is to have the same faith and credit in Delaware as it does in Georgia, that requirement does not give the Georgia judgment extra-territorial effect upon assets in other states. So far as the assets in Georgia are concerned, the Georgia judgment of probate is *in rem;* so far as it affects personalty beyond the state, it is *in personam* and can bind only parties thereto or their privies. This is the result of the ruling in *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394, 400.[13] Phrased

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[11] See *Brigham* v. *Fayerweather,* 140 Mass. 411, 413, 5 N. E. 265, 266. The Georgia Supreme Court intimated in one of the other cases cited in the *Hungerford* opinion, that if a person was not heard in probate because of a supposed lack of interest, but was in fact interested, he would not be bound by the probate decree. *Wetter* v. *Habersham,* 60 Ga. 193, 202; cf. *Young* v. *Holloway,* [1895] P. 87; *Estate of Seaman,* 51 Cal. App. 409, 196 P. 928.

[12] Cf. *Brigham* v. *Fayerweather,* 140 Mass. 411, 413; *Tilt* v. *Kelsey,* 207 U. S. 43, 51–53; *Luke* v. *Hill,* 137 Ga. 159, 161–62, 73 S. E. 345, 346.

[13] Illustrative state cases.

A will is admitted to original domiciliary probate in state *A*. Thereafter an ancillary proceeding is commenced in state *B* based upon the

somewhat differently, if the effect of a probate decree in Georgia *in personam* was to bar a stranger to the decree from later asserting his rights, such a holding would deny procedural due process.

It seems quite obvious that the administrator c. t. a. appears in Delaware as an agency of the State of New York, and not as the *alter ego* of the beneficiaries of the Hungerford estate. In its answer to the petitioners' statement of claim, it established its status by alleging

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domiciliary determination of *A*. At that point a beneficiary, a stranger to the proceeding in *A*, appears and asserts that the decedent was domiciled in *B*. The determination of domicile by state *A* will not be recognized by state *B*, but state *B* will take evidence and redetermine the issue of domicile. *Estate of Clark*, 148 Cal. 108, 82 P. 760; *Holyoke* v. *Estate of Holyoke*, 110 Me. 469, 87 A. 40 (semble); *In re Mauldin's Estate*, 69 Mont. 132, 220 P. 1102 (semble); *Strathmann* v. *Kinkelaar*, 105 Okla. 290, 233 P. 215 (semble); *Richards* v. *Huff*, 146 Okla. 108, 293 P. 1028; cf. *Estate of Reynolds*, 217 Cal. 557, 20 P. 2d 323; *In re Coppock's Estate*, 72 Mont. 431, 234 P. 258; *Matter of Gifford*, 279 N. Y. 470, 18 N. E. 2d 663; *McEwen* v. *McEwen*, 50 N. Dak. 662, 197 N. W. 862. *Contra, Corrigan* v. *Jones*, 14 Colo. 311, 23 P. 913; *Kurtz* v. *Stenger*, 169 Md. 554, 182 A. 456.

If the objector was privy to the proceeding in state *A*, state *B* will not redetermine the issue of domicile. *Willetts' Appeal*, 50 Conn. 330; *Torrey* v. *Bruner*, 60 Fla. 365, 53 So. 337; *Loewenthal* v. *Mandell*, 125 Fla. 685, 170 So. 169; *Succession of Gaines*, 45 La. Ann. 1237, 14 So. 233.

Where the proceeding in state *B* is by a stranger to the proceedings for original domiciliary probate in state *A* upon the theory that the domicile is actually *B*, state *B* will determine domicile for itself. *Scripps* v. *Wayne Probate Judge*, 131 Mich. 265, 90 N. W. 1061; *In re Crane's Estate*, 205 Mich. 673, 172 N. W. 584; *Pusey's Estate*, 321 Pa. 248, 184 A. 844; see *Matter of Horton*, 217 N. Y. 363, 371, 111 N. E. 1066, 1068.

Where the person seeking to establish domicile in state *B*, and to have original domiciliary probate there, was a party to the proceeding in state *A*, state *B* will not redetermine domicile. *Hopper* v. *Nicholas*, 106 Ohio 292, 140 N. E. 186; cf. *Thomas* v. *Morrisett*, 76 Ga. 384; *In re Fischer*, 118 N. J. Eq. 599, 180 A. 633.

that not merely the beneficiaries but creditors residing in New York and the State of New York were interested in the estate, that its appointment as temporary administrator had been sought by the New York Tax Commissioner "to protect the claim of the State of New York to inheritance and succession taxes," that the State of New York was asserting such claims in substantial amount on the theory that the domicile was New York, and that, under New York law, as evidenced by statutes likewise pleaded, an administrator was "vested by law with the right to possession and control over and to exercise all manner of dominion over all of the goods and chattels and personal property of every kind and description of the estate of a decedent."

A state is interested primarily not in the payment of particular creditors, nor in the succession of heirs or beneficiaries, as such, but in the administration of the property of its citizens, wherever located, and that of strangers within its boundaries. In a society where inheritance is an important social concept, the managing of decedents' property is a sovereign right which may not be readily frustrated.

Georgia and New York might each assert its right to administer the estates of its domiciliaries to protect its sovereign interests, and Delaware was free to decide for itself which claimant is entitled to receive the portion of Mrs. Hungerford's personalty within Delaware's borders.

Affirmed.

MR. CHIEF JUSTICE STONE:

I concur upon the single ground that the New York administrator was not bound by the Georgia judgment. He was not a party to the Georgia proceedings, nor was he represented by any of those who were parties. As administrator appointed under the New York statutes, he

was charged with the duty of administering the estate of the decedent and paying inheritance taxes upon it. His interest so far as he owes duties to the state is therefore adverse to that of the husband and the next of kin, who alone were parties to the Georgia proceeding. To have bound him by representation of those so adverse in interest would have been a denial of due process. *Hansberry* v. *Lee,* 311 U. S. 32. A judgment so obtained is not entitled to full faith and credit with respect to those not parties. *Pink* v. *A. A. A. Highway Express,* 314 U. S. 201; *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394; *Blodgett* v. *Silberman,* 277 U. S. 1, 18. Any other conclusion would foreclose New York from litigating its right to collect taxes lawfully due, by the simple expedient of a probate by the next of kin of the will of the decedent as the domiciled resident of another state, without notice to any representative of New York or opportunity to be heard.

It is unnecessary to consider the other questions discussed by the opinion.

MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON concur in this opinion.

CUDAHY PACKING CO., LTD. *v.* HOLLAND, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR.

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

No. 245. Argued February 4, 1942.—Decided March 2, 1942.

1. The Fair Labor Standards Act does not confer upon the Administrator of the Wage and Hour Division, Department of Labor, authority to delegate the power to sign and issue subpoenas *duces tecum*. Pp. 358, 367.
2. The Act gives to the Administrator all the powers with respect to subpoenas which are conferred upon the Federal Trade Commission, and no more. P. 360.
3. Section 4 (c) of the Act, providing that "The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his power in any place," means only that the Administrator and his representatives may exercise either within or without the District of Columbia such powers as they respectively possess; and this construction is fully supported by the legislative history. P. 360.
4. An unlimited authority in an administrative officer, charged with the duty of gathering data and of making investigations, to delegate the exercise of the subpoena power is not lightly to be inferred, in view of the oppressive use which may be made of it when indiscriminately delegated and when the subpoenas are not returnable before a judicial officer. P. 363.
5. It is fair to infer that in granting authority to delegate the power of inspection, and in omitting to grant authority to delegate the subpoena power, the Act shows a legislative intention to withhold the latter. P. 364.
6. The entire history of the legislation controlling the use of subpoenas by administrative officers, and particularly the legislative history of the Fair Labor Standards Act, indicates a Congressional purpose not to authorize by implication the delegation of the subpoena power. P. 364.
7. The structure of the Trade Commission Act lends no support to the view that as incorporated in the Fair Labor Standards Act it gives to the Administrator of the Wage and Hour Division an implied

power to delegate the signing and issuance of subpoenas to persons undesignated by the statute, a power not granted to or exercised by the Commission or its members. P. 366.

119 F. 2d 209, reversed.

CERTIORARI, 314 U. S. 592, to review a judgment sustaining a judgment of the District Court which required the present petitioner to produce books, papers and records relating to wages and hours, as demanded by a subpoena issued by a regional director of the Wage and Hour Division of the Department of Labor, but which postponed the question whether other books and records, relating to purchases and shipments, which were specified in the subpoena, should also be produced.

Messrs. Stephen C. Hartel and *Leopold Stahl,* with whom *Messrs. Robert E. Sher* and *James V. Hayes* were on the brief, for petitioner.

Mr. Warner W. Gardner, with whom *Solicitor General Fahy* and *Messrs. Richard S. Salant,* and *Irving J. Levy,* and *Miss Bessie Margolin* were on the brief, for respondent.

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

Of the several questions raised by this record only one requires our attention: Whether under the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. § 201, *et seq.*, the Administrator of the Wage and Hour Division of the Department of Labor has authority to delegate his statutory power to sign and issue a subpoena duces tecum.

On application of respondent, pursuant to § 9 of the Act, the District Court for Eastern Louisiana ordered petitioner to show cause why it should not be compelled to obey a subpoena duces tecum. The subpoena, issued by a regional director of the Wage and Hour Division,

commanded the production at New Orleans, Louisiana, before a specified officer of the Division, of all books, papers, and records showing for a period of eighteen months after the effective date of the Wage and Hour provisions of the Act the hours worked by employees each working day and each working week, all wages paid, all purchases made and shipments received, and all goods sold, shipped, delivered, transported, or offered for sale at petitioner's Shreveport, Louisiana, plant.

The District Court denied petitioner's motion to dismiss the proceeding for want of jurisdiction, and ordered it to produce the demanded books, papers, and records relating to wages and hours, but left undecided, until again presented to the court in the course of investigation, the further question whether the books and records relating to purchases and shipments specified in the subpoena should be produced. The Court of Appeals for the Fifth Circuit affirmed, 119 F. 2d 209, specifically ruling that the subpoena was validly issued and that the court had jurisdiction to enforce it. We granted certiorari, 314 U. S. 592, on a petition which presented as a ground for reversal the want of authority in the regional director to issue the subpoena and, as a reason for allowing the writ, the conflict on this point of the decision below with that of the Circuit Court of Appeals for the First Circuit in *Lowell Sun Co.* v. *Fleming*, 120 F. 2d 213, certiorari granted, 314 U. S. 599.

By § 11 of the Act the Administrator and his designated representatives are authorized to conduct investigations which he may deem necessary "to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act." The Act does not define the Administrator's power to issue subpoenas or specifically authorize him to delegate it to others. But, for the purposes of any hearing or investigation, § 9 of the Act makes applicable to the powers and

duties of the Administrator, the Chief of the Children's Bureau,[1] and the industry committees,[2] the subpoena provisions of §§ 9 and 10 of the Federal Trade Commission Act. 15 U. S. C. §§ 49 and 50. The Administrator is thus given all the powers with respect to subpoenas which are conferred upon the Federal Trade Commission, and no more. Under § 9 of the Trade Commission Act the Commission may require the attendance and testimony of witnesses, and production of documents by subpoena; and any members of the Commission may sign the subpoenas. The Commission may apply to any district court within whose jurisdiction an investigation is carried on for an order compelling compliance with a subpoena.

The Administrator argues that he is given authority to delegate to regional directors the signing and issuance of subpoenas by § 4 (c) of the present Act, and that, in any case, this authority is to be implied from the structure of the Act and the nature of the duties which are imposed upon him. Section 4 (c) provides: "The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place." On its face this seems no more than a definition of the geographical or territorial jurisdiction of the Administrator and his representatives. The designation of the District of Columbia as the location of the Administrator's principal office is qualified by the provision that either the Administrator or his representative may exercise "his powers" in "any place." Only if such is its meaning does § 4 (c) comport with the structure and related provisions of the Act.

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[1] The Chief of the Children's Bureau administers the child labor provisions of the Act.

[2] The function of the industry committees and their relation to the Administrator are discussed in *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126.

If, as the Administrator contends, the section is to be read as authorizing delegation of the subpoena power, that authority is without limitation. He may confer the power on any employee appointed under § 4 (b), whom "he deems necessary to carry out his functions and duties," or even on those who render the voluntary and uncompensated service which he may accept under that section. Moreover, if so read, § 4 (c) likewise gives the Administrator unrestricted authority to delegate every other power which he possesses, and would render meaningless and unnecessary the provisions of § 11 authorizing the Administrator to delegate his power of investigation to designated representatives.

If such is the meaning of the Act, he could delegate at will his duty to report periodically to Congress (§ 4 (d)), to appoint industry committees and their chairmen, to fix their compensation and prescribe their procedure (§ 5), to approve or disapprove their reports by orders whose findings of fact, if supported by substantial evidence, are conclusive (§ 10), to define certain terms used in the Act (§ 13), to provide by regulations or orders for the employment of learners and handicapped workers (§ 14), as well as other duties. A construction of the Act which would thus permit the Administrator to delegate all his duties, including those involving administrative judgment and discretion which the Act has in terms given only to him, can hardly be accepted unless plainly required by its words.

The Administrator seeks to meet this difficulty by construing § 4 (c) as authorizing the delegation of some but not all of his administrative functions. But we cannot read "any or all" as meaning "some." And in any case if only some functions can be delegated, we are afforded no legislative guide for determining which may and which may not be delegated. We think that the words of the section, read in their statutory setting, make it reasonably

plain that its only function is to provide that the Administrator and his representatives may exercise either within or without the District of Columbia such powers as each possesses. This construction is fully supported by the legislative history of § 4 (c).[3]

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[3] S. 2475, passed by the Senate on July 31, 1937 (81 Cong. Rec. 7957), and sent to the Conference Committee, provided for a Labor Standards Board, and contained § 3 (e), which read: "The principal office of the Board shall be in the District of Columbia, but it may meet or exercise any or all of its powers at any other place." Section 12 (b) of this bill also specifically authorized the Board to delegate its subpoena power. The House Committee on Labor, to which the Senate bill was referred, amended it to provide for an Administrator instead of a Board (see 82 Cong. Rec. 1391), but it included a § 3 (d) corresponding to § 3 (e) of the Senate bill, save for the substitution of the Administrator for the Board. Section 11 (b) of the bill sponsored by the House Committee also authorized any employee designated by the Administrator to subpoena witnesses. This bill, however, was recommitted to the Committee by the House on December 17, 1937 (82 Cong. Rec. 1835), and the Committee reported out a new bill on April 21, 1938 (83 Cong. Rec. 5680), which placed the administration in charge of the Secretary of Labor rather than an Administrator, contained no section comparable to § 3 (e) of the Senate bill or § 3 (d) of the recommitted House bill, and in § 7 applied §§ 9 and 10 of the Federal Trade Commission Act to the powers and duties of the Secretary. The bill with these changes passed the House on May 24, 1938 (83 Cong. Rec. 7449) and went to the Conference Committee.

The Conference put the Administrator rather than the Secretary in charge of Administering the Act, and included the present § 4 (c). The Conference also retained the House bill's adoption by reference of §§ 9 and 10 of the Federal Trade Commission Act, but extended their operation to investigations as well as hearings, and made them applicable to the powers and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees. 83 Cong. Rec. 9247–8.

The inclusion of § 4 (c), closely resembling § 3 (e) of the Senate bill and § 3 (d) of the recommitted House bill, both of which gave separate specific authority to delegate the subpoena power, indicates that the purpose of the Conference, and of Congress in adopting the Act, was not to grant a general substantive power of delegation, including that

The Administrator also urges that his authority to delegate the subpoena power is to be inferred from the nature of his duties and from the fact that under § 11 he may through designated representatives gather data and make investigations authorized by the Act. He points to the wide range of duties imposed upon him, the vast extent of his territorial jurisdiction, and the large number of investigations required for the enforcement of the Act. From this he argues that Congress must have intended that he should be permitted to delegate his authority to sign and issue subpoenas. But this argument loses force when examined in the light of related provisions of the Act and of the actual course of Congressional legislation in this field.

Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer. Under the present Act, the subpoena may, as in this case, be used to compel production at a distant place of practically all of the books and records of a manufacturing business, covering considerable periods of time. True, there can be no penalty incurred for contempt before there is a judicial order of enforcement. But the subpoena is in form an official command, and even though improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their natural respect for

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over subpoenas, but to define the places where powers otherwise granted should be exercised. The addition in § 4 (c) of the phrase "or his designated representative," the equivalent of which did not appear in either the House or Senate bills, must be taken merely as recognizing that the Administrator or his subordinates could exercise elsewhere than in the District of Columbia the powers which each had under other provisions of the Act.

what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation. All these are cogent reasons for inferring an intention of Congress not to give unrestricted authority to delegate the subpoena power which it has in terms granted only to the responsible head of the agency.

The subpoena power differs materially in these respects from the power to gather data and make investigations which is expressly made delegable by § 11. Without the subpoena that power is, in effect, a power of inspection at the employer's place of business to be exercised only on his consent. It is much less burdensome than the requirement of his selection of great numbers of books and papers and their production at other places. Because of these differences, it seems to us fairly inferable that the grant of authority to delegate the power of inspection, and the omission of authority to delegate the subpoena power, show a legislative intention to withhold the latter. Moreover, if a subpoena power in the regional directors were to be implied from their delegated authority to investigate, we should have to say that Congress had no occasion expressly to grant the subpoena power to the Administrator, who also has the power to investigate, and that the grant to him was superfluous and without meaning or purpose.

The entire history of the legislation controlling the use of subpoenas by administrative officers indicates a Congressional purpose not to authorize by implication the delegation of the subpoena power. The Interstate Commerce Act,[4] the National Labor Relations Act,[5] and the Federal Trade Commission Act,[6] whose subpoena provisions were adopted by the present Act and by the Pack-

[4] 25 Stat. 859, 49 U. S. C. § 12.
[5] 49 Stat. 456, 29 U. S. C. § 161 (1).
[6] 38 Stat. 722, 15 U. S. C. § 49.

ers and Stockyards Act,[7] all fail to grant authority to delegate the issuance of subpoenas. It appears that none of the agencies administering these acts has construed the authority of its head to include the power to delegate the signing and issuance of subpoenas.[8] On the other hand, Congress, in numerous cases, has specifically authorized delegation of the subpoena power.[9] In others it has granted the power to particularly designated subordinate officers or agents, thus negativing any implied power in the head to delegate generally to subordinates.[10] The

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[7] 42 Stat. 168, 7 U. S. C. § 222.

[8] See Monograph of the Attorney General's Committee on Administrative Procedure, Part 11, Interstate Commerce Commission, Sen. Doc. No. 10, 77th Cong., 1st Sess., p. 26. *Id.*, Part 5, National Labor Relations Board, pp. 18–19; *Id.*, Part 6, Federal Trade Commission, Sen. Doc. No. 186, 76th Cong., 3d Sess., p. 18; also Final Report of the Attorney General's Committee on Administrative Procedure (1941), Appendix K, pp. 414, 419. Apparently the actual issuance of subpoenas, though not their signing, is delegated to subordinates in some of these agencies. We are not concerned here with the validity of such a practice, since both the signing and issuance of subpoenas is delegated by the Administrator.

[9] Veterans Administration Act, 49 Stat. 2033, 38 U. S. C. § 131; Railroad Unemployment Insurance Act, 52 Stat. 1107, as amended, 45 U. S. C. § 362 (a) (m); Walsh-Healey (Public Contracts) Act, 49 Stat. 2038, 41 U. S. C. § 39; Merchant Marine Act, 52 Stat. 954, 46 U. S. C. § 1124 (a); Federal Power Act, 49 Stat. 857, 16 U. S. C. § 825f (b); Securities Act of 1933, 48 Stat 85, 15 U. S. C. § 77s (b); Securities Exchange Act of 1934, 48 Stat. 900, 15 U. S. C. § 78u (b); Public Utility Holding Company Act, 49 Stat. 831, 15 U. S. C. § 79r (c).

[10] Communications Act, 48 Stat. 1096, 47 U. S. C. § 409; Bureau of Marine Inspection and Navigation Act, 49 Stat. 1382, 46 U. S. C. § 239 (e); Civil Aeronautics Act of 1938, 52 Stat. 1021, 49 U. S. C. § 644; Motor Carrier Act, 49 Stat. 550, 49 U. S. C. § 305 (d); Longshoremen's and Harbor Workers' Comp. Act, 44 Stat. 1438, 33 U. S. C. § 927.

The grant of the subpoena power by the Fair Labor Standards Act to the Chief of the Children's Bureau and to the industry committees

suggestion that the Administrator is given authority to delegate the subpoena power because the applicable Trade Commission Act authorizes individual members of the Commission as well as the Commission itself to sign subpoenas overlooks the fact that the Administrator alone occupies a position under this Act corresponding to that of the Commissioners under their Act. The structure of the Trade Commission Act lends no support to the view that the Administrator has an implied power to delegate the signing and issuance of subpoenas to persons undesignated by the statute, a power not granted to or exercised by the Commission or its members.

All this is persuasive of a Congressional purpose that the subpoena power shall be delegable only when an authority to delegate is expressly granted. That purpose has been emphasized here not only by the authority expressly given to delegate the power to conduct investigations, and in the adoption by reference of the subpoena provisions of the Federal Trade Commission Act, which contain no authority to delegate, but by the legislative history of the present Act, which shows that the authority to delegate the subpoena power was eliminated by the Conference Committee from the bills which each House had adopted.[11] Such authority expressly granted in the bill which passed the Senate, was rejected by the Conference Committee. It also discarded the provisions of the House bill which committed the administration of the Act to the Secretary of Labor, who has a general power of delegation under Rev. Stat. § 161, 5 U. S. C. § 22, and placed in his stead the Administrator, who was given only the subpoena powers of the Federal Trade Commission incorporated in the House bill.

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is not of this class, however, since they perform functions which the Administrator does not control and could not exercise himself. In these respects they occupy an independent status under the Act.

[11] See note 3, *supra*.

We cannot assume that Congress was of the opinion that the present agency, when appropriately organized for the purpose, would be any the less able to function without the power in the Administrator to delegate the signing and issuance of subpoenas than the Federal Trade Commission, the Interstate Commerce Commission, and other agencies which have not been given and do not assert the power. Nor can we assume, as the Government argues, that Congress is wholly without design in withholding the power in this case and granting it in others, or even if it had been, that it is any part of the judicial function to restore to the Act what Congress has taken out of it. Even though Congress has underestimated the burden which it has placed upon the Administrator, which is by no means clear, we think that the legislative record establishes that Congress has withheld from him authority to delegate the exercise of the subpoena power, and that this precludes our restoring it by construction.

Reversed.

MR. JUSTICE DOUGLAS, dissenting:

We have here the narrow but important question as to the power of the Administrator to delegate his power to issue a subpoena. That problem does not involve questions as to the scope of the subpoena issued or the fact that it required documents in Shreveport to be produced at New Orleans. Statements in the opinion of the Court as to the "oppressive use" of the subpoena introduce issues wholly irrelevant to the single question before us. Those issues would not be changed one iota had the Administrator himself signed this subpoena. And if the policy underlying the opinion is a desire to see a more restrictive and discriminating use of the subpoena power, the requirement that the Administrator alone exercise the power seems idle. For his duties under this Act are

manifold and far flung. The Act extends to thousands upon thousands of persons and businesses. It is estimated that the Act covers 15,500,000 persons employed by more than 360,000 employers in 48 States, the District of Columbia, Alaska, Hawaii, Puerto Rico, and the Virgin Islands. The Administrator has 13 regional directors and one territorial representative. He has about 2200 employees. For the fiscal year ended June 30, 1941, there were 41,399 complaints received, 48,449 plant inspections made, 1,749 cases litigated, 6,000 subpoenas issued.

The problem of enforcement is intricate and exacting. If the Administrator must issue subpoenas, it seems hardly likely that he can do anything but sign them in blank. If he tried to do anything but formulate the general policy to govern the exercise of the subpoena power, he could perform little more than ministerial acts. Certainly he cannot be expected to relieve his regional offices of all questions as to where hearings shall be held, what documents are necessary for a hearing, what asserted violations should be investigated, which employer will make full and free disclosure, which will act only under the compulsion of a subpoena, and similar minutiae of daily administration. The Administrator in Washington can hardly exercise an independent judgment as to what the range or course of a particular investigation should be in remote Alaska or Puerto Rico. At least, he cannot do so unless the processes of law enforcement are to come to a standstill. Yet those matters control the nature, scope and content of subpoenas issued. Such functions must of necessity rest largely with the investigating and enforcement representatives of this kind of an administrative agency.

It would seem that his functions in this regard must of necessity largely lie in the formulation of a general policy which is to govern the exercise of the subpoena power. He has formulated that policy. The instructions to his

subordinates direct a discriminating and sparing use of the subpoena power,[1] a restriction of the scope[2] of subpoenas *duces tecum*, and a regard for the convenience of those whose records are sought.[3] Delegation is a matter of degree. An authority need not be delegated completely or not at all. It is sufficient that the administrative officer supervise and direct the execution of his duties. So far as the subpoena power is concerned, it would seem that the Administrator has satisfied all statutory demands in this situation by his selection of the limited group which can issue subpoenas, by formulating the policy to guide them, and by ratifying a subpoena issued by his subordinate.

We need not, however, rest on that alone. The subpoena power is the concomitant of the power to investigate. Congress has specifically provided that the power to make and conduct investigations may be delegated. Sec. 11 (a) provides in part:

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[1] The Administrator's Confidential Manual provides:

"The use of subpoenas should be restricted entirely to cases where difficulties have been met with in the course of inspection. If the evidence or documents sought have been refused or if the witnesses from whom information is requested refuse to be frank or require protection from coercion by their employer, the use of subpoenas will be helpful and proper. Inspectors *must*, however, first make an inspection of the plant and make a real attempt to secure the necessary information in the usual way prior to the issuance of subpoenas. The subpoena power should be used sparingly and only when all other means have failed."

[2] "The inspector must limit the demand in the subpoena to those records and those periods of time which are indispensable for his inspection." *Id.*

[3] "The person subpoenaed must be given a reasonable time to produce the records or to appear. The place at which he is requested to appear should be accurately described and be *reasonably nearby*. The time at which he is to appear should be a reasonable hour and one fixed so that any possible interference with the individual's business will be reduced to a minimum." *Id.*

"The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act."

But now we are told that that power when delegated is only a power to be exercised with the employer's consent; that if resistance is encountered, the only one who can sign the subpoena to obtain that data is the Administrator. The power to delegate the authority to make investigations is certainly the greater of the two powers. In fact, the decision to make the investigation is the significant and controlling one. Once that is made, the decision to issue a subpoena under this Act must rest with the regional offices if it is to be an informed one. Without the subpoena power the power to investigate will often be an empty one.

Hence, in view of the nature of the Administrator's functions and the fact that the power to make investigations can be delegated, the lesser but companion power to delegate the issue of subpoenas should be implied as an incident of the office.

A subpoena of course exerts a coercive influence. So does an investigation. So does all law enforcement. And any power, including the judicial power, may be abused. But as I have said, we have here no question of abuse of power. We cannot assume that the Administrator would haul a business into court where the representative of the Administrator abused the subpoena power. At least, we should assume that where the Administrator

seeks enforcement of the subpoena and stands behind his subordinate who has issued the subpoena, the subpoena is as much the Administrator's as if he had signed it. Cf. *Norris* v. *United States,* 257 U. S. 77, 82.

The reasons for holding that authority to delegate this power is an incident of the office are certainly no less cogent than those underlying the cases which hold that an administrative officer may delegate the function of holding hearings without express statutory authority. As stated by Chief Justice Hughes in *Morgan* v. *United States,* 298 U. S. 468, 481, "Assistants may prosecute inquiries. Evidence may be taken by an examiner." Such a delegation has been approved under the Fair Labor Standards Act. *Southern Garment Mfrs. Assn.* v. *Fleming,* 122 F. 2d 622. Can it be that the power to hold hearings and take evidence is so unimportant as compared with the power to sign subpoenas that the power to delegate the one but not the other can be implied? Can it be that the requirements of "practicable administrative procedure" (*Morgan* v. *United States, supra,* p. 481) are relevant and controlling in the one instance but not in the other? Both the power to conduct hearings and the power to issue subpoenas are intermediate steps in administrative procedure. The findings of the examiner are advisory only; this kind of subpoena is a command without legal sanction unless supported by a court decree. But the function of the examiner is not simply ministerial. The role which he fills is significant. The very essence of a fair hearing may depend on his conduct. If that function may be delegated without express statutory authority, it should follow *a fortiori* that the lesser subpoena power may also be delegated by reason of the requirements of "practicable administrative procedure."

The legislative history of this Act does not stand in the way. There is no indication whatsoever that the choice of the House bill as against the Senate bill was in any

way influenced by the presence in the latter of an express power of the proposed Board to delegate its subpoena power. The controversy centered on the question as to where administration of the Act should be lodged. See H. Rep. No. 1452, 75th Cong., 1st Sess.; H. Rep. No. 2182, 75th Cong., 3d Sess.; S. Rep. No. 884, 75th Cong., 1st Sess. As a matter of fact, if we are to speculate as to the intent of Congress on this point, we must assume that all delegation of the subpoena power was not precluded. The provisions of §§ 9 and 10 of the Federal Trade Commission Act were "made applicable to the jurisdiction, powers, and duties of the Administrator." § 9. The Federal Trade Commission Act lodges the subpoena power in the Commission. § 9. But it also provides that any member of the Commission may sign subpoenas. § 9. If the Commission has a limited power of delegation, it is hard to see why the Administrator has none. Logical difficulties prevent literal incorporation of the whole of § 9 into the Fair Labor Standards Act. But it certainly is impossible to deduce that a more stringent rule governs the Administrator than the Commission.

Nor can it be inferred that, because Congress has expressly granted delegation of the subpoena power under some statutes but not under others, the power may not be implied. The omission of that power in a particular statute may be an historical accident or a matter of design. Whether or not the power can fairly be implied as an incident of a particular office must depend on the nature of that office, the other statutory provisions which govern it, and the legislative history of its creation. The farthest we need go here is to say that where the legislative history is inconclusive the power to delegate is not necessarily precluded.

A requirement that the Administrator himself exercise the subpoena power at this stage of the enforcement of

the law may well retard the social and economic program which the Act inaugurated. We should be alert to prevent sheer technicalities from interposing delay in a law enforcement program. If the subpoena power is abused, Congress and the courts are open to remedy it. Meanwhile, the subpoena power should be treated sympathetically and regarded as a necessary legal sanction to obtain compliance with the law by those who, having lost the battle in the legislature, seek a delaying action in the courts.

I am authorized to state that MR. JUSTICE BLACK, MR. JUSTICE BYRNES, and MR. JUSTICE JACKSON join in this dissent.

INTERSTATE COMMERCE COMMISSION ET AL. *v.* RAILWAY LABOR EXECUTIVES ASSN. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

No. 223. Argued February 3, 1942.—Decided March 2, 1942.

Under § 1 (18)–(20) of the Interstate Commerce Act, the Interstate Commerce Commission, in authorizing the abandonment of a railway line, has authority to attach terms and conditions for the benefit of employees who will be displaced by the abandonment. P. 376.
38 F. Supp. 818, 824, affirmed.

APPEAL from a decree of the District Court of three judges setting aside in part a report and order of the Interstate Commerce Commission, 242 I. C. C. 9.

Mr. E. M. Reidy, with whom *Mr. Daniel W. Knowlton* was on the brief, for the Interstate Commerce Commission; and *Mr. Frank Karr,* with whom *Messrs. J. R. Bell*

and *C. W. Cornell* were on the brief, for the Pacific Electric Railway Co., appellants.

Mr. Willard H. McEwen, with whom *Messrs. Frank L. Mulholland* and *Clarence M. Mulholland* were on the brief, for appellees.

MR. JUSTICE BLACK delivered the opinion of the Court.

The appellant, Pacific Electric Railway Company, owns and operates electric railroads and motor bus and truck lines in California. It is a wholly owned subsidiary of the Southern Pacific Railroad Company, with whose lines it makes connections at numerous points. It applied to the Interstate Commerce Commission for permission to carry out "a general program of rearrangement of . . . passenger service, involving abandonment of certain rail lines and substitution of motor coach transportation as a means of increasing operating revenues, reducing expenses, and rendering a more adequate service to the public." The Railway Labor Executives' Association and The Brotherhood of Railroad Trainmen appeared before the Commission as representatives of Pacific's employees. They contended that if the Commission were to grant Pacific's application, it should do so only upon conditions designed to protect employees, and proposed that Pacific be required to provide certain specified benefits for employees who would be displaced or otherwise prejudiced by the abandonment. In support of this contention, they argued that many of Pacific's employees had devoted a large part of their lives to the service of the railroad and had acquired valuable rights of seniority in connection with their employment; that the proposed change would cause many of them to lose their jobs, as a result of which they would suffer great hardships and some would become public charges; and that, although the abandonment and rearrangement would give Pacific a net annual savings

of approximately $378,000, about $302,000 of the saving would be due to a net wage loss suffered by employees. After a hearing, Division 4 of the Commission issued an order permitting abandonment upon the ground that continued operation of the line by Pacific "would impose an undue burden upon the applicant and upon interstate commerce," but held that the Commission was without statutory authority to impose any conditions whatever for the protection of employees in these proceedings. 242 I. C. C. 9. The full Commission denied the brotherhood's request for rehearing. Upon application of the brotherhoods, the Federal District Court of the District of Columbia, composed of three judges, in accordance with 28 U. S. C. § 47, held that the Commission did have authority to impose conditions for the protection of displaced employees. Accordingly, it set aside "That part of the Commission's report which denies consideration of the employees' petition for lack of power . . . with directions to the Commission to consider the petition and take such action thereon as in the discretion of the Commission is proper." 38 F. Supp. 818, 824. Whether it is within the Commission's power in abandonment proceedings to impose conditions for the protection of employees is the single question presented by this appeal.

Section 1 (18) of the Interstate Commerce Act provides that "no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment." And § 1 (20) empowers the Commission to "attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require." 49 U. S. C. § 1 (18)–(20).

With respect to consolidations, another section of the Act, 5 (4), is controlling. In *United States* v. *Lowden*, 308 U. S. 225, this Court held that the Commission has authority under § 5 (4) to impose conditions similar to those sought here in order to protect employees adversely affected by a consolidation. At the time of the *Lowden* case, § 5 (4) provided: "If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation . . . will promote the public interest, it may enter an order approving and authorizing such consolidation . . . upon the terms and conditions and with the modifications so found to be just and reasonable." 49 U. S. C. § 5 (4).

The Commission argues that the conditions it is authorized to impose under the consolidation section—"just and reasonable" conditions, which "will promote the public interest"—are of much broader scope than the conditions it is authorized to impose under the abandonment section—conditions which "the public convenience and necessity may require." Although admitting that provisions for the protection of displaced employees may be a condition that "will promote the public interest," the Commission concludes that such provisions cannot be required by "the public convenience and necessity." We need not decide in what respects, if any, the authorization to impose conditions in consolidations is broader than the authorization to impose conditions in abandonments. For even assuming that the language of the abandonment section is narrower, we cannot agree that it excludes all power to impose conditions of the kind sought here.

The phrase "public convenience and necessity" no less than the phrase "public interest" must be given a scope consistent with the broad purpose of the Transportation Act of 1920: to provide the public with an efficient and nationally integrated railroad system. *New England*

Divisions Case, 261 U. S. 184, 189–191. Clear recognition that "public convenience and necessity" includes the consideration of effects on the national transportation system of a proposed abandonment appears in the decision of this Court in *Colorado* v. *United States,* 271 U. S. 153. There, Mr. Justice Brandeis, although stating that "public convenience and necessity" was the sole criterion for determining whether or not an abandonment should be allowed, nevertheless considered the effect of the proposed abandonment in a much broader sphere than the immediate locality and population served by the trackage to be abandoned. See also *Transit Commission* v. *United States,* 284 U. S. 360. And if national interests are to be considered in connection with an abandonment, there is nothing in the Act to indicate that the national interest in purely financial stability is to be determinative while the national interest in the stability of the labor supply available to the railroads is to be disregarded. On the contrary, the *Lowden* case recognizes that the unstabilizing effects of displacing labor without protection might be prejudicial to the orderly and efficient operation of the national railroad system. Such possible unstabilizing effects on the national railroad system are no smaller in the case of an abandonment like the one before us than in a consolidation like that involved in the *Lowden* case. Hence, it is only by excluding considerations of national policy with respect to the transportation system from the scope of "public convenience and necessity," an exclusion inconsistent with the Act as this Court has interpreted it, that the distinction made by the Commission can be maintained.

It was not until 1935, fifteen years after the passage of § 1 (20), that the Commission first decided that it was without power to impose conditions for the protection of workers in an abandonment. Chicago G. W. R. Co. Trackage, 207 I. C. C. 315, 322. At that time, the Com-

mission took the position that requiring displacement allowances as a condition would be the equivalent of granting a private benefit to a particular group of workers, and therefore beyond the scope of authority granted by Congress. The Commission has taken the same position here. It must not be forgotten, however, that the immediate result of permitting the abandonment itself is a private benefit for the railroad in the form of savings realized by discontinuing uneconomic services. The justification lies in the benefit to the transportation system which the Commission concluded the abandonment would produce. There is nothing in the Act to prevent the Commission from taking action in furtherance of the "public convenience and necessity" merely because the total impact of that action will include benefits to private persons, either carriers or employees. The *Lowden* case specifically recognized that the imposition of conditions similar to those sought here might strengthen the national system through their effect on the morale and stability of railway workers generally. Exactly the same considerations of national importance are applicable and operative here.

We must also reject the further argument that Congress has ratified the Commission's construction of § 1 (18)–(20). It is true that Congress made no changes in § 1 (18)–(20) of the Interstate Commerce Act in passing the Transportation Act of 1940, and that the annual reports of the Commission to Congress in 1935 and 1936 had specifically asked "for further statutory provisions to protect employees from undue financial loss as a consequence of authorized railway abandonments or unifications." But the *Lowden* case, clearly establishing that the Commission's 1935 and 1936 doubts about its powers with respect to unifications were erroneous, was decided on December 4, 1939. Congress could with good reason have concluded that the principle of the *Lowden* case was

equally applicable to abandonments. In any event, the contrary conclusion—that abandonments were now to be distinguished, although the Commission had made no such distinction in presenting the problem to Congress, and that Congress approved such a distinction—is at best the product of a set of inferences none of which is free from doubt. We therefore cannot impute to Congress's failure to amend § 1 (18)–(20) the significance which the petitioners contend it should have.

Nor is the petitioners' contention strengthened because Congress did modify § 5 (4) in the Transportation Act of 1940. The modifications, so far as relevant here, merely made mandatory with respect to unifications the protections for workers that had previously been discretionary.[1] See *United States* v. *Lowden, supra,* 239. To regard them as a restriction on the discretionary power of the Commission with respect to abandonments is not merely illogical. It requires us to impute to Congress a policy of mandatory protection for labor in unifications and no

[1] "As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees." 54 Stat. 906–907.

protection at all in abandonments. It is reasonable to suppose that if Congress had intended to make such a distinction, it would have said so more explicitly.

The petitioners have made further arguments based on the statutory history of the Transportation Act of 1940, relying upon incidental and sporadic references in committee hearings and reports to the protection of labor in connection with abandonments. We have reviewed those references, and have found that they raise inferences too ambiguous to support the conclusion that Congress has ratified the Commission's construction of § 1 (18)–(20).

It is also urged that we should not disturb the Commission's construction of the abandonment provisions for the reason that administrative interpretations by the agency charged with the enforcement of a statute are entitled to great weight. But as we have pointed out, the construction placed upon § 1 (18)–(20) by the Commission is not only hostile to the major objective of the Act and inconsistent with decisions of this Court, but irreconcilable with its own interpretations of § 5 (4). Under such circumstances, we believe the court below was amply justified in refusing to accept the Commission's construction. Cf. *Mitchell* v. *United States,* 313 U. S. 80; *City Bank Co.* v. *Helvering,* 313 U. S. 121.

We therefore conclude that the Commission has authority to attach terms and conditions for the benefit of employees displaced by railroad abandonments. Whether such terms and conditions should be attached in this case, and, if so, their nature and extent, are questions for the Commission to decide in the light of the evidence. The judgment of the court below should accordingly be

Affirmed.

Counsel for Parties.

PURCELL ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

No. 803. Argued February 11, 1942.—Decided March 2, 1942.

1. Where most of a short railway was included in the limits of a government flood control reservoir, and continued operation of the remaining portions would serve no practical purpose, and the cost of relocating and rebuilding the line, and the increased expenses of operating it if relocated, would not be justified by public convenience and necessity, the Interstate Commerce Commission was authorized by § 1 (18) of the Interstate Commerce Act to permit abandonment of the line in its entirety. P. 383.
2. In such a case it was proper for the Commission to consider the cost of relocation even though it would be paid not by the railway company but by the Government; for, in determining such applications, the interests of those served by the existing line are balanced against the interests of the carrier and the transportation system, and operation of that system without waste was one of the objects of the Transportation Act of 1920. P. 384.

41 F. Supp. 309, affirmed.

APPEAL from a decree dismissing a bill to annul an order of the Interstate Commerce Commission permitting abandonment of a railway line.

Messrs. Clarence W. Miles and *Joseph Sherbow,* with whom *Messrs. Benjamin C. Howard, Jr.* and *William B. Rafferty* were on the brief, for appellants.

Mr. James C. Wilson, with whom *Solicitor General Fahy, Assistant Attorney General Arnold,* and *Mr. Daniel W. Knowlton* were on the brief, for the United States et al.; and *Mr. C. M. Clay,* with whom *Messrs. Charles R. Webber* and *John E. Evans, Sr.* were on the brief, for the Confluence & Oakland Railroad Co. et al., appellees.

MR. JUSTICE BLACK delivered the opinion of the Court.

A federal district court, composed of three judges in accordance with 28 U. S. C. § 47, dismissed the appellants' bill, which prayed for the annulment of an order of the Interstate Commerce Commission. 41 F. Supp. 309. The order permitted the Confluence and Oakland Railroad Company, as owner, and the Baltimore and Ohio Railroad Company, as lessee, to abandon a railroad line approximately 20 miles long and to discontinue service entirely in the area now served: a semi-mountainous section along the Youghiogheny River between Confluence and Oakland Junction, Pennsylvania, and Kendall, Maryland. The appellants, who also appeared as protestants before the Interstate Commerce Commission, are the Public Service Commission of Maryland and the McCullough Coal Corporation, a coal mining company which alleges it will be forced out of business if railroad service is discontinued.

The application to the Commission for abandonment was not made because the line had been operating at a loss. On the contrary, the Commission concluded that there was no evidence that the line had theretofore been a burden on the Baltimore and Ohio system, of which it was a part; or that a predictable decline in the volume of traffic would make it one in the future, if it were allowed to continue in existence undisturbed. 244 I. C. C. 451, 458; 247 I. C. C. 399, 401. But continued undisturbed existence would be an impossibility in view of a flood control project already begun by the War Department under authority of an Act of Congress. 52 Stat. 1215–1216. This project entails the construction of a dam which will create a reservoir covering an area in which twelve miles of the line are now located. It is conceded that unless a new connecting section is built, the sections of the line not to be inundated—a detached six mile segment above the dam,

and a one mile segment connecting with the main line of the Baltimore and Ohio below it—would serve no practical purpose justifying continued operation.

The appellants do not challenge the statutory authority of the War Department to submerge the line as it proposes to do. Nor do they suggest that the Commission could or should take any action to deter completion of the project. Nevertheless, they contend that since "the sole reason for the abandonment was the flood control project, the application should have been denied forthwith by the Commission because of lack of jurisdiction to grant an abandonment on such ground." But under § 1 (18) of the Interstate Commerce Act the standard prescribed for the Commission in cases of this kind is whether "the present or future public convenience and necessity permit of such abandonment." 49 U. S. C. § 1 (18). It is difficult to imagine what consideration of present or future public convenience could reasonably impel the Commission to decline to authorize abandonment of a line admittedly doomed to be rendered inoperable regardless of what action the Commission might take. And the appellants suggest none. We must dismiss the appellants' contention on this point as without merit.[1]

The appellants make the further argument that, even if the Commission did not err in permitting abandonment of the line, its order cannot stand because of the failure to

[1] Where projected inundation of a line made discontinuation of operations over it compulsory, the Commission has consistently given its authorization for abandonment. See Los Angeles & S. L. R. Co. Abandonment, 212 I. C. C. 597, 598: "It is apparent from the record that under the circumstances stated above the proposed abandonment is compulsory, and will not result in public inconvenience." In some such situations the Commission has attached the condition of relocation. *E. g.*, St. Louis-S. F. Ry. Co. Trustees Abandonment, 244 I. C. C. 485. In others, it has not. *E. g.*, Southern Ry. Co. Abandonment, 217 I. C. C. 764.

impose a condition that substitute service be provided by relocating the line.[2] After hearing testimony on the probable cost of relocation and the probable cost of maintaining a relocated line, the Commission concluded that "considering the expenditure necessarily incident to that relocation and the increased costs of operating the line that will be caused thereby, . . . we are not justified by the public convenience and necessity in taking action herein that will require the relocation of the line." The appellants do not contest the Commission's finding, amply supported by evidence, that the relocated line would require increased operating expenses. If the Commission had based its conclusion on this finding alone, there would seem to be no adequate ground for setting its order aside in judicial proceedings. The Commission did consider relocation costs, however, and the appellants contend that this was an improper consideration which invalidates its order.

In making this attack on the order, the appellants contend that under the statute authorizing the War Department to construct flood control projects, the cost of relocation would have to be borne by the Government rather than the railroad. Cost thus borne would not affect the financial condition of the railroad itself, the appellants urge, and therefore there could be no such weakening of the railroad's capital structure as would adversely affect the transportation system. Hence, the argument continues, in that balancing of the interests of those now served by the present line on the one hand, and the interests of the carrier and the transportation system on the other, which a proper disposition of abandon-

[2] The Commission is empowered to attach conditions by § 1 (20) of the Interstate Commerce Act which provides in part: "The commission . . . may attach . . . such terms and conditions as in its judgment the public convenience and necessity may require." 49 U. S. C. § 1 (20).

ment applications requires, *Colorado* v. *United States,* 271 U. S. 153, the former interests must prevail.

As the court below pointed out, however, "an uneconomic outlay of funds would not be in the interests of transportation even though the money be derived from the national government." This Court has recognized that operation of the national railway system without waste was one of the purposes the Transportation Act of 1920 was intended to further. *Texas* v. *United States,* 292 U. S. 522, 530; *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.,* 270 U. S. 266, 277. And a stated purpose of the Transportation Act of 1940, in the light of which Congress prescribed that the "Act shall be administered and enforced" is "to promote . . . adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers." 54 Stat. 899. When materials and labor are devoted to the building of a line in an amount that cannot be justified in terms of the reasonably predictable revenues, there is ample ground to support a conclusion that the expenditures are wasteful whoever foots the bill. The fostering care of the railroad system intrusted to the Commission is not so circumscribed as to leave it without authority to pass on the economic advisability of relocation in a situation where someone other than the carrier provides the money. The weight to be given to cost of a relocated line as against the adverse effects upon those served by the abandoned line is a matter which the experience of the Commission qualifies it to decide. And, under the statute, it is not a matter for judicial redecision. Nor is there any indication in the Flood Control Act of 1938 that Congress desires to take away from the Commission any of the powers to make decisions of this kind which the Interstate Commerce Act had previously granted it.

The judgment of the court below is

Affirmed.

WILLIAMS ET AL. *v.* JACKSONVILLE TERMINAL CO.*

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

No. 112. Argued January 6, 1942.—Decided March 2, 1942.

The Fair Labor Standards Act of 1938 requires employers to pay to every employee engaged in interstate commerce not less than the prescribed minimum hourly wage. When the Act became effective, the respondent terminal companies gave notice to redcaps in their employ of the establishment of a so-called accounting and guarantee system, whereby each redcap was required to account for the tips he received and was guaranteed a compensation which, including tips, would not be less than the statutory minimum. *Held:*

1. The employment of the redcaps, prior to the notice, was at will. Their continuing to work, after the notice, created a new contract. P. 397.

2. The establishment of the accounting and guarantee system was not inconsistent with provisions of the Railway Labor Act forbidding (except as provided) changes of pay or working conditions of employees "as a class as embodied in agreements," since those provisions apply only to collective bargaining agreements. P. 398.

3. Redcaps were not embraced in a certain collective bargaining agreement relied on in one of these proceedings. P. 400.

4. There having been no collective bargaining agreement previously in effect, the establishment of the accounting and guarantee system did not violate § 2 of the Railway Labor Act, even though the company had received from the accredited representative of the redcaps a request to negotiate such an agreement. P. 402.

5. The accounting and guarantee system, as applied to the specific situations here involved, constituted compliance with the minimum wage requirements of the Fair Labor Standards Act. P. 403.

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*Together with No. 1023, October Term, 1940, *Pickett, General Chairman of the Brotherhood of Railway & Steamship Clerks, etc.*, v. *Union Terminal Co.*, also on writ of certiorari, 314 U. S. 701, to the Circuit Court of Appeals for the Fifth Circuit,—argued January 6, 7, 1942.

6. The words "pay wages" in § 6 of the Act are not to be interpreted as limited to money passing from the terminal company to the redcap. P. 407.

7. The petitioners here are without standing to assert that in its operation the accounting and guarantee system violates §§ 2 and 6 (7) of the Interstate Commerce Act. P. 408.

8. A temporary modification of the accounting practice of the terminal company in one of these cases, during which period redcaps were not required to report tips unless they amounted to less than the statutory minimum wage, did not show that the accounting and guarantee system had been abandoned in favor of the former system of nonaccountability for tips. P. 409.

118 F. 2d 324, 328, affirmed.

In No. 112, certiorari was granted, 314 U. S. 590, to review the affirmance of an order (35 F. Supp. 267) granting the defendant's motion for summary judgment in a suit to recover wages and liquidated damages under the Fair Labor Standards Act.

In No. 1023, certiorari was granted, 314 U. S. 701, on petition for rehearing of an order denying certiorari, 313 U. S. 591, to review the reversal of a judgment for the plaintiffs in a suit to recover wages and liquidated damages under the Fair Labor Standards Act, 33 F. Supp. 244.

Mr. Frank F. L'Engle for petitioners in No. 112.

By special leave of Court, *Mr. Robert L. Stern* argued the cause for the Administrator of the Wage and Hour Division, U. S. Department of Labor, as *amicus curiae,* in No. 112; and *Solicitor General Fahy* and *Messrs. Robert L. Stern, Warner W. Gardner, Irving J. Levy,* and *John E. Skilling* were on the brief for the Administrator, as *amicus curiae,* in Nos. 112 and 1023.

Mr. John Dickinson, with whom *Mr. Julian Hartridge* was on the brief, for respondent in No. 112.

Mr. Charles M. Hay, with whom *Messrs. S. D. Flanagan* and *E. D. Franey* were on the brief, for petitioner in No. 1023.

Messrs. Robert G. Payne and *John Dickinson* argued the cause, and *Mr. Payne* was on the brief, for respondent in No. 1023.

MR. JUSTICE REED delivered the opinion of the Court.

The question presented by both these cases is whether a railroad company operating a terminal subject to the Railway Labor Act and the Fair Labor Standards Act of 1938 is required by those statutes, in the absence of a negotiated agreement respecting wages, to pay "redcaps" a fixed minimum hourly wage irrespective of the tips from passengers received by the redcaps, or whether an accounting and guarantee plan which leaves all tips with the redcaps and assures them that each will receive at least the minimum wage is valid.

The Fair Labor Standards Act is not intended to do away with tipping. Nor does it appear that Congress intended by the general minimum wage to give the tipping employments an earnings-preference over the non-service vocations. The petitioners do not dispute the railroad's contention that, during the entire period, each redcap received as earnings—cash pay plus tips—a sum equal to the required minimum wage. Nor is there denial of increased pay to the redcaps on account of the minimum wage guarantee of the challenged plan as compared with the former tipping system. The guarantee also betters the mischief of irregular income from tips and increases wage security. The desirability of considering tips in setting a minimum wage, that is, whether tips from the viewpoint of social welfare should be counted as part of

that legal wage, is not for judicial decision.[1] We deal here only with the petitioners' assertion that the wages Act requires railroads to pay the redcaps the minimum wage without regard to their earnings from tips.

The cases have a common background. Prior to October 24, 1938, the effective date of the Fair Labor Standards Act, the redcaps at the terminals in question performed their familiar tasks without reward other than the tips of the passengers, and, although subject to considerable supervision by the terminals,[2] were not officially considered employees. On September 29, 1938, the Interstate Commerce Commission, acting under § 1 of the Railway Labor Act, 45 U. S. C. § 151, ruled that redcaps in cities of over 100,000 population were employees within that Act. 229 I. C. C. 410.

Subsequent to that ruling, the parallel series of events culminating in the two controversies now before us, while differing in details, followed the same general pattern. In No. 112, nothing further occurred until the Fair Labor Standards Act became effective. At that time, the Jacksonville Terminal, in supposed compliance with the Act, began paying its redcaps in cash the amount by which the statutory minimum wage exceeded each redcap's receipts in tips. This system, in some form, was used at the terminal until July 1, 1940.

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[1] See Anderson, Tips and Legal Minimum Wages, XXXI American Labor Legislation Review 11; Gilson, Tips and Social Insurance, *id.* 67; Needleman, Tipping as a Factor in Wages, Monthly Labor Review, December 1937, p. 1303.

[2] For example, the terminals forbade the collection of charges for redcap services, issued instructions for the meeting of sick or disabled passengers, provided equipment for that purpose, and required that redcaps be uniformed and suitably dispersed about the terminal at such hours and in such places as their services would be needed.

In the belief that the Act required payment of the minimum wage without deduction of tips, the redcaps, by their representative, Williams, brought an action against the terminal in United States District Court for the recovery of unpaid minimum wages between October 24, 1938, and July 1, 1940, and an equal additional amount as liquidated damages. Jurisdiction of the action was conferred by § 24 (8) of the Judicial Code, 28 U. S. C. § 41 (8), and by § 16 (b) of the F. L. S. A., 29 U. S. C. § 216 (b).[3] The terminal answered and moved for summary judgment. Upon consideration of the exhibits, depositions, and stipulated facts the trial judge granted the motion, and the Circuit Court of Appeals affirmed. 118 F. 2d 324. Because of the importance of the question whether the tips could be treated as payment of the statutory wage, the petition of the redcaps' representative for certiorari was granted. 314 U. S. 590.

Section 6 of the Act requires every employer to pay each employee engaged in interstate commerce wages at

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[3] "(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." June 25, 1938, c. 676, § 16 (b), 52 Stat. 1069.

the prescribed rates per hour.[4] Violation of that requirement renders the employer liable for the unpaid wages and for liquidated damages, recoverable in an action by the employees' designated agent or representative.[5] Since the terminal admitted by stipulation that Williams was the redcaps' authorized representative *ad litem,* that the redcaps were its employees, and that they were engaged in interstate commerce, the sole issue was whether the payment required by § 6 of the Act had been made.

The evidence, taken most favorably to the redcaps, discloses the following. About October 24, 1938, the effec-

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[4] "(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

"(1) during the first year from the effective date of this section, not less than 25 cents an hour,

"(2) during the next six years from such date, not less than 30 cents an hour,

. . . . . .

"(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act." June 25, 1938, c. 676, § 6, 52 Stat. 1062, 29 U. S. C. § 206.

"As used in this Act . . . (b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

"(e) 'Employee' includes any individual employed by an employer.

"(m) 'Wage' paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees." June 25, 1938, c. 676, § 3, 52 Stat. 1060, 29 U. S. C. § 203.

[5] See note 3, *supra.*

tive date of the Act, the terminal issued a written notice to each redcap:

"Jacksonville, Florida,
"Oct. 24th, 1938.

"To Red Cap .....,

"Jacksonville Terminal Company:

"In view of the requirements of the Fair Labor Standards Act, effective October 24, 1938, and in consideration of your hereafter engaging in the handling of hand baggage and traveling effects of passengers or otherwise assisting them at or about stations or destinations, it will be necessary that you report daily to the undersigned the amounts received by you as tips or remuneration for such services.

"The carrier hereby guarantees to each person continuing such service after October 24, 1938 compensation which, together with and including the sums of money received as above provided, which [*sic*] will not be less than the minimum wage provided by law.

"You are privileged to retain subject to their being credited on such guarantee all such tips or remuneration received by you except such portion thereof as may be required of you by the undersigned for taxes of any character imposed upon you by law and collectible by the undersigned.

"All the matters above referred to are subject to the right of the carrier to determine from time to time the number and identity of persons to be permitted to engage in said work and the hours to be devoted thereto, to establish rules and regulations relating to the manner, method and place of rendition of such service, and the accounting required.

"Jacksonville Terminal Company,
"By J. L. Wilkes,
"President-General Manager."

On November 3rd L. L. Wooten, the General Chairman of the Brotherhood of Railway and Steamship Clerks, received the redcaps' designation of the Brotherhood as their bargaining representative. November 4th he saw a copy of the terminal's notice. In the meantime he had written Wilkes on October 25th that in view of the I. C. C. decision he considered the redcaps covered by the collective labor agreement of February 1, 1937, between the Brotherhood and the terminal, and within the union's jurisdiction. After the designation the Brotherhood, continually protesting the invalidity of the existing accounting and guarantee system,[6] attempted negotiations with the terminal for a redcap contract. Eventually, June 16, 1939, a contract limited to hours of service and working conditions was signed. Meanwhile the redcaps continued their accustomed activities, made the reports, kept the tips, and accepted the sums proffered them by the terminal. At first, no receipts for wage payments were required at Jacksonville; later, receipts were introduced expressly reserving the redcaps' right to sue for additional amounts under the Act.[7] On July 1, 1940, the terminal inaugurated a new system of charging passengers ten cents per parcel for redcap service, and paying the redcaps an hourly wage. An agreement with the Brotherhood reducing this arrangement to writing and ending the controversial accounting and guarantee system was signed August 9th.

[6] The system was so described because the redcaps made a daily accounting of the number of hours worked, and the amount of tips collected, and because the terminal guaranteed the overall receipt of the minimum wage by paying the redcaps semi-monthly any shortage between the total tips and the minimum.

[7] The receipt stated:

"It is my understanding that by signing this receipt I do not forfeit or release my right to sue for such additional amount as may be due under Section 16 (b) of the Act."

No. 1023 is a similar proceeding brought against the Union Terminal Company by Pickett, the agent of forty-five redcaps working in the Dallas terminal. At the trial, the evidence, consisting of an agreed statement of facts, some exhibits, and some uncontradicted testimony, indicated, and the trial judge found, that the redcaps were employees of the terminal and were engaged in interstate commerce. He further found that prior to the Fair Labor Standards Act the redcaps were paid by the tips of the public, that no other contract was made on or since October 22, 1938, and that the question of tips as wages was still an open one. On the ground that tips of the public were not wages paid by the employer, he gave judgment in favor of the redcaps. The Circuit Court of Appeals reversed, 118 F. 2d 328, and certiorari was denied. 313 U. S. 591. Because of the importance of the issues presented, on petition for rehearing certiorari was granted. 314 U. S. 701.

Since the basic elements of Pickett's case are no longer in dispute, the crucial issue again is whether the minimum wages were paid. It was shown that, after the I. C. C. ruling that redcaps were employees, the redcaps notified the Dallas terminal on October 11, 1938, that the Board of Adjustment of the Brotherhood of Railway and Steamship Clerks was their authorized representative under the Railway Labor Act, and Pickett, as General Chairman of the Board, asked for a conference in order to negotiate an agreement. On October 22d, the terminal delivered to each redcap a letter, signed by Buckner, the terminal's vice-president and general manager, in the same terms as the notice used at the Jacksonville terminal.

Two days later, on October 24th, the effective date of the wage law, Pickett, on behalf of the redcaps and at

their request, protested this proposal in a letter to Buckner,[8] concluding:

"This letter is formal notice to the carrier, made for and on behalf of each employee concerned as a protest against the method proposed by the carrier to meet its

[8] The entire letter is as follows:

"I have a copy of a circular issued by your Company dated at Dallas, Texas, on October 22, 1938, and which was handed to each employee to whom it was addressed: i. e., redcaps, the general tenor of which is to require the individual employee to report to the carrier the amount that he receives in tips from the public and which information the carrier intends to employ, in compiling its records to indicate that it has complied with Section 6 of the Fair Labor Standards Act:

"In other words, the carrier contemplates crediting tips and other moneys paid to its employees by persons other than itself to relieve itself of the obligations imposed by the following quoted section of the law:

" 'Fair Labor Standards Act:

" 'Section 6-(a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

" '(1) during the first year from the effective date of this section, not less than 25 cents an hour.'

"The above section of the law which is quoted in part for the purpose of this notice, clearly sets forth that every employer who engages in commerce shall pay to each his employees during the first year after the effective date of the law 25 cents per hour.

"An examination of the law in its entirety does not authorize the carrier to depend upon others to discharge its obligation with respect to the law, in payment of wages imposed thereby.

"This letter is formal notice to the carrier, made for and on behalf of each employee concerned as a protest against the method proposed by the carrier to meet its obligation under the said law, and since it appears that the carrier has acted in the premise without authority of law or upon order of the Administrator, we are accordingly filing this notice of protest, for the reasons set forth herein."

obligation under the said law, and since it appears that the carrier has acted in the premise without authority of law or upon order of the Administrator, we are accordingly filing this notice of protest, for the reasons set forth herein."

No action was ever taken to recall or revoke the letter of protest and the individual redcaps never told the company that they accepted the terms of its letter of October 24th.

On December 26th, 1938, Pickett submitted to Buckner a proposed general agreement covering the hours of service and working conditions of the redcaps, but not their wages. After protracted consideration of the matter by both the terminal and the union, Buckner wrote Pickett on December 6, 1939, as follows:

"As I told you and as you know, this case as to whether or not the railroads will be allowed credit for tips received up to $2.40 per day, is in the Court and as soon as same is decided we will be glad to negotiate an agreement with the Clerks Union, of which you are the General Chairman for this Company."

On January 1, 1940, although the wage dispute was not yet settled, a working agreement of the limited type Pickett had proposed was signed. On March 6, 1940, the accounting and guarantee system was abandoned by the terminal, presumably for the ten cents per parcel charge, and the following day this action was commenced. Throughout the entire preceding period the redcaps had performed their usual duties, had filed slips showing the hours worked and, except for a brief period, the tips received, had kept the tips, and had accepted the money paid by the terminal pursuant to its guarantee. Never, however, was the demand for additional pay abandoned, and no redcaps were discharged for refusing to expressly consent to the terminal's action.

Effect of Terminals' Notice. The terminal companies instituted the accounting and guarantee system by the written notice, quoted above, to each redcap as the Act became effective. It is accepted here by all parties that, both prior and subsequent to the notice, the redcaps were employees of the railroads [9] engaged in a service "so closely related to physical transportation" in interstate commerce as to come under § 6 (1) of the Interstate Commerce Act. Stopher v. Cincinnati Union Terminal Co., 246 I. C. C. 41, 45. As such employees, before the notice they were permitted by agreement to come upon the terminal property, render supervised service to the companies' customers and receive pay for performing this portion of the terminals' transportation business by retaining all tips received. This employment of the redcaps was at will and subject to the employers' conclusions as to the desirability of continuing their employment. In businesses where tipping is customary, the tips, in the absence of an explicit contrary understanding, belong to the recipient. *Polites* v. *Barlin,* 149 Ky. 376, 149 S. W. 828; *Zappas* v. *Roumeliote,* 156 Iowa 709, 137 N. W. 935; *Manubens* v. *Leon,* [1919] 1 K. B. 208. Where, however, an arrangement is made by which the employee agrees to turn over the tips to the employer, in the absence of statutory interference, no reason is perceived for its invalidity.[10] The employer furnishes the facilities, supervises the work and

[9] In the Matter of Regulations Concerning Class of Employees and Subordinate Officials to be Included within Term "Employee" Under the Railway Labor Act, Ex parte No. 72 (Sub.-No. 1), 229 I. C. C. 410; cf. *Cole* v. *Atlantic Coast Line R. Co.,* 211 N. C. 591, 191 S. E. 353; *Booker* v. *Pennsylvania R. Co.,* 82 Pa. Super. 588.

[10] On the general question of the validity of a contract to turn over tips, see the following cases: *Harrison* v. *Kansas City Terminal Ry. Co.,* 36 F. Supp. 434, 438; *Gloyd* v. *Hotel La Salle Co.,* 221 Ill. App. 104; *In re Farb,* 178 Cal. 592, 174 P. 320; *Setree* v. *Falkner,* 5 Labor Cases ¶ 60,779, 2 P. H. Labor Service ¶ 22,547 (Ohio App.).

may take the compensation paid by travelers for the service, whether paid as a fixed charge or as a tip. A tip to a redcap is compensation for service. It is customarily given and always expected when such service is rendered.

With the effective date of the Act the employers became bound to pay a minimum wage to their employees, the redcaps. Accordingly, the latter were notified that future earnings from tips must be accounted for and considered as wages. Although continuously protesting the authority of the railroads to take over the tips, the redcaps remained at work subject to the requirement. Such protests were unavailing against the employers. Although the new plan was not satisfactory to the redcaps, the notice transferred to the railroads' credit so much of the tips as it affected. By continuing to work, a new contract was created. This result follows because the employer, after notice, may keep all earnings arising from the business. Labatt, Master & Servant, (2d ed.) Vol. 5, § 2037; Restatement, Agency, § 388. If the redcap did not accept the terms offered, he would be a volunteer and not an employee. As a volunteer he could probably keep his tips, but would not be entitled to a contractual wage. Restatement, Contracts, § 55. No such gift of services to the terminals is here claimed.

Railway Labor Act. Petitioners assert that, whatever may be the authority to issue orders for the accounting and guarantee plan, these railroads could not validly exercise the power because of the Railway Labor Act. 48 Stat. 1185. The applicable provisions are quoted in the note below.[11]

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[11] 48 Stat. 1187–88, § 2. "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any

The object of the Act is to avoid interruption to commerce through the promotion of free association among employees for the purpose of settling disputes between them and the carriers. § 2. To assure continued operations, changes by the carriers in agreements reached through collective bargaining, pending negotiations, are prohibited. Independent individual contracts are not affected by the Act. It is to be noted that § 2, First to Sixth, inclusive, relied upon by petitioners, is largely concerned with the organization of employees, freedom from carrier interference in such organization, the choice of representatives for collective bargaining, and the manner

interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

"Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act." 45 U. S. C. § 152.

Id., 1197. "SEC. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board." 45 U. S. C. § 156.

of entering into and carrying on such negotiations. Section 2, Seventh, note 11, *supra,* forbids changes of pay or working conditions of employees "as a class as embodied in agreements" except as provided in § 6, note 11, *supra.* The crucial § 6 is phrased so as to leave no doubt that only agreements reached after collective bargaining were covered. Section 2, Seventh, first appeared in the 1934 amendments to the Railway Labor Act, and § 6 was likewise then amended by adding "in agreements" to that section's former requirement of notice of "an intended change affecting rates of pay, rules or working conditions." Compare § 6, 44 Stat. 582, with § 6, 48 Stat. 1197. These additions point squarely to limiting the bargaining provisions of the Railway Labor Act to collective action.[12]

In No. 112, the Jacksonville case, petitioners find such an agreement in the contract of February 1, 1937, the "Revised Agreement Between the Jacksonville Terminal Company and Employees Herein Named Represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees." The scope of that agreement is limited to the hours of service and working conditions of certain groups of employees, in none of which do redcaps appear.[13] Wages are not covered. When the contract was negotiated, the redcaps were not thought of as employees engaged in

[12] Cf. *Virginian Ry. Co.* v. *Federation,* 300 U. S. 515, 548–549; *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, 44–45.

[13] The closest are groups (2) and (3) described as follows:

"Group (2) Other office and station employees—such as office boys, messengers, chore boys, train announcers, gatemen, baggage and parcel room employees, train and engine crew callers, telephone switchboard operators, elevator operators, office, station and warehouse watchmen and janitors.

"Group (3) Laborers employed in and around stations, storehouse, and warehouses."

transportation service.[14] Evidently the redcaps only authorized the contracting Brotherhood to represent them after the notice.[15] Neither party to the agreement took any steps in regard to the redcaps under the 1937 agreement until after the disputed plan was instituted. Thereafter, when the Brotherhood first claimed that the redcaps were covered by the 1937 Clerks' contract, the suggestion was promptly repudiated in writing by the terminal company. Finally, after the authorization, the Brotherhood did immediately begin negotiations for the redcaps and ultimately secured a collective contract, June 16, 1939, which covered hours of service and working conditions and which embodied much that was in the Clerks' contract. Subsequently a wage agreement of August 9, 1940, became a part of this earlier working agreement. While no finding as to its coverage appears in the record, we are clear from the 1937 contract, its practical application by the parties and the new arrangements ultimately concluded, that the redcaps were not within its terms.

A different approach to this particular problem is made by petitioner in No. 1023, the *Union Terminal* case. The

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[14] Ex parte No. 72 (Sub.-No. 1), *supra,* n. 9; Stopher *v.* Cincinnati Union Terminal Co., 246 I. C. C. 41.

[15] The General Chairman of the Brotherhood testified:

"Q. Does that organization have the authority, or were they appointed by the redcaps, or the plaintiffs in this case, the redcaps employed by the Jacksonville Terminal Company, to negotiate contracts and wage agreements for them with a Jacksonville Terminal Company?

"A. It was.

"Q. At or about what time?

"A. About November 3rd, was when the official authorizations were turned over to me.

"Q. What year?

"A. 1938."

Dallas redcaps do not rest their argument upon any collective agreement. Their contention is that, since the Brotherhood of Clerks, their then accredited representative for the purposes of the Railway Labor Act, had asked the terminal on October 11, 1938, for a conference to negotiate an agreement for working conditions and other related subjects, the subsequent act of the terminal in establishing the accounting and guarantee plan violated the Railway Labor Act and was therefore ineffective to change the existing arrangements by which the redcaps retained the tips as their own. This, it is urged, would result in a recovery of the minimum wage without credit to the carrier for the tips. Petitioner relies upon the first six paragraphs of § 2 of the Railway Labor Act, 48 Stat. 1187, and particularly § 2, First, note 11, *supra*, placing the duty on the carrier to "make . . . agreements . . . in order to avoid any interruption . . . to the operation of any carrier."

The Brotherhood and the terminal did negotiate and finally concluded, effective January 1, 1940, their first collective working agreement covering the redcaps. Because the carrier was, by the Act, placed under the duty to exert every effort to make collective agreements, it does not follow that, pending those negotiations, where no collective bargaining agreements are or have been in effect, the carrier cannot exercise its authority to arrange its business relations with its employees in the manner shown in this record. As we have stated in discussing the *Jacksonville* case, the Railway Labor Act dealt with collective bargaining agreements only, and not with the employment of individuals. This conclusion is pertinent in considering the effect of the Dallas request for collective bargaining.

The institution of negotiations for collective bargaining does not change the authority of the carrier. The prohibi-

tions of § 6 against change of wages or conditions pending bargaining and those of § 2, Seventh, are aimed at preventing changes in conditions previously fixed by collective bargaining agreements. Arrangements made after collective bargaining obviously are entitled to a higher degree of permanency and continuity than those made by the carrier for its own convenience and purpose.

Minimum Wages. We stated in the discussion of the notice given by the terminals to their employees that its effect was to transfer the tips covered by the notice to the credit of the terminals. But this terminal credit in the hands of the redcaps, assert petitioners in both cases, cannot be utilized as cash paid to the employee by the employer.[16] It is urged that the terminals have worked out a scheme to largely relieve themselves of wage payments to redcaps and to let travelers pay "amounts which the law requires should be paid by the employer itself," and that the accounting difficulties make the plan not only undesirable but contrary to the policy of the statute as likely to foster false reports of tips by redcaps in order to reach the minimum and save the terminals from any guarantee payments.

Section 6 prescribed that "Every employer shall pay to each of his employees . . . wages at the following rates. . . ." Wages are defined only by the direction to include

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[16] In No. 112, petitioners say: "We are dealing here only with Fair Labor Standards Act and not any other Act, statute or ruling of any commission. It is the mandatory requirement of the act 'that the employer shall pay.' The act contains no word, or words, or phrases suggesting any guarantee of payment."

In No. 1023, petitioners say: "We, of course, do not want to be understood as contending that 25 cents received in tips will not purchase as much as 25 cents received in wages, but we do say that Congress had the right to say what means should be employed to carry out the purposes of the act, and that Congress has said, and for very good reasons, that the purposes of the act can best be accomplished by a direct wage payment from the employer to the employee."

in that word the "reasonable cost . . . to the employer of furnishing such employee with board, lodging, or other facilities. . . ." What the word "wages" connotes in addition to the items specified, we must deduce from other provisions of the act in the light of its legislative purpose. Obviously, "pay wages" ordinarily means for the employer to hand over money or orders convertible into money at face. The absence of the word "tip" from the statutory extension of the ordinary meaning of wages makes it quite clear that not every gratuity given a worker by his employer's customer is a part of his wages. If Congress had had it in mind to include in wages all tips, the words were readily available for expressing the thought. Such a conclusion, however, does not foreclose a decision that in certain specific situations the so-called tips may be in reality the employee's compensation for his services, and therefore wages.

The diverse interests of employers and employees have variously influenced legislators to include, exclude, or ignore tips in the specification of wage items in enactments where the wage base was important. For example, the Longshoremen's and Harbor Workers' Compensation Act,[17] which also applies to employment in the District of Columbia,[18] specifically includes tips for computation of compensation. Workmen's compensation acts are usually construed as including tips in wages or remuneration, with a tendency to make the inclusion of tips as wages turn upon the contemplation of the parties, express or implied, in wage contracts.[19] State minimum wage acts are gen-

[17] March 4, 1927, c. 509, § 2 (13), 44 Stat. 1425; 33 U. S. C. § 902 (13).

[18] Act of May 17, 1928, c. 612, 45 Stat. 600.

[19] Compare *Hartford Co.* v. *Industrial Accident Comm'n*, 41 Cal. App. 543, 183 P. 234; *Gladys Gross' Case*, 132 Me. 59, 166 A. 55; *Powers's Case*, 275 Mass. 515, 176 N. E. 621; *Sloat* v. *Rochester Taxicab Co.*,

erally silent as to tips.[20] Under the N. R. A. the inclusion of tips in wages on a plan similar to the accounting and

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177 App. Div. 57, 163 N. Y. S. 904, aff'd mem. 221 N. Y. 491, 116 N. E. 1076; *Bryant* v. *Pullman Co.*, 188 App. Div. 311, 177 N. Y. S. 488, aff'd mem. 228 N. Y. 579, 127 N. E. 909; *Kadison* v. *Gottlieb*, 226 App. Div. 700, 233 N. Y. S. 485; *Lloyds Casualty Co.* v. *Meredith*, 63 S. W. 2d 1051 (Tex. Civ. App.); *Federal Underwriters Exchange* v. *Husted*, 94 S. W. 2d 540 (Tex. Civ. App.); *Penn* v. *Spiers & Pond, Ltd.*, [1908] 1 K. B. 766 (C. A.); *Great Western Ry. Co.* v. *Helps*, [1918] A. C. 141 (H. L.) with *Begendorf* v. *Swift & Co.*, 193 App. Div. 404, 183 N. Y. S. 917; *Anderson* v. *Horling*, 214 App. Div. 826, 211 N. Y. S. 487. But cf. *Industrial Comm'n* v. *Lindvay*, 94 Colo. 531, 31 P. 2d 495; *Makris* v. *Top Hat Restaurant, Inc.*, 16 N. J. Misc. 26, 195 A. 857; *Coates* v. *Warren Hotel*, 18 N. J. Misc. 363, 13 A. 2d 787, where gratuities were excluded by statute. Unemployment compensation is apparently following the same trend. Compare *Matter of Feinberg*, 258 App. Div. 834, 15 N. Y. S. 2d 766 with *Alexander Hamilton Hotel Corp.* v. *Board of Review*, 127 N. J. L. 184, 21 A. 2d 739. See Wage and Hour Manual (1941 ed.) 191.

[20] See 2A C. C. H. Labor Law Serv. (3d ed.), 2 P. H. Labor Serv., *passim*. Probably this is due to the fact that in most states the statute does not fix the minimum, but merely authorizes some board or official to do so by orders, occupation by occupation. Such orders as relate to trades in which tipping is common seem to take tips into consideration in setting the minimum wage for that trade, and quite naturally, therefore, are apt expressly to forbid crediting of tips against the minimum.

E. g., New York State Dept. of Labor, Minimum Wage Standards, Directory Order No. 5, Restaurant Industry, effective June 3, 1940, provides: "SERVICE EMPLOYEES Basic Rate. The basic minimum wage for *service employees* in New York City shall be at the rate of 20 cents per hour. . . . NON-SERVICE EMPLOYEES Basic Rate. The basic minimum wage for *non-service employees* in New York City shall be at the rate of 29 cents per hour . . . from June 3, 1940 through March 2, 1941 and 30 cents thereafter. . . . GRATUITIES. In no event shall gratuities from patrons or others be counted as part of the minimum wage. SERVICE EMPLOYEE. 'Service employee' means any employee whose duties relate solely to the serving of food to patrons seated at tables and to the performance of duties incidental thereto, and who customarily receive gratuities from such patrons." See also,

guarantee plan here involved, was proposed.[21] In the approved codes, tips were not expressly credited toward wages, but the relatively lower minimums for those customarily receiving tips may indicate that tips were given weight although not expressly mentioned.[22] The federal social security laws define wages for old age benefits [23] and social security taxes [24] as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash." The regulations of the Social Security Board state, "The following are excluded from the computation of 'wages': . . . Tips or gratuities paid directly to an employee by a customer of an employer, and not in any way accounted for by the employee to the employer." [25] The Railroad Retirement Act, § 1 (h),[26]

New York State Dept. of Labor, Minimum Wage Standards, Directory Order No. 6, Hotel Industry, effective Nov. 25, 1940; New Hampshire Bureau of Labor, Minimum Wage Division, Mandatory Order No. 3, Restaurant Occupation, effective Nov. 1, 1938; District of Columbia Minimum Wage Board, Order No. 4, Public Housekeeping Occupation, effective May 8, 1938, and reprinted in the Annual Report of the Board for 1939, pp. 27 ff.

[21] Proposed Code of Fair Competition for the Hotel Industry, submitted Sept. 6, 1933, by the American Hotel Association, Art. III (C) (e); Proposed Code of Fair Competition for the Barber Shop Trade, as revised for public hearing on Jan. 8, 1934, submitted by the Barbers' Industrial Recovery Association, Art. IV (1); Restaurant Industry Code of Fair Competition, submitted Sept. 12, 1933, by the National Restaurant Association, Art. IV, § 6.

[22] See Needleman, Tipping as a Factor in Wages, *supra*, note 1, at 1319.

[23] Aug. 10, 1939, c. 666, § 209 (a), 53 Stat. 1373; 42 U. S. C. § 409 (a).

[24] I. R. C. §§ 1426 (a), 1607 (b), 53 Stat. 1383, 1392; 26 U. S. C. §§ 1426 (a), 1607 (b).

[25] Reg. 2, Art. 14, Social Security Board, 2 F. R. 1280; 20 C. F. R. § 402.14. See also S. S. T. 301, 1938–1 Cum. Bull. 455.

[26] Act of June 24, 1937, c. 382, § 1 (h), 50 Stat. 309; 45 U. S. C. § 228a (h).

and the Railroad Unemployment Insurance Act, § 1 (i)[27] exclude tips from "compensation" within the meaning of their provisions. The Railroad Retirement Board has determined that all earnings of the redcaps, accounted for to the carriers under the plan here in question, are "money remuneration" and therefore "compensation" under the acts and not forbidden "tips."[28] We can therefore examine the Fair Labor Standards Act with the safe assumption that the word "wages" has no fixed meaning either including or excluding gratuities.

To interpret "pay wages" as limited to money passing from the terminal to the redcap would let construction of an important statute turn on a narrow technicality. It, of course, can make no practical difference whether the redcaps first turn in their tips and then receive their minimum wage or are charged with the tips received up to the minimum wage per hour.[29]

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[27] Act of June 25, 1938, c. 680, § 1 (i), 52 Stat. 1095; 45 U. S. C. § 351 (i).

[28] Opinion No. 1941, R. R. 35, U. I. 11, approved by the Board on September 18, 1941, B. O. 41–397, 3 Railroad Retirement Law Bulletin —.

[29] The former plan is substantially the tag system put into effect by agreement of the red caps and the carrier at Jacksonville following the termination of the accounting and guarantee system. The important provisions are:

"1. Red Caps will be paid the hourly wage established by the Hours and the Wage Law, or orders of the Administrator, at the minimum set in such orders or law.

. . . . . .

"3. Daily records of each Red Cap's hours, tags sold, and money re-remitted, will be kept by the Company; at the end of each 15 day period or pay roll period, all money received from sale of checks, etc., by Red Caps will be totaled, wages paid to Red Caps, deducted, after one (1) cent per parcel or tag has been set aside for Company expenses, the remaining nine (9) cents used to pay wages of Red

Congress approached the problem of improving labor conditions by the establishment of a minimum wage in certain industries. It required that workers in these industries receive a compensation at least as great as that fixed by the Act. Except for that requirement, the employer was left free, in so far as the Act was concerned, to work out the compensation problem in his own way. Other courts are in accord with our view. *Harrison* v. *Kansas City Terminal Ry. Co.*, 36 F. Supp. 434; *Harrison* v. *Terminal Railroad Assn. of St. Louis*, 4 C. C. H. Labor Cases ¶ 60,346; *Ryan* v. *Denver Union Terminal Co., id.*, ¶ 60,618.

The other arguments of petitioner have been considered, but we find only two that require mention.

First. It is said that if the carriers take credit for the tips as compensation for redcap service, it would be in effect a charge by the terminals for a transportation service, and therefore, since the terminals have filed no covering tariff, a violation of § 6 (7) of the Interstate Commerce Act, 34 Stat. 587, 49 U. S. C. § 6 (7).[30] Furthermore, petitioners assert § 2 of the same act, prohibiting special rates, is violated because by the carrier's regulations the indigent receive the redcap service without charge. Neither contention, if true, would avail petitioners. Sections 8, 9 and 10 of the Interstate Commerce

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Caps, and Captains, other than the ten (10) cents per hour for Captains covered in Item 2.

"If the sum total of nine (9) cents per parcel handled and or tags sold is greater than the wages paid to Red Caps for that period, the remaining funds will be divided among all Red Caps on the basis of hours worked during the pay roll period, so that all Red Caps will share alike for each hours service, from this fund. If the nine (9) cents per parcel handled is not sufficient to pay wages outlined in item (1) of this agreement, the Terminal Co. agrees to pay the wages as outlined in item 1."

[30] Cf. Stopher *v.* Cincinnati Union Terminal Co., 246 I. C. C. 41.

Act provide for damages to persons injured by unlawful acts and punishment of the carrier or its agents. There is nothing in the sections to indicate that petitioners would have a right of action.[31]

Second. It is urged in the *Dallas* case that the terminal from March 1, 1939, to October 15, 1939, voluntarily abandoned the accounting and guarantee system in favor of the old system of non-accountability for tips. We find nothing in the modified accounting practice during that period to support such a conclusion. Rather the terminal seems only to have simplified its bookkeeping and partially relieved the redcaps of clerical duties. Prior to March 1, 1939, and after October 15th, the redcaps had to make a daily report of both hours worked and tips received regardless of amount, on a printed time slip furnished by the terminal for the purpose. Between March 1st and October 15th, the time slips furnished by the company contained no provision for reporting tips, but only for reporting hours.[32] But the redcaps were instructed

[31] Brownlee *v.* Southern Ry. Co., 192 I. C. C. 119, 121. The Commission stated: "It is well settled that a carrier is entitled to compensation for any transportation service rendered, and that where a service has been rendered for which no tariff authority exists and the beneficiary of such service has paid the sum claimed by the carrier, we are empowered to order the payment of reparation only in the event the sum paid by the shipper amounted to an unjust or unreasonable exaction for the service received." See also Twin Coach Corp. *v.* Erie R. Co., 203 I. C. C. 393, 395; Cities Service Oil Co. *v.* Erie R. Co., 237 I. C. C. 387, 389.

[32] Mr. Flanagan:

"We next offer in evidence PLAINTIFF'S EXHIBIT 'C', which is also a time slip but a little different from the one just read, and it reads:

"'The Union Terminal Company. Date ..... Hours on duty from ..... M. to ..... M., showing four of those lines.'

"And then says: 'Total hours worked' ....., and then a blank line to be signed by the Red Cap and right under it the words, 'Red Cap.'

"I call attention to the fact that on this slip there is no provision for reporting the tips."

that should any of them, during any work period, receive in tips less than 25 cents per hour, the statutory minimum hourly wage, he should report it to the terminal and the terminal would pay the difference between the tips received and the minimum wage. Thus the only effect of the change was to eliminate the superfluous reporting of tips equalling or exceeding the minimum wage—a step toward more efficient administration, not elimination, of the accounting and guarantee system.

Affirmed.

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

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

I think the judgments should be reversed. It appears to me that the question in these cases is: Upon whom does the statute impose the duty of paying a minimum wage, the employer or someone else? There is no ambiguity in the congressional mandate that "Every employer shall pay to each of his employees . . . wages . . . not less than 30 cents an hour." I am unable to agree that tips given to redcaps by travellers are "wages" paid to the redcaps by the railroad.

The employers here could have openly charged a fee for the services performed by redcaps. It appears that they have now adopted such a system. It is said that there is no practical difference between a system under which the railroads openly impose a charge on the public and one under which the redcaps accept from travellers so-called tips, treated by the railroad as a part of the redcaps' wages. Generally, the traveller who pays a railroad charge knows he is paying it to the railroad. One who gives a redcap a tip does not necessarily know that he is thereby helping the railroad to discharge its statutory duty

of paying a minimum wage to its employees. The tip-paying public is entitled to know whom it tips, the red-cap or the railroad. A plan like that before us, which covertly diverts tips from employees for whom the giver intended them to employers for whom the giver did not intend them and to whom any kind of tip doubtless would not have been voluntarily given, seems to me to contain an element of deception. And I think an interpretation of the F. L. S. A. which permits employers to benefit from such a plan does not accord with the meaning of the language used by Congress.

HYSLER *v.* FLORIDA.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 64. Argued December 12, 1941.—Decided March 2, 1942.

1. The procedure adopted by Florida, whereby a person under sentence of imprisonment or death, who claims that his conviction resulted from some fundamental unfairness amounting to a denial of due process of law, may apply to the Supreme Court of the State, even though that court has affirmed his conviction, for permission to apply to the trial court for a writ of error *coram nobis,* and who thus is afforded a full opportunity to have a jury pass upon his claim, provided that he first make an adequate showing of its substantiality, is a procedure which meets the requirements of the due process clause of the Fourteenth Amendment. P. 415.

According to decisions of the Supreme Court of Florida defining this procedure, a naked allegation that a constitutional right has been invaded is not sufficient; a petitioner must make a full disclosure of the specific facts relied on, not merely his conclusions as to the nature and effect of such facts; the proof must enable the appellate court to "ascertain whether, under settled principles pertaining to such writ, the facts alleged would afford, at least *prima facie,* just ground for an application to the lower court for a writ of error *coram nobis*"; and in the exercise of its discretion in matters of this sort, the court should look to the

reasonableness of the allegations of the petition and to the probability of their truth.

2. A person who, with others, had been convicted of murder in Florida, and whose sentence of death had been affirmed by the Supreme Court of the State, petitioned that court for leave to apply to the trial court for a writ of error *coram nobis*, claiming that his conviction had been secured by means of false testimony delivered at the trial by an accomplice who was coerced thereto by state officials and who, four years later, on the eve of his own electrocution for participation in the same crime, had made affidavits exonerating the petitioner. The Supreme Court of Florida, on the basis of the petition and accompanying affidavits and the records of prior cases arising out of the same crime, concluded that the petitioner had failed to make the showing of substantiality which according to the local procedure was necessary in order to obtain the extraordinary relief furnished by the writ of error *coram nobis;* and this Court, upon an independent examination of the affidavits on which the claim was based, has no doubt that the finding of insubstantiality was justified. P. 421.

146 Fla. 593, 1 So. 2d 628, affirmed.

CERTIORARI, 313 U. S. 557, to review a judgment denying a petition for leave to apply to a trial court for a writ of error *coram nobis* in a case of murder.

Mr. Carlton C. Arnow, with whom *Mr. P. Guy Crews* was on the brief, for petitioner.

Mr. Joseph E. Gillen, Assistant Attorney General of Florida, with whom *Messrs. J. Tom Watson,* Attorney General, and *Woodrow M. Melvin* were on the brief, for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

After the Supreme Court of Florida had affirmed his conviction for murder, the petitioner applied to that court for leave to ask the trial court to review the judgment of conviction. The basis of his application was the claim

that the testimony of two witnesses implicating him was perjured, and that they had testified falsely against him because they were "coerced, intimidated, beaten, threatened with violence and otherwise abused and mistreated" by the police and were "promised immunity from the electric chair" by the district attorney. After twice considering the matter, the Supreme Court of Florida denied the application. 146 Fla. 593, 1 So. 2d 628. We brought the case here, 313 U. S. 557, in view of our solicitude, especially where life is at stake, for those liberties which are guaranteed by the Due Process Clause of the Fourteenth Amendment.

The guides for decision are clear. If a state, whether by the active conduct or the connivance of the prosecution, obtains a conviction through the use of perjured testimony, it violates civilized standards for the trial of guilt or innocence and thereby deprives an accused of liberty without due process of law. *Mooney* v. *Holohan,* 294 U. S. 103. Equally offensive to the Constitutional guarantees of liberty are confessions wrung from an accused by overpowering his will, whether through physical violence or the more subtle forms of coercion commonly known as "the third degree." *Brown* v. *Mississippi,* 297 U. S. 278; *Chambers* v. *Florida,* 309 U. S. 227; *Lisenba* v. *California,* 314 U. S. 219. In this collateral attack upon the judgment of conviction, the petitioner bases his claim on the recantation of one of the witnesses against him. He cannot, of course, contend that mere recantation of testimony is in itself ground for invoking the Due Process Clause against a conviction. However, if Florida through her responsible officials knowingly used false testimony which was extorted from a witness "by violence and torture," one convicted may claim the protection of the Due Process Clause against a conviction based upon such testimony.

And so we come to the circumstances of this case.

On November 25, 1936, as a result of an attempted robbery, John H. Surrency and his wife, Mayme Elizabeth, were murdered. On December 16, 1936, Hysler was indicted for the murder of John Surrency; he was tried on January 21, 1937, was convicted on February 12, 1937, with recommendation of mercy, and was thereafter sentenced to imprisonment for life. On February 3, 1938, his sentence was affirmed by the Florida Supreme Court. 132 Fla. 200, 181 So. 350. The record in the case was more than 3000 pages. On January 15, 1937, Hysler, together with two others, James Baker and Alvin Tyler, was indicted for the murder of Mrs. Surrency. A severance having been granted as to Tyler and Baker, Hysler was placed on trial on March 15, 1937, and on April 5 was found guilty without recommendation of mercy. On April 23, 1937, he was sentenced to death. On April 24 he sued out a writ of error to the state Supreme Court, which on February 3, 1938, sustained the sentence, and on June 3 denied a rehearing. The record on this second trial was some 2500 pages. 132 Fla. 209, 181 So. 354.

Surrency kept a restaurant near Jacksonville, and on the fatal day was returning from one of his regular and well-known trips to that city to get checks cashed. Hysler had known Baker in connection with Hysler's illicit whiskey business. Baker and Tyler were friends. The principal evidence in both trials against Hysler was their testimony. They testified with circumstantiality that Hysler induced them to hold up Surrency, furnished them a car, a pistol, and some whiskey, gave them detailed instructions for carrying out the plan, and by prearrangement was in the vicinity of the place of its execution. While their testimony doubtless was the foundation of Hysler's convictions, the testimony both of numerous witnesses and Hysler himself sheds much confirming light

on the story told by Baker and Tyler. A careful concurring opinion affirming the conviction now challenged concluded thus: "From the evidence it is difficult to see or understand how the jury in the Court below could have rendered a verdict other than guilty. We have thoroughly considered each assignment and failed to find error in the trial of the cause in the lower court." 132 Fla. 209, 235, 181 So. 354, 364.

Accordingly, the date for the execution was set by the Governor of Florida for the week of February 20, 1939. In the meantime, however, an application for a writ of *habeas corpus* by Hysler was made to the Supreme Court of Florida, partly on the ground of insanity. This was denied by that Court on February 20, 1939. 136 Fla. 563, 187 So. 261. Tyler broke jail and has apparently remained a fugitive from justice. Baker was tried after Hysler, was convicted of murder in the first degree, and sentenced to death. His conviction was affirmed by the Florida Supreme Court on March 14, 1939, and a rehearing denied on April 11, 1939. 137 Fla. 27, 188 So. 634.

We have now reached the final chapter of this unedifying story in the administration of criminal justice. On April 10, 1941, more than four years after Hysler's conviction for the murder of Mrs. Surrency, he petitioned the Supreme Court of Florida for permission to apply to the Circuit Court of Duval County, Florida (the court before which he was originally tried), for writ of error *coram nobis*. This common law writ, in its local adaptation, is Florida's response to the requirements of *Mooney* v. *Holohan*, 294 U. S. 103, for the judicial correction of a wrong committed in the administration of criminal justice and resulting in the deprivation of life or liberty without due process. See *Lamb* v. *Florida*, 91 Fla. 396, 107 So. 535; *Skipper* v. *Schumacher*, 124 Fla. 384, 169 So. 58; *Jones* v. *Florida*, 130 Fla. 645, 178 So.

404. In brief, a person in Florida who claims that his incarceration is due to "failure to observe that fundamental fairness essential to the very concept of justice," *Lisenba* v. *California, supra,* at p. 236, even after his sentence has been duly affirmed by the highest court of the State, has full opportunity to have a jury pass on such a claim provided he first makes an adequate showing of the substantiality of his claim to the satisfaction of the Supreme Court of Florida. The decisions of that Court show that a naked allegation that a constitutional right has been invaded is not sufficient. A petitioner must "make a full disclosure of the specific facts relied on," and not merely his conclusions "as to the nature and effect of such facts." The proof must enable the appellate court to "ascertain whether, under settled principles pertaining to such writ, the facts alleged would afford, at least *prima facie,* just ground for an application to the lower court for a writ of error *coram nobis.*" *Washington* v. *Florida,* 92 Fla. 740, 749, 110 So. 259, 262; see *Skipper* v. *Schumacher,* 124 Fla. 384, 405–08, 169 So. 58; *Skipper* v. *Florida,* 127 Fla. 553, 554–55, 173 So. 692. The latest formulation by the Florida Supreme Court of its function in considering an application for leave to apply to the trial court for a writ of error *coram nobis* is found in *McCall* v. *Florida,* 136 Fla. 349, 350, 186 So. 803 (1939): "In the exercise of its discretion in matters of this sort the court should look to the reasonableness of the allegations of the petition and to the existence of the probability of the truth thereof. This duty we have met and we are convinced that to grant the petition would be no less than a trifling with justice."

Such a state procedure of course meets the requirements of the Due Process Clause. Vindication of Constitutional rights under the Due Process Clause does not demand uniformity of procedure by the forty-eight States. Each State is free to devise its own way of secur-

ing essential justice in these situations. The Due Process Clause did not stereotype the means for ascertaining the truth of a claim that that which duly appears as the administration of intrinsic justice was such merely in form, that in fact it was a perversion of justice by the law officers of the State. Each State may decide for itself whether, after guilt has been determined by the ordinary processes of trial and affirmed on appeal, a later challenge to its essential justice must come in the first instance, or even in the last instance, before a bench of judges rather than before a jury.

Florida then had ample machinery for correcting the Constitutional wrong of which Hysler complained. But it remains to consider whether in refusing him relief the Supreme Court of Florida denied a proper appeal to its corrective process for protecting a right guaranteed by the Fourteenth Amendment.

Hysler's claim before the Supreme Court of Florida was that Baker repudiated his testimony insofar as it implicated Hysler and that he now named another man as the instigator of the crime. Considering the fact that this repudiation came four years after leaden-footed justice had reached the end of the familiar trail of dilatory procedure, and that Baker now pointed to an instigator who was dead, the Supreme Court of Florida had every right and the plain duty to scrutinize this repudiation with a critical eye, in the light of its familiarity with the facts of this crime as they had been adduced in three trials, the voluminous records of which had been before that Court.[1]

The Florida Supreme Court had before it four affidavits by Baker. The affidavits must be considered here

[1] In denying Hysler's application, the Supreme Court of Florida specifically stated that it was taking judicial cognizance of its own records. 146 Fla. 593, 594–95, 1 So. 2d 628.

as they were before that Court—in their entirety. One was made on April 7, 1941; the second on April 8 between six and seven in the evening; another between eight-thirty and nine of the same night; the fourth, the next day. The most striking feature of this series of retractions is that, in his first and spontaneous new account of the happenings that led to the murders on November 25, 1936, Baker does not attribute to coercion or inducements made by state authorities his testimony at the trials that Hysler was the instigator of the crimes. On the contrary, according to Baker's new story, after the killing of the Surrencys, Tyler and he "agreed between them while they were in Cracker Swamp in the Marietta section of Duval County, that they would lay the blame of the planning of the robbery of the Surrencys upon Clyde Hysler because they had had considerable liquor dealings with Clyde Hysler and knew him well, and for the reason that the Hyslers bore a bad reputation in Duval County, and for the further reason that Clyde Hysler's father had plenty of money and they thought that by laying the planning of the robbery of the Surrencys on Clyde Hysler that his father and his other relatives would put up sufficient money to get Clyde Hysler out of the trouble and that by laying it on to Clyde Hysler, that he, James Baker, and Alvin Tyler would escape the death penalty . . ."

There is no suggestion whatever in this explanation of what is now claimed to have been a false accusation that it was induced from without. Baker gives five reasons for having fixed the blame on Hysler—an explanation to which he had adhered for more than four years—but all these reasons make Baker and Tyler the spontaneous concocters of the alleged false charge. It was not until the next day, that Baker, under leading questions, suggested that his account of the crime, contemporaneous with it,

was induced by the hope of getting "life instead of the chair." [2] Even in this second affidavit there is no hint that the prosecutor had any knowledge of the falsity of his implication of Hysler.[3] Only after a third session did Baker, in an ambiguous reply to another leading question, convey a suggestion of the prosecutor's knowledge of the use of force preceding Baker's original testimony. This

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[2] "Q. Then it was a definite promise from Mr. Harrell, the State's Attorney to keep you from burning?

A. He said that he would see that I would get life, but that he would see that I didn't stay at the chain gang but three years.

Q. You say he played off sick to keep from prosecuting you?

A. Yes, sir, Mr. Simpson his assistant and Mr. Hallows prosecuting, the Judge had ordered him to handle the Hysler case straight through, cause Mr. Hollows was not familiar with the case.

Q. Do you know whether or not Mr. Harrell had gone out of office and Mr. Hallows had taken office?

A. Yes, sir, I think he had and that was why the Judge wanted him to carry this thing on through, but I don't be sure.

Q. Is there anything else you want to say along that line about those threats or beatings?

A. No, sir, that is all I can think of right now."

[3] "Q. Now what threats or promises did they make you to testify and implicate Clyde Hysler?

A. Well, Mr. Griffen and them didn't, they didn't make no promises, Mr. Hulbert did talk to me, that he would get me life imprisonment—life instead of the chair.

Q. Mr. Hubbert talked to you and made promises that you would get life instead of the chair?

A. Yes, sir.

Q. What police——

A. That's what it was, police officers and John Harrell.

Q. John W. Harrell, the State's Attorney at that time?

A. Yes, sir.

Q. Did Mr. Harrell tell you that he would help you get a life sentence if you would testify against Clyde Hysler?

A. He said he wouldn't burn me, that he, Mr. Acosta and Mr. Carson would get me out in three years time."

is the only testimony that bears on the complicity of the prosecutor in the alleged coercion of Baker's testimony:

"Q. Baker do you know whether or not Mr. Harrell [the State's Attorney] knew if you was beat up to make you testify?

A. Yes, sir, he knows I couldn't set down, none of the sheriff's force knew it at the time, they knew it later when I made it in front all of the officers.

Q. When you made that statement you couldn't set down?

A. Yes, sir, and I can't set down good, and I wish you and those men could see that now.

Q. No, we want care to see—that's all you want to say.

A. (Baker nodding his head indicating yes.)"

In his final affidavit on April 9, Baker returns to the alleged promise of the State's Attorney that he would not "burn" him. But there is this time no suggestion that the prosecutor induced or knew of any false testimony by Baker.

We have seen that, according to Baker's first statement on April 7, his attribution of Hysler's responsibility was spontaneous and uncoerced. The circumstances of the case reinforce this and cast a proper scepticism upon Baker's subsequent claims of coercion. According to the affidavits of the two lawyers who represented Hysler at his trials, they examined Baker and Tyler "at great length" in the presence of counsel for the two accomplices and "said witnesses were particularly questioned as to who was involved in said case, and said witnesses denied that anyone was involved in said case other than the defendants named in the indictment; that said witnesses further denied that any statements previously made by them to law enforcement officers were made under duress or with any hope or expectation of reward." And the present Chief Justice of Florida, in his separate opinion on Baker's appeal, characterized Baker's confession as

"entirely free and voluntary." 137 Fla. 27, 29, 188 So. 634, 635.

In addition to these four affidavits by Baker, there were four subsidiary affidavits by others. Their want of significance is sufficiently attested by the fact that on the motion for rehearing of this cause before the Florida Supreme Court, reliance was placed exclusively upon the Baker affidavits and no reference whatever was made to these subsidiary affidavits. Nor was reliance upon them made here.

The essence of Hysler's claim before the Supreme Court of Florida was that his conviction was secured by unconstitutional means, that Baker was coerced to testify falsely by responsible state officials. The Court had to judge the substantiality of this claim on the basis of all that was before it, namely, the petition with its accompanying affidavits and the records of prior cases arising out of the same crime. The Court concluded that Hysler's proof did not make out a *prima facie* case for asking the trial court to reconsider its judgment of conviction. However ineptly the Florida Supreme Court may have formulated the grounds for denying the application, its action leaves no room for doubt that the Court deemed the petitioner's claim without substantial foundation. We construe its finding that the "petition" did not show the responsibility of the state officials for the alleged falsity of Baker's original testimony to mean that the petitioner had failed to make the showing of substantiality which, according to the local procedure of Florida, was necessary in order to obtain the extraordinary relief furnished by the writ of error *coram nobis*.[4] And our

[4] The opinion of the Florida Supreme Court on petitioner's motion for rehearing states, *inter alia*, that: "The allegations of the petition do not show that the prosecuting attorney had any guilty knowledge of the alleged maltreatment of the witness [Baker], or that the

independent examination of the affidavits upon which his claim was based leaves no doubt that the finding of insubstantiality was justified. It certainly precludes a holding that such a finding was not justified.

The State's security in the just administration of its criminal law must largely rest upon the competence of its trial courts. But that does not bar the state Supreme Court from exercising the vigilance of a hardheaded consideration of appeals to it for upsetting a conviction. That in the course of four years witnesses die or disappear, that memories fade, that a sense of responsibility may become attenuated, that repudiations and new incriminations like Baker's on the eve of execution are not unfamiliar as a means of relieving others or as an irrational hope for self—these of course are not valid considerations for relaxing the protection of Constitutional rights. But they are relevant in exercising a hardy judgment in order to determine whether such a belated disclosure springs from the impulse for truth-telling or is the product of self-delusion or artifice prompted by the instinct of self-preservation.

Our ultimate inquiry is whether the State of Florida has denied to the petitioner the protection of the Due Process Clause. The record does not permit the conclusion that Florida has deprived him of his Constitutional rights.

Petitioner also claims that Florida has denied him the "equal protection" of its law. This contention is plainly without substance. If Hysler had been singled out for invidious treatment by the Florida Supreme Court, he could properly complain here. Compare *Yick Wo* v.

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alleged falsity of the testimony of the witness Baker was known to the prosecuting officer. The petition does not show that any alleged maltreatment of witness was inflicted by any officer of the trial court or that same was known to any officer of the trial court." 146 Fla. 593, 594, 1 So. 2d 628.

Hopkins, 118 U. S. 356; *McFarland* v. *American Sugar Co.,* 241 U. S. 79. But it is not a fact that the Florida Supreme Court has granted such applications in other cases but not in Hysler's. See, e. g., *Skipper* v. *Florida,* 127 Fla. 553, 173 So. 692; *McCall* v. *Florida,* 136 Fla. 349, 186 So. 803.

Affirmed.

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

The application denied by the Supreme Court of Florida alleges that Tyler and Baker, the accomplices in the murder for which Hysler was convicted, confessed and gave false testimony against Hysler because they were "coerced, intimidated, beaten, threatened with violence and otherwise abused and mistreated," and because they were promised life sentences instead of the electric chair. Sworn statements of Baker made in a state prison in the presence of prison officials were presented in support of these allegations, as were corroborative affidavits of four others. Tyler, a fugitive from justice, is unavailable to the petitioner as an additional source of verification.

The Florida Supreme Court has stated that the petition does not assert that "the alleged falsity of the testimony of the witness Baker was known to the prosecuting officer." In *Mooney* v. *Holohan,* 294 U. S. 103, this Court held that the use by a State of testimony known by its "prosecuting authorities" to be false is a denial of due process of law. I do not, however, regard this as a proper occasion to determine whether the rule of *Mooney* v. *Holohan* applies only where the guilty knowledge is that of "the prosecuting officer" and not any other responsible official. For even if every representative of the State believed that the confessions of Tyler and Baker were true in every detail, other allegations of the petitioner make out a denial of due

process on independent grounds, upon which the scope of *Mooney* v. *Holohan* has no bearing. In those cases in which this Court held that a conviction based on confessions wrung from the accused or his accomplices by third-degree methods was offensive to the guarantees of the due process clause, there are no indications that the knowledge of any of the state officials involved as to the truth or falsity of the confessions was deemed relevant.[1] And if the allegations of Hysler's petition are true, that is, if Tyler and Baker were held incommunicado and tortured into supplying the controlling testimony at Hysler's trial, his conviction is tainted with a measure of brutality which I had supposed was sufficient, without more, to establish a violation of Constitutional rights. I am therefore unable to agree with the statement of the Florida Supreme Court that "if all petitioner alleges in his petition had been true and had been fully made known to the trial court and to the jury which tried the defendant-petitioner, it would not have precluded the entry of the judgment upon a verdict of guilty of Murder . . ." Nor do I go along with the intimations of approval of that statement to be found in the opinion which this Court has just handed down.

The opinion of this Court does not rest solely on the ground that Hysler's allegations, if true, fail to establish a denial of due process. The Court finds in the opinion of the Florida Supreme Court a determination that "Hysler's proof" was insufficient "to make the showing of substantiality which, according to the local procedure of Florida, was necessary in order to obtain the extraordinary relief furnished by the writ of error *coram nobis.*" But "Hysler's proof" is nowhere mentioned in the opinion below, and of the eight reasons there given for denying Hysler's petition, the only one which touches in any

[1] *E. g., Brown* v. *Mississippi,* 297 U. S. 278; *Chambers* v. *Florida,* 309 U. S. 227.

way upon the credibility of his allegations accepts them as true.

To be convinced that the Florida Supreme Court did not pass on the credibility of Hysler's allegations but merely decided that these allegations, however fully proved, would not make out a violation of due process, I should need to look no further than the opinion below. But more support for this interpretation of Florida's denial of Hysler's petition is amply available in other decisions of its highest court. In *Washington* v. *State,* 92 Fla. 740, 749, 110 So. 259, 262, for example, the Florida Supreme Court said the issue to be determined when such a petition is before it is "whether . . . the *facts alleged*"—not the *proof*—"would afford, at least *prima facie,* just ground for an application to the lower court for a writ of error *coram nobis.*" That is not to say that the Florida Supreme Court will not deny a petition when the facts alleged are so patently incredible that further pursuit of the remedy would be a frivolous imposition upon the trial court. Thus, in *McCall* v. *State,* 136 Fla. 349, 350, where the allegations of the petitioner denied his guilt for the first time, were without any supporting affidavits, and were "positively and directly contradicted" by himself and other witnesses at the trial, the court denied the petition, stating that to grant it "would be no less than a trifling with justice." Even under such circumstances, however, the court explicitly pointed out that it had looked into "the probability of the truth" of the allegations. And where there is a color of plausibility in the allegations, the court has been meticulous to give the petitioner ample opportunity to prove them. In *Chambers* v. *State,* for example, Mr. Justice Buford, who spoke for the court in its opinion on Hysler's petition said: "The petition for leave to file writ of error *coram nobis* presents allegations which, if true, would constitute ground for issuing the writ. It is not

the province of this Court to determine whether or not such allegations are true. The determination of such question may be had in the circuit court under issues duly made for that purpose." 111 Fla. 707, 713, 152 So. 437.

It must also be borne in mind that if the proof accompanying a petition for leave to apply for a writ of error *coram nobis* had to be so full as to establish conclusively the truth of the allegations, petitioners who required the amplifying or corroborative evidence of inaccessible or unwilling witnesses would be effectively barred from access to this remedy, for they would never have the opportunity to utilize the compulsory process which a trial of the facts would afford. In the light of Florida's liberal treatment of other petitioners in other cases,[2] and the unambiguous explanation its courts have given where petitions have been denied, I cannot impute to the Florida Supreme Court, on the basis of its opinion in this case, a decision that Hysler's "proof" was inadequate to support his allegations.

Although it is at best not clear that the court below has canvassed the issue of credibility, this Court has not hesitated to do so. In the opinion just announced, there has even been a recital of considerations relevant in determining whether the disclosure made by Baker "springs from the impulse for truth-telling or is the product of self-delusion or artifice prompted by the instinct of self-preservation." And the Court has apparently concluded that Hysler's allegations are so patently incredible that due process does not require a hearing. Where, as here, allegations that controlling testimony was extorted by

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[2] See *Nickels* v. *State*, 86 Fla. 208, 98 So. 497, 502, 99 So. 121; *Lamb* v. *State*, 91 Fla. 396, 107 So. 535; *Washington* v. *State*, 92 Fla. 740, 110 So. 259; *Chambers* v. *State*, 111 Fla. 707, 151 So. 499; 113 Fla. 786, 152 So. 437; 117 Fla. 642, 158 So. 153.

third-degree methods are supported by sworn statements and not denied by anyone, a summary rejection of them without hearing by the court of first instance would raise serious questions of compliance with the Constitutional requirement of a fair trial.[3] Under such circumstances, I should suppose this Court would be particularly reluctant to make the original and only disposition itself of what it treats as a major issue of the case: the credibility of Hysler's allegations.

The Supreme Court of Florida declined even to consider the credibility of these allegations, proceeding on the assumption—erroneous if tested by principles which I believe decisions of this Court have affirmed [4]—that, if true, they would be insufficient to impugn the conviction. Having corrected this erroneous assumption, this Court, in my opinion, should allow the Florida courts to make their own disposition of the issue they have not considered. We granted certiorari because of a "solicitude, especially where life is at stake, for those liberties which are guaranteed by the Due Process Clause of the Fourteenth Amendment." That solicitude would seem to call for remanding this case for further consideration below. I cannot see why it should impel this Court to sustain the conviction upon a gratuitous disposition of an issue which the state court might resolve otherwise.

In cases raising no issue of life or death this Court has not hesitated to remand to the lower court for further proceedings where ambiguities in the opinion below beclouded the ground of decision.[5] The vital issues here

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[3] Cf. *Mooney* v. *Holohan, supra; Smith* v. *O'Grady,* 312 U. S. 329.

[4] See cases cited in footnote 1, *supra,* and *Canty* v. *Alabama,* 309 U. S. 629; *White* v. *Texas,* 310 U. S. 530; *Lomax* v. *Texas,* 313 U. S. 544; *Vernon* v. *Alabama,* 313 U. S. 547.

[5] *Villa* v. *Van Schaick,* 299 U. S. 152; *State Tax Comm'n* v. *Van Cott,* 306 U. S. 511; *Minnesota* v. *National Tea Co.,* 309 U. S. 551.

and the manner of treatment below compel me to believe that a like procedure should be followed now. Because the basis for my belief can best be shown by reference to the record, I am adding excerpts from the petition and accompanying exhibits as well as the whole of the opinion of the Florida Supreme Court in an appendix.

APPENDIX.

I. Excerpts from Hysler's petition for leave to apply for a writ of error *coram nobis*:

". . . Alvin Tyler and James Baker who were co-defendants of the petitioner, Clyde Hysler, and upon whose testimony the State of Florida relied upon for a conviction of petitioner was coerced, intimidated, beaten, threatened with violence and otherwise abused and mistreated in order to compell the said witnesses, Tyler and Baker to give testimony at the trial of said cause against petitioner and to implicate said petitioner in the killing of Mrs. Mamie Surrency; and further that the said witnesses, Tyler and Baker were promised immunity from the electric chair, by John W. Harrell and further promised if they would implicate Clyde Hysler in said murder and testify against him during the trial of said cause that he as State's Attorney of the Fourth Judicial Circuit of Florida together with other law enforcing officers of Duval County, Florida would see that he did not get the chair, and that they would procure a pardon and have him released from the State Penitentiary after serving three (3) years of his sentence, all of which is more particularly described by reference to a statement and affidavit made by the said James Baker on the 7th day of April, A. D. 1941, also by further affidavit and statement made by the said James Baker on the 8th day of April, A. D. 1941, and also by statement and affidavit made by the said James Baker on the 9th day of April, A. D. 1941, said affidavit being marked 'A–b and c' respectively and hereby made a part of this petition as fully as though set out herein in haec verba. And for further reason that said affidavits show that the said petitioner was not implicated in the murder of the said Mrs.

Mamie Surrency but that one Joe Peterson, Sr. was the person implicated in said murder and not the petitioner, Clyde Hysler, all of which is set out herein more fully in the affidavits herein above referred to and further substantiated by photostatic copies of the following affidavits, to-wit; affidavit of one Ed. Mosley; affidavit of one A. J. Mooney; affidavit of one Mrs. Ruby Crews and affidavit of one Rudolph J. Dowling, said photostatic copies being marked 'd-e-f and g' respectively, and each of said affidavits being hereto attached and hereby made a part of this petition as fully as though set out herein in haec verba.

. . . . .

"That the said witnesses, Alvin Tyler and James Baker immediately after and following their arrest were held incommun-cado for a long period of time without being allowed the benefit and advice of counsel, without being allowed to see or confer with their friends or relatives and without being allowed to confer with the attorneys for the petitioner; that said witnesses, Tyler and Baker were removed from the Duval County Jail and confined in the State Penitentiary at Raiford, Florida with instructions to allow no one to communicate with them for a long period of time immediately following their arrest, and it became necessary for the attorneys for petitioner to procure an order of the Circuit Court of Duval County for permission to confer with said witnesses several weeks after their arrest, and then only in company with, and in the presence of the attorneys appointed by the Court to represent said witnesses and said attorneys for petitioners made diligent effort to ascertain from said witnesses facts about which they would testify to in trial of said petitioner, and thereby used diligent effort in trying to procure the information as set out herein by the respective affidavits by the witness, James Baker, but said witness Baker was afraid to divulge the truth to the attorneys for the petitioner as set out herein in the said affidavits, a-b and c hereto attached, and that said petitioner was denied a fair and impartial trial by reason of the coercion and intimidation of the witnesses, Alvin Tyler and James Baker and the hope of reward promised them as hereinabove set forth, and has by reason thereof denied equal

protection of the law as guaranteed to him by the 14th Amendment to the United States Constitution and was thereby denied due process of the law as guaranteed by the 5th Amendment of the United States Constitution.

. . . . . .

"That had the said witnesses, Tyler and Baker not been intimidated, coerced and promised immunity from the electric chair by the law enforcement officers in Duval County as described in affidavits 'a-b and c' hereto attached, and by John W. Harrell as herein above described, and the said witnesses had been left free to testify and tell the truth as to the said Joe Peterson, Sr. being the person involved in the murder of the said Mrs. Mamie Surrency instead of the petitioner, said testimony would have prevented the rendition of the judgment, verdict and sentence of petitioner in this cause, and if another trial be had of this cause, this petitioner would be acquitted.

. . . . . .

"That petitioner further alleges that the affidavits of the witness, James Baker, being affidavits hereto attached and marked 'a-b and c' and made by the said James Baker freely and voluntarily on his part and without any suggestion of prompting on the part of petitioner or any one on his behalf, and that the statements contained in said affidavits were made in the presence of several prison officials at Raiford, Florida after said James Baker made a voluntar*ily* request to see and talk with the attorney for petitioner."

II. Excerpts from exhibits accompanying Hysler's petition: (These are from the transcript of three conferences held in a Florida prison on April 7 and 8, 1941. Baker was under oath. Where the statements are not in narrative form, the questioner is Hysler's attorney.)

". . . James Baker . . . deposes and says:

"That after the killing of Mr. and Mrs. Surrancy near Grand Crossing in Jacksonville, Florida on the 23rd day of November 1936, that he and Alvin Tyler, the man who was with him at the time of the said killing agreed between them while they were in Cracker Swamp in the

Marietta section of Duval County, that they would lay the blame of the planning of the robbery of the Surrancys upon Clyde Hysler because they had had considerable liquor dealings with Clyde Hysler and knew him well, and for the reason that the Hyslers bore a bad reputation in Duval County, and for the further reason that Clyde Hysler's father had plenty of money and they thought that by laying the planning of the robbery of the Surrancys on Clyde Hysler that his father and his other relatives would put up sufficient money to get Clyde Hysler out of the trouble and that by laying it on to Clyde Hysler that he, James Baker and Alvin Tyler would escape the death penalty, that in truth and fact, that Clyde Hysler was not implicated in the planning of the robbery and had nothing to do with the killing of Mr. and Mrs. Surrancy, but that one Joe Peterson, Sr. was the man who planned the robbery and hired the said James Baker and Alvin Tyler to perform the robbery after being advised by the said Joe Peterson that it would be no trouble, and that Mr. Surrancy did not carry a gun, and all they would have to do would be to point the pistol at him and take the money, that affiant further deposes and says:

"That Clyde Hysler was in no way responsible for the attempted robbery of Mr. and Mrs. Surrancy; that he had nothing to do with it, and the man who planned the robbery and was supposed to protect us in the robbery was Joe Peterson and not Clyde Hysler; that Joe Peterson was in the immediate vicinity when the attempted robbery and the killing of the Surrancys took place, and had it not been that Joe Peterson planned the robbery and hired Alvin Tyler and myself to rob Mr. Surrancy they would probably have still been living and we would not be in any trouble."

. . . . .

"Q. Now Baker, I don't want you to tell me anything except the truth, I want you to tell me if Joe Peterson was the man that got you into all of this instead of Clyde Hysler.

A. Yes, sir, he is the man.

Q. Then you and Alvin Tyler planned to lay this all on Clyde Hysler in order to try to get out of it yourself or to get a life sentence instead of the chair?

A. Yes, sir.

. . . . . .

"Q. You recall what officers brought you over here?

A. Mr. Gene Griffen and Mr. Dick Barker and some more officers.

Q. Now what threats or promises did they make you to testify and implicate Clyde Hysler?

A. Well, Mr. Griffen and them didn't, they didn't make no promises, Mr. Hulbert did talk to me, that he would get me life imprisonment—life instead of the chair.

Q. Mr. Hubbert talked to you and made promises that you would get life instead of the chair?

A. Yes, sir.

Q. What police——

A. That's what it was, police officers and John Harrell.

Q. John W. Harrell, the State's Attorney at that time?

A. Yes, sir.

Q. Did Mr. Harrell tell you that he would help you get a life sentence if you would testify against Clyde Hysler?

A. He said he wouldn't burn me, that he, Mr. Acosta and Mr. Carson would get me out in three years time.

Q. Was Detective Cannon and—you was talking about and Inspector Acosta——

A. The two men that arrested me, yes sir.

Q. Now from the time you was arrested, Baker, how long was you kept to yourself before you was allowed to talk to your lawyer or your friends?

A. From the time I was arrested until the 21st of January, till we went back and had my trial set.

Q. The day you were arraigned in Circuit Court for the trial?

A. Yes, sir.

Q. You was held to your self without being allowed to communicate with any of your friends or your lawyer?

A. Yes, sir.

Q. When was you arrested?

A. It was on the 23rd—24—26—when was Thanksgiving Day—just a few days.

Q. You was arrested just a few days after Thanksgiving?

A. Yes, sir.

. . . . . .

"Q. Did any of those officers threaten you?

A. They carried me in a dark room——

Q. That was here?

A. No, sir, that was in Jacksonville, they carried me out to Marietta and whipped me.

Q. What was that with?

A. Something covered up in canvas, I don't know what it was and a piece of hose and something looked like a pine limb.

Q. You remember any of those names?

A. Yes, sir.

Q. Who were they?

A. Mr. Woods, R. L. Woods, and Mr. Carson slapped me two or three times and gave them the black jack to beat me with. . . .

Q. That was in the presence of Mr. Woods, Carson and Acosta?

A. Yes, sir.

Q. That was to try to make you implicate Mr. Hysler in the robbery of Mr. Surrency and Mrs. Surrency?

A. Yes, sir.

Q. And if it hadn't been for the beatings and threats and the promises to get you out of here in three years as you have stated above would you have implicated Mr. Hysler in the case at all?

A. No, sir, cause I told them I didn't no anything about it; and another thing, between Mr. Hysler's first trial and last one, Mr. Harrell came down to the County Jail after I was allowed to see people, I said, don't you know that if you burn Mr. Hysler you will have to burn me too, and he said he could burn the whole Hysler family and don't burn me cause he and Mr. Sidney Hulbert, Mr. Carson and Mr. Cannon and some more officers was going to run the County as long as they were running it.

. . . . . .

"Q. Baker, how many times did the officers threaten you and beat you after you were arrested?

A. They beat me about three o'clock in the morning to ten o'clock before they got me to say anything.

Q. It was the police made you tell the sheriff's office?

A. Yes, sir.

Q. Was you afraid not to tell them what they wanted you to, afraid they would beat you some more?

A. Yes, sir, if them—I said two words they would slap me, before the sheriff bunch got there they had sent out and bought me dinner, give me $5.00 or $6.00 dollars in money, and said don't tell any body about me being whipped, if anyone asked me, tell them no.

Q. Then it was a definite promise from Mr. Harrell, the State's Attorney to keep you from burning?

A. He said that he would see that I would get life, but that he would see that I didn't stay at the chain gang but three years.

. . . . .

"Q. Baker what about the remarks you wanted to make?

A. Where they kicked me.

Q. That at Jacksonville police station?

A. Yes, sir.

Q. Who was that?

A. Mr. Carson, thats who had me at that time, he taken me down there where a bunch of police was shooting pool.

Q. What all did they do to you?

A. Those officers down there asked him if he made me tell him what they wanted to know, and Mr. Carson—Mr. Carson said not yet, and they said, turn him loose with us about 25 minutes and we will make him say anything they wanted me to say, and he told them to take me and hold me until they went up into the office and make a call, and while he was gone to make a call they carried me back into a room and put a coat over my head and went to beating me, I got scars on me now, I want to show them to you and its what you call risons, you can get your doctor and he will tell you what was caused from blows——

Q. You still have scars on you from that beating?

A. Yes——

Q. Was those beatings that caused those scars on you to tell on Clyde Hysler?

A. To make me tell anything.

Q. Did they mention Clyde Hysler's name to you while they were beating you?

A. Yes, sir.

Q. Do you know the names of those officers?

A. No, sir, those were new officers to me, they were speed cops, had those things on their shoulders.

Q. Did any of them tell you that Clyde Hysler was mixed up in the killing or such as that?

A. They said they knew he was in it—and after I told how it was they made me implicate him.

Q. Implicate him?

A. Yes, sir.

Q. As a matter of fact, Hysler was not mixed in it but it was Joe Peterson——

A. They had me hand cuffed behind my back and I was chained and beat me, . . .

. . . . . .

"Q. Baker do you know whether or not Mr. Harrell knew if you was beat up to make you testify?

A. Yes, sir, he knows I couldn't set down, none of the sheriff's force knew it at the time, they knew it later when I made it in front all of the officers.

Q. When you made that statement you couldn't set down.

A. Yes, sir, and I can't set down good, and I wish you and those men could see that now."

III. The opinion of the Supreme Court of Florida on motion for rehearing: (No opinion accompanied the original denial of Hysler's petition.)

"Buford, J.:

On motion for hearing on application for an order for leave to apply to the Circuit Court of Duval County for a writ of error coram nobis to review the judgment of conviction of petitioner of the offense of Murder in the First Degree heretofore entered in that Court, on grounds stated in the petition, we have denied the petition for reasons as follows:

(a) This Court may take judicial cognizance of its own records and the record lodged in this Court on the writ of error to the judgment of conviction of the petitioner shows ample evidence to support the judgment of conviction without the aid of the testimony given on that trial by the witness James Baker.

(b) Writ of error coram nobis will not lie because of false testimony given at the trial by important witness. Lamb *v.* State, 91 Fla. 396, 107 Sou. 535.

(c) Matters properly presentable for writ of coram nobis are such as would have prevented conviction and not such as may have caused a different result. Chesser *v.* State, 92 Fla. 754, 109 Sou. 906.

(d) If witness Baker swore falsely at defendant's trial, that fact was known to petitioner at the time of the trial. Washington *v.* State, 95 Fla. 289, 116 Sou. 470; Pike *vs.* State, 103 Fla. 594, 139 Sou. 196.

(e) The allegations of the petition do not show that the prosecuting attorney had any guilty knowledge of the alleged maltreatment of the witness, or that the alleged falsity of the testimony of the witness Baker was known to the prosecuting officer.

(f) The petition does not show that any alleged maltreatment of witness was inflicted by any officer of the trial court or that same was known to any officer of the trial court.

(g) The records of this Court, of which we take judicial cognizance, show that petitioner was convicted on trial held subsequent to the trial and confiction of the witness Baker of the offense of Murder in the first degree without recommendation to mercy, and that both trials were conducted on behalf of each defendant by able, diligent and faithful counsel.

(h) If all petitioner alleges in his petition had been true and had been fully made known to the trial court and to the jury which tried the defendant-petitioner, it would not have precluded the entry of the judgment upon a verdict of guilty of Murder in the first degree having been returned by the jury.

So it is, the petition is insufficient to require us to grant same and for such reasons the same was denied and the petition for rehearing is likewise denied.

So ordered.

Terrell, J. Thomas and Chapman, J. J. Concur.

Brown, C. J. Dissents."

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122, ET AL. *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD ET AL.

CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

No. 124. Argued January 9, 12, 1942.—Decided March 2, 1942.

A state regulation which forbids violence on the part of strikers in picketing the premises of their employer, but which permits peaceful picketing, *held* consistent with the due process clause of the Fourteenth Amendment. P. 441.

236 Wis. 329, 294 N. W. 632, 295 N. W. 634, affirmed.

CERTIORARI, 314 U. S. 590, to review the affirmance of a decree which sustained an order of the Employment Relations Board of Wisconsin acting under the Employment Peace Act of the State of Wisconsin.

Messrs. I. E. Goldberg and *Joseph A. Padway* for petitioners.

Messrs. N. S. Boardman, Assistant Attorney General of Wisconsin, and *Herman M. Knoeller* argued the cause for respondents. *Messrs. John E. Martin,* Attorney General, and *James Ward Rector,* Deputy Attorney General, were on the brief with *Mr. Boardman* for the Wisconsin Employment Relations Board, and *Mr. Walter H. Bender* was on the brief with *Mr. Knoeller* for the Plankinton House Company, respondents.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

We brought this case here from the Supreme Court of Wisconsin, 314 U. S. 590, to canvass the claim that Wisconsin has forbidden the petitioners to engage in peaceful

picketing insofar as we have deemed it an exercise of the right of free speech protected by the Due Process Clause of the Fourteenth Amendment. *Thornhill* v. *Alabama*, 310 U. S. 88; *American Federation of Labor* v. *Swing*, 312 U. S. 321. The specific question for decision is the constitutional validity of an order made by the Wisconsin Employment Relations Board acting under the Employment Peace Act, Wisconsin Laws of 1939, c. 57. In deciding this question we are of course controlled by the construction placed by the Supreme Court of Wisconsin upon the order and the pertinent provisions of the Act.

These are the undisputed facts. In June 1938, the petitioners, various unions representing hotel and restaurant employees, made a closed shop agreement for a year with the respondent Plankinton House Company, which owned two hotels in Milwaukee. After negotiations between the parties for renewal of the contract failed, the dispute was submitted to arbitration. On October 30, 1939, the Company notified the unions of its willingness to sign a contract in accordance with the terms of the arbitration. Three days later the employees of both hotels went on strike. Members of the unions picketed the hotels, and the Company continued to operate the hotels with new employees. Union pickets forcibly prevented the delivery of goods to one of the hotels. For this conduct two union officials were arrested and fined. One of them returned to the picket line immediately after his arrest, assaulted one of the non-striking employees, and was again arrested and fined. Numerous other outbreaks of violence resulted in the conviction of the offending pickets and occasioned special police measures to maintain the peace.

The Company complained to the Employment Relations Board that the petitioners had committed "unfair labor practices." After due hearing, the Board made findings of fact, not challenged throughout these proceedings.

Upon the basis of these findings, the Board issued the order set forth in the margin.[1]

In accordance with the statutory provisions for judicial review, the petitioners applied to the Circuit Court of Milwaukee County, Wisconsin, to set aside the Board's order. The Board cross-petitioned for enforcement. The Circuit Court sustained the order, and an appeal was taken to the Supreme Court of Wisconsin, which affirmed the judgment and, after further elucidating the meaning of the statute and the order, denied a rehearing. 236 Wis. 329, 352; 294 N. W. 632, 295 N. W. 634.

The Wisconsin statute underlying this controversy was enacted as a comprehensive code governing the relations

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[1] "It is ordered that the respondent unions, Hotel and Restaurant Employees International Alliance, Local No. 122, International Laundry Workers, Local No. 174, Bartenders International League of America, Local No. 64, International Union of Operating Engineers, Local No. 311, and the Milwaukee Building Trades Council, the officers, members, agents, successors and assigns of each shall:

"1. Immediately cease and desist from:

(a) Engaging in promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company;

(c) Boycotting in any way the Plankinton House Company.

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the act:

(a) Post notices to their members in conspicuous places at the union headquarters that the union has ceased and desisted in the manner aforesaid, and that all officers, members and agents of the union are to refrain from engaging in promoting or inducing picketing and boycotting of the Plankinton House Company, and also to refrain from attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company.

(b) Notify the Board in writing forthwith that steps have been taken by each of the respondent unions to comply herewith."

between employers and employees in the state. Only a few of its many provisions are relevant here. Section 111.06 provides that it shall be "an unfair labor practice" to "cooperate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employes of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike," and to "hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance." The Act contains a provision expressly dealing with its construction: "Except as specifically provided in this chapter, nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this chapter be so construed as to invade unlawfully the right to freedom of speech." § 111.15.

The central attack against the order is that, as enforced by the Wisconsin courts, it enjoins peaceful picketing. Whether Wisconsin has denied the petitioners any rights under the federal Constitution is our ultimate responsibility. But precisely what restraints Wisconsin has imposed upon the petitioners is for the Wisconsin Supreme Court to determine. In its opinion in this case, and more particularly in its explanatory opinion denying a rehearing, the Court construed the relevant provisions of the Employment Peace Act and confined the scope of the challenged order to the limits of the construction which it gave them. That Court has of course the final say concerning the meaning of a Wisconsin law and the scope of administrative orders made under it. *Aikens*

v. *Wisconsin,* 195 U. S. 194; *Senn* v. *Tile Layers Union,* 301 U. S. 468. What is before us, therefore, is not the order as an isolated, self-contained writing but the order with the gloss of the Supreme Court of Wisconsin upon it. And that Court has unambiguously rejected the construction upon which the claim of the petitioners rests.

That the order forbids only violence, and that it permits peaceful picketing by these petitioners, is made abundantly clear by the expressions of the Court:

"The act does not limit the right of an employee to speak freely. . . . The term 'picketing', as used in [the act], does not include acts held in the *Thornhill Case, supra,* to be within the protection of the constitutional guaranty of the right of free speech. The express language of the act forbids such a construction. It clearly refers to that kind of picketing which the *Thornhill Case* says the state has power to deal with 'as a part of its power to preserve the peace, and protect the privacy, the lives and the property of its residents'. . . . In this case it is undisputed that numerous assaults were committed by the pickets, that the pickets acted in concert; that the fines of these pickets were paid by the unions; that ingress and egress to and from the premises of the employer were prevented by force and arms. It was at conduct of that kind that the statute was aimed. It is conduct of that kind that is dealt with in this case. It is conduct of that kind that is declared to be an unfair labor practice by the statute and from which the defendants are ordered to cease and desist. . . ." And on rehearing: "Under the statute and the order of the board as interpreted and construed by the explicit language of the [previous] opinion, freedom of speech and the right peacefully to picket is in no way interfered with. The appellants could not be ordered to cease and desist from something they were not engaged in. . . . The picketing carried on in this case was not peaceful and the right of

free speech is in no way infringed by the statute or the order of the board." 236 Wis. 329, *passim.*

What public policy Wisconsin should adopt in furthering desirable industrial relations is for it to say, so long as rights guaranteed by the Constitution are respected. *Aikens* v. *Wisconsin,* 195 U. S. 194; *Senn* v. *Tile Layers Union,* 301 U. S. 468. As the order and the appropriate provisions of the statute upon which it was based leave the petitioners' freedom of speech unimpaired, the judgment below must be affirmed. Problems that would arise had the order and the pertinent provisions of the Act been otherwise construed by the Supreme Court of Wisconsin need not therefore be considered.

Affirmed.

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

THOMSON, TRUSTEE OF CHICAGO & NORTHWESTERN RAILWAY CO., ET AL. *v.* GASKILL ET AL.

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

No. 139. Argued January 7, 8, 1942.—Decided March 2, 1942.

1. The policy of Jud. Code § 24 (1), conferring jurisdiction by diversity of citizenship, calls for strict construction of the statute. If a plaintiff's allegations of jurisdictional facts are challenged by the defendant, the plaintiff must support them by competent proof, or the bill must be dismissed. P. 446.
2. Owing to the absence from the record of agreements upon which this suit was founded, it can not be determined whether the nature of the plaintiffs' claims is such that they may be aggregated in determining the jurisdictional amount. P. 446.
3. In computing jurisdictional amounts, claims of plaintiffs can not be aggregated merely because they are derived from a single instrument, or because the plaintiffs have a community of interests. P. 447.

4. The value of the "matter in controversy," in a suit based on diversity of citizenship, is measured, not by the monetary result of determining the principle involved, but by its pecuniary consequence to those involved in the litigation. P. 447.

119 F. 2d 105, reversed.

CERTIORARI, 314 U. S. 590, to review a decree reversing a decree of the District Court which dismissed for want of jurisdiction a suit by numerous conductors and brakemen against the above-named Railway Company, its trustee in reorganization proceedings, and others. The plaintiffs claimed seniority rights to work on certain railroad runs, arising under agreements between the railway and two railway brotherhoods. The bill sought an accounting to show the loss to each plaintiff from failure to observe these rights, and damages for each accordingly, in the order of his seniority, and prayed for future enforcement of the agreements.

Messrs. Wymer Dressler and *W. M. McFarland,* with whom *Messrs. W. C. Fraser, J. M. Grimm, Robert D. Neely, W. T. Faricy,* and *Samuel H. Cady* were on the brief, for petitioners.

Mr. S. L. Winters, with whom *Mr. Nelson C. Pratt* was on the brief, for respondents.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The question for decision is whether the record shows an essential requisite of the jurisdiction of the District Court, namely, that the "matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000." Judicial Code, § 24 (1), 28 U. S. C. § 41 (1). There were other questions which, in the view we take of the case, need not be stated.

Respondents, forty-one conductors and brakemen employed by the Chicago & Northwestern Railway Company,

brought suit against the railroad and one Kimball, an employee of the road, in the United States District Court for the District of Nebraska. The complaint alleged that the plaintiffs "belong to" the trackage of the railroad called the Nebraska Division; that "the controversy arises over the division of seniority rights between the Nebraska Division to which plaintiffs belong, and the Sioux City Division to which the defendant George Kimball belongs, over the Northwestern road from Omaha, Nebraska to Sioux City, Iowa"; that trains running between these points moved over 31 miles of the Nebraska Division and 70 miles of the Sioux City Division; that prior to May 1, 1930, seniority rights of the plaintiffs were governed by certain contracts "referred to sometimes as the 'Schedule of Wages and Rules of Compensation for Conductors and Trainmen,'" which provided that, when trains were operated over more than one seniority district, the "percentage of miles run over each division will govern in assignment to such runs"; that since May 1, 1930, the railroad has assigned all of the work on the Omaha-Sioux City run to the Sioux City Division; that, although the railroad insists that the plaintiffs' seniority rights have been abrogated "by an alleged agreement between the said defendant railroad trainmen, and the order of Railway Conductors," the plaintiffs are not bound by such agreement; and that, on account of the "wrongful deprivation" of their seniority rights, the plaintiffs have been damaged in excess of $3,000.

The railroad's answer stated that the plaintiffs had only such seniority rights as were derived from agreements between the railroad and the Order of Railroad Conductors and the Brotherhood of Railroad Trainmen; that the agreements could be abrogated or modified by the railroad and the unions without the consent of the plaintiffs; that the track between Omaha and Blair, located on the Omaha-

Sioux City run, was not part of the Nebraska Division of the railroad; that this trackage is owned by the Chicago, St. P., M. & O. Railway Company; that the only part of the Nebraska Division on the run between Omaha and Sioux City is 7.5 miles long; and that the complaint did not show the existence of the required jurisdictional amount. The District Court ordered the plaintiffs to prove that more than $3,000 was involved, and ten of them submitted affidavits. The substance of each affidavit was that, since May 1, 1930, the Chicago & Northwestern had "operated trains over thirty-one miles of the Nebraska Division in violation of existing contracts," and that, "to the best of [affiant's] knowledge and ability," his loss exceeded $3,000. The defendants submitted affidavits supporting the allegations of their answers. But neither the pleadings nor the affidavits of the parties contain the terms of the various agreements referred to in the complaint and upon which the plaintiffs' action is based.

Upon the defendants' motion to dismiss the cause for want of jurisdiction, the District Court held that the pleadings and supporting affidavits established that "the amount in controversy as to any one plaintiff does not amount to as much as $3,000," and that the nature of the suit was not such as to permit aggregation of the claims of all the plaintiffs. Accordingly, the action was dismissed. The first conclusion of the District Court was not challenged either in the Circuit Court of Appeals or before us. The plaintiffs contended that their claims should be aggregated because "the rights of the plaintiffs are so interlocked and interwoven that the rights of one cannot be determined without the others being parties thereto." The Circuit Court of Appeals reversed the dismissal, holding that the plaintiffs' claims could be aggregated for purposes of determining the value of the matter in controversy. The Court stated that, although it found the com-

plaint "very difficult of analysis," it had construed it "most favorably to the pleader, for the purpose of passing on the sole question of jurisdiction raised on the appeal." 119 F. 2d 105, 108. We brought the case here, 314 U. S. 590, in view of the important question affecting the jurisdiction of the district courts.

The policy of the statute conferring diversity jurisdiction upon the district courts calls for its strict construction. *Healy* v. *Ratta,* 292 U. S. 263, 270; and see *Elgin* v. *Marshall,* 106 U. S. 578, 580. Accordingly, if a plaintiff's allegations of jurisdictional facts are challenged by the defendant, the plaintiff bears the burden of supporting the allegations by competent proof. *McNutt* v. *General Motors Acceptance Corp.,* 298 U. S. 178, 188–89; *KVOS, Inc.* v. *Associated Press,* 299 U. S. 269, 278; *Gibbs* v. *Buck,* 307 U. S. 66, 72. The bill must be dismissed if the evidence in the record does not support the allegations as to jurisdictional amount. And our review of the District Court's determination of the jurisdictional amount must be confined to this record. *Henneford* v. *Northern Pacific Ry. Co.,* 303 U. S. 17, 19; *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583, 589–90.

Since the record does not contain the various agreements upon which the plaintiffs' action is founded, there is no basis for determining whether this is a suit "in which several plaintiffs, having a common undivided interest, unite to enforce a single title or right, and in which it is enough that their interests collectively equal the jurisdictional amount," *Lion Bonding Co.* v. *Karatz,* 262 U. S. 77, 86; see *Shields* v. *Thomas,* 17 How. 3, 5; *Troy Bank* v. *Whitehead & Co.,* 222 U. S. 39, 40–41; *Gibbs* v. *Buck,* 307 U. S. 66, 74–75, or one in which "the matters in dispute are separate and distinct, and are joined in one suit for convenience or economy," *Davis* v. *Schwartz,* 155 U. S. 631, 647; see *Clay* v. *Field,* 138 U. S. 464, 479–80; *Russell* v. *Stansell,*

105 U. S. 303. Aggregation of plaintiffs' claim cannot be made merely because the claims are derived from a single instrument, *Pinel* v. *Pinel,* 240 U. S. 594, or because the plaintiffs have a community of interest, *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583. In a diversity litigation the value of the "matter in controversy" is measured not by the monetary result of determining the principle involved, but by its pecuniary consequence to those involved in the litigation. *Wheless* v. *St. Louis,* 180 U. S. 379, 382; *Oliver* v. *Alexander,* 6 Pet. 143, 147.

The record contains no showing of the requisite jurisdictional amount, and the District Court was therefore without jurisdiction. The judgment will be reversed and the cause remanded to the District Court without prejudice to an application for leave to amend the bill of complaint.

Reversed.

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

D'OENCH, DUHME & CO., INC. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION.

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

No. 206. Argued January 9, 1942.—Decided March 2, 1942.

1. Jurisdiction of the District Court of an action by the Federal Deposit Insurance Corporation to collect a note, part of the assets acquired by the Corporation as collateral securing a loan made by it to a state bank, is based upon the fact that the plaintiff is a federal corporation suing under an Act of Congress authorizing it to sue and be sued "in any court of law or equity, State or Federal," and providing that "All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to

arise under the laws of the United States." Federal Reserve Act, § 12B. P. 455.

2. Whether the doctrine of *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, requiring a federal District Court to follow the conflict-of-law rules of the State in which it sits, is applicable where federal jurisdiction is not based on diversity of citizenship, need not be decided where the issue is a federal question. P. 456.
3. In view of the federal policy evinced by the Federal Reserve Act, § 12B (s) and former subdivision (y), to protect the Federal Deposit Insurance Corporation and the public funds which it administers against misrepresentations of the assets of banks which it insures or to which it makes loans, the maker of a note which was part of the assets of a state bank when the Corporation insured it and was acquired later by the Corporation as part of the collateral furnished by the bank for a subsequent loan, is estopped to defend against the Corporation upon the ground that the note was accommodation paper, given without consideration and upon an understanding that it would not be collected, in order to enable the bank to carry it as a real asset in lieu of defaulted paper and thereby deceive the public examiners. Pp. 459, 461.
4. Although the maker of the note here involved did not know that it was to be used to deceive the Federal Deposit Insurance Corporation, which had not then been created, yet the permission which the maker gave the bank to carry the note as a real asset was a continuing one and had not been revoked when the Corporation acquired the paper; and that permission must be presumed to have included authority from the maker to treat the note as genuine for the purposes of examination by public authorities as well as for general banking activities. P. 459.
5. Inasmuch as the Federal Deposit Insurance Corporation was authorized to insure a state bank only on a certificate from state authority that the bank was solvent, it is presumed that in this case such certificate was given. P. 460.
6. The inability of the accommodation maker to plead the defense of no consideration does not depend upon the commission of a penal offense in violation of § 12B (s) of the Federal Reserve Act, but upon whether the note was designed to deceive the creditors or the public examining authority, or would tend to have that effect. P. 460.
7. The fact that the note was charged off by the bank after the bank had been insured by the Federal Deposit Insurance Corporation and before the latter had acquired the note under the loan, is immaterial,

since a note may be nonetheless an asset though it is charged off, and the suit here is to protect the rights of the Corporation as insurer. The right to recover on the note is not dependent upon proof of loss or damage caused by the fraudulent practice. P. 460.

117 F. 2d 491, affirmed.

CERTIORARI, 314 U. S. 592, to review the affirmance of a judgment holding the present petitioner liable to the respondent on a promissory note.

Messrs. John W. Giesecke and *Harold C. Ackert,* with whom *Mr. Franklin E. Reagan* was on the brief, for petitioner.

The renewal note sued on shows on its face that it wasn't a negotiable instrument. It is against the public policy of Missouri to hold a citizen of Missouri liable on an accommodation note under the facts in this case, particularly so as there was a specific agreement not to sue which constitutes a complete defense under the law of the forum. *Trautman* v. *Schroeder,* 230 Mo. App. 985; *Williams* v. *Kessler,* 295 S. W. 482; *Peoples Bank* v. *Rankin,* 220 Mo. App. 205.

Under the Missouri rule of conflict of laws the renewal note sued on would be construed to be a Missouri contract and subject to all of the defenses urged by petitioner. See *Hansen* v. *Duvall,* 62 S. W. 2d 732, 738; *Federal Chemical Co.* v. *Hitt,* 155 S. W. 2d 897, 902.

Even if the note had been delivered in Illinois, which was not shown, it would have still remained a Missouri contract. *Smoot* v. *Judd,* 161 Mo. 673.

R. S. Mo. 1929, § 806, cited by respondent, is simply a rule of evidence dispensing with proof of a foreign law only if it is pleaded. Clearly it is not a rule of pleading.

The acts claimed to constitute estoppel occurred before the federal Act was passed and before the beginning of the corporate existence of the respondent. Further-

more, the Bank remained solvent for more than five years after the note sued on was given and for more than three years after it was charged off by the Bank. The note showed on its face that it was nonnegotiable, and at the time the Bank closed was in default of ten semi-annual interest payments and in default as to principal. This, under Missouri law, charged respondent with notice of defenses. Furthermore, although it was executed by a duly licensed brokerage house, a member of the St. Louis Stock Exchange, the Bank, three years prior to its failure and while still solvent, had charged the note off (although it was apparently a good and collectible note unless it was subject to some defense).

Respondent was not damaged. The asserted estoppel is wholly without substance.

Determination of the place of contract by general law rather than the law of Missouri, the forum state, was clearly erroneous. *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487; *Griffin* v. *McCoach*, 313 U. S. 498.

Jurisdiction in this case is governed by U. S. C., Tit. 12, § 264 (j) (Fourth), which permits the plaintiff corporation to sue or be sued in any state or federal court.

The spirit of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and subsequent cases, calls for a uniformity of decision so as not to "disturb equal administration of justice in coordinate state and federal courts sitting side by side."

The fundamental principle of the *Erie* case is that the federal courts do not have the power to declare rules of decision in the broad field of general law.

Cf. *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349.

It is unimportant whether jurisdiction in the federal court is invoked by reason of diversity of citizenship or on some other basis giving the state and federal courts coördinate jurisdiction. Cf. *Mishawaka Rubber & Woolen Mfg. Co.* v. *S. S. Kresge Co.*, 119 F. 2d 316.

It has long been the substantive law in Missouri that the courts of that State will not take judicial notice of the law of any foreign state; that such law must be pleaded and proved if a party expects to rely thereon, and that a foreign law which has not been pleaded or proved will be presumed to be the same as the law of Missouri. See *Rositzky* v. *Rositzky,* 329 Mo. 662; *Madden* v. *Railroad,* 192 S. W. 455, 456; *Kinsley Bank* v. *Woods,* 61 S. W. 2d 384; *Gordon* v. *Andrews,* 2 S. W. 2d 809.

If this case had been tried in the state court in Missouri, even if the Missouri court had reached the conclusion under the Missouri law that this was an Illinois contract governed by the laws of Illinois, the Missouri court would have ascertained the Illinois law, not from the Illinois decisions as the court below did, but from the Missouri decisions, for the reason that the Illinois law not having been pleaded or proved would be presumed to be the same as the Missouri law. It seems self-evident that in this case the doctrine of the *Erie* case was not properly applied. *West* v. *American Telephone & Telegraph Co.,* 312 U. S. 223, and *Fidelity Union Trust Co.* v. *Field,* 312 U. S. 169.

This Court, prior to the decision in the *Erie* case, uniformly applied the very rule for which we are contending to cases which came here on writ of error or certiorari from a state court (see *Hanley* v. *Donoghue,* 116 U. S. 1; *Renaud* v. *Abbott,* 116 U. S. 277), although it did not apply the rule in cases coming up through the federal courts for the reason that it was then the accepted rule of general federal law that the federal courts took judicial notice of the laws of all states. However, the *Erie* case held there was no general federal law. Therefore, the rule of state law applicable in a particular forum must be applied in all cases where there is concurrent jurisdiction of

both state and federal courts, as here. *Waggaman* v. *General Finance Co.*, and *Warfield* v. *General Finance Co.*, 116 F. 2d 254, 257; *A. B.* v. *C. D.*, 36 F. Supp. 85.

The Court of Appeals erred in failing to determine whether a Missouri court would refuse to apply the Illinois law because of repugnancy between it and the law of Missouri. *Griffin* v. *McCoach*, 313 U. S. 498.

It is well established in Missouri that a renewal of an accommodation note in no wise enlarges the rights of the parties when it is given without consideration, and in no way changes the rights under the original note. In this case, the original notes were executed in Missouri and made payable at the office of the maker in Missouri. The Missouri rule is indisputable that all defenses that were available against the original accommodation note are available against renewal notes. *Massa* v. *Huehnerhoff*, 59 S. W. 2d 723; *Farmers Bank* v. *Harris*, 250 S. W. 946, 950; *Davies County Bank* v. *Grantham*, 13 S. W. 2d 1079, 1081; *Peoples Bank* v. *Yager*, 221 Mo. App. 955; *Ford* v. *Ford Roofing Co.*, 285 S. W. 538, 541.

Whether the foreign law must be pleaded and proved is not a procedural rule. Even if it were, the same result would be reached, for then the matter would be governed by the Conformity Act. *Lyon* v. *Mutual Benefit Assn.*, 305 U. S. 484.

The three cases to which respondent refers as indicating that the rule in the *Erie* case "is probably not applicable to a suit to which the United States is a party" are clearly inapplicable and suggest a contrary inference. In each of those cases this Court specifically stated that federal statutes or treaties were involved, and that no local common law applied, thus indicating that had local common law been applicable, as in the case at bar, it would have been applied. *Board of Commissioners* v. *United States*, 308 U. S. 343; *Royal Indemnity Co.* v. *United*

States, 313 U. S. 289; *Deitrick* v. *Greaney,* 309 U. S. 190.

Assistant Attorney General Shea, with whom *Solicitor General Fahy* and *Messrs. Melvin H. Siegel, Paul A. Sweeney, Francis C. Brown,* and *James Kane* were on the brief, for respondent.

The court below was correct in applying the law of Illinois, assuming that such law did not need to be pleaded or proved.

The federal courts have heretofore taken judicial notice of the laws of the several States. As a general rule, however, the state courts of Missouri may notice the laws of a sister State only if pleaded.

The doctrine of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, did not preclude the courts below from taking judicial notice of the Illinois law in accordance with traditional federal practice.

A Missouri statute abrogated the common law requirement that the laws of sister States must be proved by the introduction of evidence, and left only the pleading requirement, which is inapplicable in the federal courts.

Even if the abrogation of the Missouri common law rule of proof is conditioned upon the pleading of a sister-state law, the doctrine of the *Erie* case did not preclude the federal courts from taking judicial notice of the Illinois law.

Petitioner is estopped to deny liability on the note under federal statutory law and also under Illinois law, which the courts of Missouri would be bound to apply.

Mr. Justice Douglas delivered the opinion of the Court.

Respondent instituted this suit in the United States District Court for the Eastern Division of the Eastern

District of Missouri on a demand note for $5000, executed by petitioner in 1933 and payable to the Belleville Bank & Trust Co., Belleville, Illinois. Respondent insured that bank January 1, 1934; and it acquired the note in 1938 as part of the collateral securing a loan of over $1,000,000 to the bank, made in connection with the assumption of the latter's deposit liabilities by another bank. Since 1935 the note had been among the charged off assets of the bank. The note was executed by petitioner in renewal of notes which it had executed in 1926. Petitioner, who was engaged in the securities business at St. Louis, Missouri, had sold the bank certain bonds which later defaulted. The original notes were executed to enable the bank to carry the notes and not show any past due bonds. Proceeds of the bonds were to be credited on the notes.[1] The receipts for the notes contained the statement, "This note is given with the understanding it will not be called for payment. All interest payments to be repaid." Respondent had no knowledge of the existence of the receipts until after demand for payment on the renewal note was made in 1938. Certain interest payments on the notes were made prior to renewal for the purpose of keeping them "as live paper." Petitioner's president, who signed the original notes, knew that they were executed so that the past due bonds would not appear among the assets of the bank, and that the purpose of the interest payments was "to keep the notes alive." The original notes were signed in St. Louis, Missouri, were payable at petitioner's office there, and were delivered to the payee in Illinois. The evidence does not disclose where the note sued upon was signed, though it was dated at Belleville, Illinois, and payable to the bank there.

[1] The bank sold some of the bonds in 1937 for $100 and credited this amount to interest due on the note. This credit paid interest to May 1, 1933. No later payments were made on the note.

The main point of controversy here revolves around the question as to what law is applicable. The District Court held that Illinois law was applicable and that petitioner was liable. The Circuit Court of Appeals applied "general law" to determine that the note was an Illinois rather than a Missouri contract; and it decided that, under Illinois law, respondent was the equivalent of a holder in due course and entitled to recover. 117 F. 2d 491. Petitioner contends that, under the rule of *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, a federal court sitting in Missouri must apply Missouri's conflict of law rules; that if, as was the case here, Illinois law was not pleaded or proved, a Missouri court would have ascertained Illinois law from Missouri decisions, since in such a case Illinois law would be presumed to be the same as the Missouri law; and that the District Court was bound to follow that same course. We granted the petition for certiorari because of the asserted conflict between the decision below and *Klaxon Co.* v. *Stentor Electric Mfg. Co., supra.*

We held in the latter decision that a failure of a federal court in a diversity of citizenship case to follow the forum's conflict of laws rules "would do violence to the principle of uniformity within a state" upon which *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, was based. 313 U. S. at p. 496. The jurisdiction of the District Court in this case, however, is not based on diversity of citizenship. Respondent, a federal corporation, brings this suit under an Act of Congress authorizing it to sue or be sued "in any court of law or equity, State or Federal." [2] Sec. 12 B, Federal

[2] That subdivision of the Act further provides: "All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States: *Provided,* That any such suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the

Reserve Act; 12 U. S. C. § 264 (j); 48 Stat. 162, 168, 172; 49 Stat. 684, 692. And see 28 U. S. C. § 42, 43 Stat. 941. Whether the rule of the *Klaxon* case applies where federal jurisdiction is not based on diversity of citizenship, we need not decide. For we are of the view that the liability of petitioner on the note involves decision of a federal, not a state, question under the rule of *Deitrick* v. *Greaney*, 309 U. S. 190.

Petitioner in its answer alleged that the note was given without any consideration whatever and with the understanding that no suit would be brought thereon; and that respondent was not a holder in due course. Respondent in its reply alleged that petitioner was estopped to assert those defenses on the grounds that the note was executed for the purpose of permitting the bank to avoid having its records show any past due bonds; that this constituted a misrepresentation which would deceive the creditors of the bank, the state banking authorities and respondent; that petitioner participated in the misrepresentation not only by reason of its knowledge as to the purpose which the note would serve but also by reason of its payment of interest in order to make the notes appear as a good asset. The District Court held that respondent was an innocent holder of the note in good faith and for value and that petitioner was estopped to assert want of consideration as a defense.

Sec. 12 B (s) of the Federal Reserve Act, 12 U. S. C. § 264 (s), provides that "Whoever, for the purpose of obtaining any loan from the Corporation . . . or for the purpose of influencing in any way the action of the Corporation under this section, makes any statement, know-

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rights or obligations of depositors, creditors, stockholders and such State bank under State law shall not be deemed to arise under the laws of the United States." And see S. Rep. No. 1007, 74th Cong., 1st Sess., p. 5.

ing it to be false, or wilfully overvalues any security, shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both." Subdivision (y) of the same section provided, at the time respondent insured the Belleville bank,[3] that such a state bank "with the approval of the authority having supervision" of the bank and on "certification" to respondent "by such authority" that the bank "is in solvent condition" shall "after examination by, and with the approval of" the respondent be entitled to insurance.[4]

These provisions reveal a federal policy to protect respondent, and the public funds which it administers, against misrepresentations as to the securities or other assets in the portfolios of the banks which respondent insures or to which it makes loans. If petitioner and the bank had arranged to use the note for the express purpose of deceiving respondent on insurance of the bank, or on the making of the loan, the case would be on all fours with *Deitrick* v. *Greaney, supra.* In that case, the defendant, for the purpose of concealing a national bank's acquisition of its own stock, had the shares held by a straw man and executed a note to the bank, it being agreed that the shares were to be held for the bank and that he was not to be liable on the note. We held as a

[3] These provisions of subdivision (y) were dropped when § 12 B was amended by the Banking Act of 1935. 49 Stat. 684. See S. Rep. No. 1007, 74th Cong., 1st Sess., p. 9.

[4] Subdivision (y) also gave respondent power to prescribe rules and regulations for the further examination of such bank. Though subdivision (y) was revised in 1935, as indicated in note 3, *supra,* subdivision (k) (2) of the amended Act gave respondent's examiners power "to make a thorough examination of all the affairs" of such banks and in doing so "to administer oaths and to examine and take and preserve the testimony of any of the officers and agents thereof." They were directed to make a "full and detailed report of the condition of the bank to the Corporation." 12 U. S. C. § 264 (k) (2).

matter of federal law, based on the policy of the National Banking Act to prevent the impairment of a bank's capital resources by prohibiting such acquisitions, that the defendant could not rely on his own wrongful act to defeat the obligation of the note as against the receiver of the bank. The defendant's act was itself a violation of the statute. 309 U. S. p. 198. But the reach of the rule which prevents an accommodation maker of a note from setting up the defense of no consideration against a bank or its receiver or creditors is not delimited to those instances where he has committed a statutory offense. As indicated by the cases cited in the *Deitrick* case (309 U. S. p. 198), an accommodation maker is not allowed that defense as against the receiver of the bank and its creditors, or at times even as against the bank itself, where his act contravenes a general policy to protect the institution of banking from such secret agreements. In some of those cases, the accommodation maker was party to the scheme of deception, in the sense that he had full knowledge of the intended use of the paper. *Putnam* v. *Chase,* 106 Ore. 440, 212 P. 365; *Vallely* v. *Devaney,* 49 N. D. 1107, 194 N. W. 903; *Niblack* v. *Farley,* 286 Ill. 536, 122 N. E. 160; *Cedar State Bank* v. *Olson,* 116 Kan. 320, 226 P. 995; *Bay Parkway Nat. Bank* v. *Shalom,* 270 N. Y. 172, 200 N. E. 685; *German-American Finance Corp.* v. *Merchants & Mfrs. State Bank,* 177 Minn. 529, 225 N. W. 891. In others he had "no positive idea of committing any fraud upon any one." *Denny* v. *Fishter,* 238 Ky. 127, 129, 36 S. W. 2d 864, 865; *Iglehart* v. *Todd,* 203 Ind. 427, 442, 178 N. E. 685; *Mount Vernon Trust Co.* v. *Bergoff,* 272 N. Y. 192, 5 N. E. 2d 196. And see *Pauly* v. *O'Brien,* 69 F. 460; Williston on Contracts (Rev. Ed.) § 1632. Yet, he has not been allowed to escape liability on the note as against the receiver even though he was "very ignorant and ill-informed of the character of the

transaction." *Rinaldi* v. *Young,* 67 App. D. C. 305, 307, 92 F. 2d 229, 231. Indeed, recovery was allowed by the bank itself in *Mount Vernon Trust Co.* v. *Bergoff, supra,* where the court said (272 N. Y. p. 196, 5 N. E. 2d 197): "The defendant may not have intended to deceive any person, but when she executed and delivered to the plaintiff bank an instrument in the form of a note, she was chargeable with knowledge that, for the accommodation of the bank, she was aiding the bank to conceal the actual transaction. Public policy requires that a person who, for the accommodation of the bank executes an instrument which is in form a binding obligation, should be estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced."

Furthermore, the fact that creditors may not have been deceived or specifically injured is irrelevant. As we held in the *Deitrick* case (309 U. S. p. 198), it is the "evil tendency" of the acts to contravene the policy governing banking transactions which lies at the root of the rule. See 7 Zollman, Banks & Banking (1936) § 4783.

Those principles are applicable here, because of the federal policy evidenced in this Act to protect respondent, a federal corporation, from misrepresentations made to induce or influence the action of respondent, including misstatements as to the genuineness or integrity of securities in the portfolios of banks which it insures or to which it makes loans. Those principles call for an affirmance of the judgment below.

Petitioner, at the time it executed the renewal note in 1933, did not know that it was to be used to deceive respondent, as the Act creating respondent was not passed until later. But the permission which it gave the bank to carry the note as a real asset was a continuing one and not revoked. That permission must be presumed to have

included authority for the bank to treat the note as genuine for purposes of examination at the hands of the public authorities as well as for its general banking activities.

Respondent insured the bank in 1934. The loan was made in 1938 to satisfy respondent's liability to the depositors of the bank under that insurance agreement. Respondent was authorized to insure such a bank only on a certificate from the state authority that the bank was solvent. We assume that such certificate was given, for to assume otherwise would be to infer that respondent did not discharge its statutory duties. The genuineness of assets ostensibly held by a bank is certainly germane to a determination of solvency. Clearly respondent is a member of the creditor class which the banking authorities were intended to protect. Plainly one who gives such a note to a bank with a secret agreement that it will not be enforced must be presumed to know that it will conceal the truth from the vigilant eyes of the bank examiners. If the bank had wilfully padded the bank's assets with the spurious note in order to obtain insurance from respondent, there seems no doubt but that § 12 B (s) would have been violated. Moreover, as we have seen, the inability of an accommodation maker to plead the defense of no consideration does not depend on his commission of a penal offense. The test is whether the note was designed to deceive the creditors or the public authority, or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which respondent relied in insuring the bank was or was likely to be misled. As we have said, petitioner's authority to the bank to use this note was a continuing one. The use to which it was put was not unusual but within the normal scope of banking activities. The fact that the note was charged off by the bank subsequent to the time when respondent insured

the bank and prior to the time when it acquired the note under the loan is immaterial. A note may be nonetheless an asset though it is charged off. And respondent is suing here to protect its rights as an insurer, a relationship with the bank which was created prior to the time when the note was charged off. The fact that subsequently respondent learned that the note had been charged off certainly was not notice that the note was spurious. It is indeed clear that at no time prior to the demand for payment did respondent know that the note was not genuine. It needs no argument to demonstrate that the integrity of ostensible assets has a direct relation to solvency. And it is no more a defense here than it was in the *Deitrick* case that no damage was shown to have resulted from the fraudulent or unlawful act. The federal policy expressed in the Act, like its counterpart in state law, is not dependent on proof of loss or damage caused by the fraudulent practice.

Though petitioner was not a participant in this particular transaction and, so far as appears, was ignorant of it, nevertheless it was responsible for the creation of the false status of the note in the hands of the bank. It therefore cannot be heard to assert that the federal policy to protect respondent against such fraudulent practices should not bar its defense to the note. Criminal penalties are no more the sole sanctions of the federal policy expressed in this Act than were the criminal penalties imposed on the agreement in the *Deitrick* case. If the secret agreement were allowed as a defense in this case the maker of the note would be enabled to defeat the purpose of the statute by taking advantage of an undisclosed and fraudulent arrangement which the statute condemns and which the maker of the note made possible. The federal policy under this Act of protecting respondent in its various functions against such arrangements is

no less clear or emphatic than the federal policy of outlawing purchases by a bank of its own stock involved in the *Deitrick* case. Cf. *Rinaldi* v. *Young, supra; Federal Deposit Ins. Corp.* v. *Woods,* 34 F. Supp. 296.

Affirmed.

MR. JUSTICE ROBERTS did not participate in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER:

The CHIEF JUSTICE and I concur in the result on the ground that in the circumstances of this case respondent is entitled to recover, whatever law be deemed controlling. If Illinois law governs, respondent is admittedly entitled to recover as a holder in due course. If Missouri law governs, petitioner is estopped to assert the defenses on which it now relies. Whether the case is governed by the law of one State or the other, or by "federal common law" drawn here from one State or the other, the result is the same.

When the original accommodation notes were executed in 1926, petitioner fully knew that the whole transaction was aimed at giving the bank an appearance of assets where there were none. Petitioner's representative admitted that the bank "suggested that we issue a note to the Bank," which would enable it "to carry this note and not show any past due paper." He had been in the investment security business since 1910; he "knew what the bank meant," and that it was subject to periodic examinations by the state bank examiner, and he assumed the bank did not want past due paper. On these facts the trial judge held that petitioner is estopped to assert absence of consideration as a defense.

Nothing in Missouri statutes or decisions brought to our notice would warrant us in setting aside this ruling. A case decided in 1901, *Chicago Title & Trust Co.* v.

Brady, 165 Mo. 197, 65 S. W. 303, might have called for a different result. There an accommodation maker was held not estopped to assert absence of consideration as a defense against the bank's receiver, even though he had known that the note was part of a scheme to deceive the state banking authorities by swelling the apparent assets of the bank. But in 1920 the Missouri Supreme Court made it clear that the *Brady* decision can no longer be taken to represent the law of that state. Such is the purport of *Bank of Slater* v. *Union Station Bank,* 283 Mo. 308, 320, 222 S. W. 993, 996:

"The facts in this case inevitably suggest the question [of estoppel] we have discussed in this paragraph. Counsel for respondent, however, have not raised it—being deterred, doubtless, by the decision in Title & Trust Co. *v.* Brady, 165 Mo. 197, where a contrary doctrine is countenanced—and we therefore refrain from ruling upon the proposition. We have touched upon it, for the reason that if the Brady case, supra, is considered as announcing 'the Missouri rule' upon this topic, as some commentators have said, that rule is apparently in conflict with numerous and respectable authorities, and its soundness may admit of question."

No subsequent decision was cited, nor have we found any, to show that the court has since reverted to the doctrine of the *Brady* case. It cannot be said, therefore, that in holding petitioner estopped the trial judge departed from Missouri law.

There is no federal statute to override either the Missouri law as to estoppel or the Illinois law which treats respondent as a holder in due course. Were this Court, in the absence of federal legislation, to make its own choice of law, compare *United States* v. *Guaranty Trust Co.,* 293 U. S. 340; *O'Brien* v. *Western Union Telegraph Co.,* 113 F. 2d 539; and *Hinderlider* v. *La Plata Co.,* 304

U. S. 92, decided the same day as *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, Illinois or Missouri law would furnish the governing principles. See *Board of Comm'rs* v. *United States,* 308 U. S. 343; *Royal Indemnity Co.* v. *United States,* 313 U. S. 289, 296; *Just* v. *Chambers,* 312 U. S. 383, 387.

We are unable to find an estoppel created by federal statute. Reliance is placed upon *Deitrick* v. *Greaney,* 309 U. S. 190. But that case rested on a plain violation of an explicit provision of a federal statute in force at the time of its occurrence. This is not true here. An accommodation note deposited in a bank before an Act of Congress is on the books can hardly become a violation of the Act after it is passed merely because the note remains in the bank. One cannot violate a statute before it comes into being. Insofar as the statute may apply to arrangements whereby the Federal Deposit Insurance Corporation might have been misled to its detriment into insuring an insolvent bank, the record is barren of any indication that the $5,000 note in question had any relation to the bank's solvency or to the Corporation's undertaking as an insurer.

The Federal Deposit Insurance Corporation is bringing this suit as pledgee. As to the note sued upon, it is in no different position than would be any other pledgee. Indeed, from the business point of view, its position is less favorable. For it became pledgee only in 1938, three years after the note had been charged off on the books of the bank. The Corporation had since 1934 been making a regular annual examination of the bank's books, which showed this fact; and the schedule of collateral given to respondent when it became pledgee made it perfectly clear that the note had been charged off.

We are not concerned here with liability based on any doctrine of "equitable estoppel" evolved as a principle of

federal common law having no statutory roots. For we have put to one side, as unnecessary to the disposition of this case, the duty of this Court to make law "interstitially" (as Mr. Justice Holmes put it in *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 221) in controversies arising in the federal courts outside their diversity jurisdiction.

Of course the policy expressed by the Federal Deposit Insurance Act might be violated, as the National Bank Act was violated in the *Deitrick* case, wholly apart from any question of estoppel or proof of loss to the Corporation. Our difficulty is that the statute cannot be stretched to fit this case. And it seems unnecessary to force such a result when a solution according to settled doctrines is available.

MR. JUSTICE JACKSON, concurring:

I think we should attempt a more explicit answer to the question whether federal or state law governs our decision in this sort of case than is found either in the opinion of the Court or in the concurring opinion of MR. JUSTICE FRANKFURTER. That question, as old as the federal judiciary, is met inescapably at the threshold of this case. It is the one which moved us to grant certiorari, and we could not resort to the rule announced without at least a tacit answer to it. The petitioner asserts that the decisions in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, and *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U. S. 487, govern this case. If they do, we would not be free to disregard the law of Missouri and Illinois and to apply a doctrine of estoppel actually—but not avowedly—drawn from common-law sources to effectuate the policy we think implicit in federal statutes.

The Rules of Decision Act[1] provides that "the laws of the several States, except where the Constitution, treaties

[1] § 34 of the Judiciary Act of 1789, 28 U. S. C. § 725.

or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." Whether "laws of the several States" as so used included non-statutory law embodied in judicial decisions of state courts was long a subject of controversy. After acting for half a century on the belief that it did, the Court in *Swift* v. *Tyson*, 16 Pet. 1, decided that it did not. Almost a century later that decision with its numerous and sorry progeny was overruled, and the Court answered that it did. *Erie R. Co.* v. *Tompkins, supra.* It later held that state decisions on conflicts of laws were also binding on the federal courts. *Klaxon Co.* v. *Stentor Mfg. Co., supra.* Thus, the Rules of Decision Act as now interpreted requires federal courts to use state law whether declared by the legislature or by the courts as rules of decision "in cases where they apply," except where federal law "shall otherwise require or provide." These recent cases, like *Swift* v. *Tyson* which evoked them, dealt only with the very special problems arising in diversity cases, where federal jurisdiction exists to provide nonresident parties an optional forum of assured impartiality.[2]

[2] "However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true, that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states." Chief Justice Marshall in *Bank of the United States* v. *Deveaux*, 5 Cranch 61, 87. See also, *Dodge* v. *Woolsey*, 18 How. 331, 354; *Burgess* v. *Seligman*, 107 U. S. 20, 34; *Lankford* v. *Platte Iron Works*, 235 U. S. 461, 478. But compare Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harvard Law Review 483.

The Court has not extended the doctrine of *Erie R. Co.* v. *Tompkins* beyond diversity cases.[3]

This case is not entertained by the federal courts because of diversity of citizenship. It is here because a federal agency brings the action, and the law of its being provides, with exceptions not important here, that: "All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States: . . ."[4] That this

[3] Its effect even in such cases seems not to have been definitely settled. In an equity case it was said that "the doctrine applies though the question of construction arises not in an action at law, but in a suit in equity." *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, 205. That case was in the federal courts by reason of diversity jurisdiction. In a later case in which a suit in equity was brought in federal court to enforce liability under a federal statute the Court said: "The Rules of Decision Act does not apply to suits in equity. Section 34 of the Judiciary Act of 1789, 28 U. S. C. 725, directing that the 'laws of the several states' 'shall be regarded as rules of decision' in the courts of the United States, applies only to the rules of decision in 'trials at common law' in such courts, but applies as well to rules established by judicial decision in the states as those established by statute. . . . In the circumstances we have no occasion to consider the extent to which federal courts, in the exercise of the authority conferred upon them by Congress to administer equitable remedies, are bound to follow state statutes and decisions affecting those remedies." *Russell* v. *Todd*, 309 U. S. 280, 287, 294. In any event, the estoppel here involved seems no more an equity matter than the issue of good-faith purchase involved in *Cities Service Oil Co.* v. *Dunlap*, 308 U. S. 208, where state law was held to govern.

[4] Paragraph Fourth of 12 U. S. C. § 264 (j) empowers the Corporation "To sue and be sued, complain and defend, in any court of law or equity, State or Federal. All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States: *Provided*, That any such suit to which the Corporation is a party in its capacity as receiver

provision is not merely jurisdictional is suggested by the presence in the same section of the Act of the separate provision that the Corporation may sue and be sued "in any court of law or equity, State or Federal." [5]

Although by Congressional command this case is to be deemed one arising under the laws of the United States, no federal statute purports to define the Corporation's rights as a holder of the note in suit or the liability of the maker thereof. There arises, therefore, the question whether in deciding the case we are bound to apply the law of some particular state or whether, to put it bluntly, we may make our own law from materials found in common-law sources.

This issue has a long historical background of legal and political controversy as to the place of the common law in federal jurisprudence.[6] As the matter now stands, it

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of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders and such State bank under State law shall not be deemed to arise under the laws of the United States."

In a number of respects and with varying degrees of explicitness the Act elsewhere makes reference to state law. Specific federal criminal sanctions are provided.

[5] A similar provision without more is found in many federal statutes. E. g., 15 U. S. C. § 604 (Reconstruction Finance Corporation); 12 U. S. C. § 24 (National Banks); 12 U. S. C. § 341 (Federal Reserve Banks); 12 U. S. C. § 1432 (Federal Home Loan Banks); 12 U. S. C. § 1716 (c) (3) (National Mortgage Associations). This is not to suggest, however, that questions not specifically dealt with in these statutes cannot be federal questions simply because of the absence of an express provision that suits "shall be deemed to arise under the laws of the United States."

[6] Judicial opinions discussing various aspects of the question include: *Wheaton* v. *Peters,* 8 Pet. 591, 658 (1834); *Kendall* v. *United States,* 12 Pet. 524, 621 (1838); *Smith* v. *Alabama,* 124 U. S. 465, 478 (1888); *Bucher* v. *Cheshire R. Co.,* 125 U. S. 555, 583–584 (1888); Justice Field, dissenting in *Baltimore & Ohio R. Co.* v. *Baugh,* 149 U. S. 368, 394–395; Justices Holmes and Pitney, dissenting in *Southern Pacific Co.* v. *Jensen,*

seems settled that the federal courts may not resort to the common law to punish crimes not made punishable by Act of Congress;[7] and that, apart from special statutory or constitutional provision, they are not bound in other fields by English precedents existing at any particular date. The federal courts have no *general* common law, as in a sense they have no general or comprehensive jurisprudence of any kind, because many subjects of private law which bulk large in the traditional common law are ordinarily within the province of the states and not of the federal government. But this is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all of the source materials of the common law, or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law.

I do not understand Justice Brandeis's statement in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 at 78, that "There is no federal general common law," to deny that the common law may in proper cases be an aid to, or the basis of, de-

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244 U. S. 205, 221–222, 230. See also, George Wharton Pepper, The Border Land of Federal and State Decisions (1889); Frankfurter, Distribution of Judicial Power between United States and State Courts, 13 Cornell Law Quarterly 499; Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harvard Law Review 49; von Moschzisker, The Common Law and our Federal Jurisprudence, 74 University of Pennsylvania Law Review 109, 270, 367.

[7] The research of Charles Warren, leaned on heavily in *Erie R. Co.* v. *Tompkins* to discredit *Swift* v. *Tyson,* led that scholar to conclude that *United States* v. *Hudson,* 7 Cranch 32, and *United States* v. *Coolidge,* 1 Wheat. 415, establishing the above proposition, were probably wrongly decided. Warren, History of the Federal Judiciary Act of 1789, 37 Harvard Law Review 49, 73. The error, if it be one, comports, however, with the present tendency to constrict the jurisdiction of federal courts, and I think is likely to survive.

cision of federal questions. In its context it means to me only that federal courts may not apply their own notions of the common law at variance with applicable state decisions except "where the constitution, treaties, or statutes of the United States [so] require or provide." [8] Indeed, in a case decided on the same day as *Erie R. Co.* v. *Tompkins,* Justice Brandeis said that "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Hinderlider* v. *La Plata Co.,* 304 U. S. 92, 110.

Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself.

The contract clause, which prohibits a state from passing any "Law impairing the Obligation of Contracts," is an example of the part the common law must play in our system. This provision is meaningless unless we know what a contract is. The Constitution wisely refrains from saying. We have very recently held, upon a long line of authority, that in applying this clause we are not bound by the state's views as to whether there is a contract. *Irving Trust Co.* v. *Day,* 314 U. S. 556. Take the case where the question is whether a promise made without consideration comes within the protection of the contract clause. Is there any doubt as to where we must go for the answer that we do not find in the Constitution itself? This Court has not hesitated to read the com-

[8] Similarly, Mr. Justice Holmes's statement that there is no "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute" was made with reference to "matters that are not governed by any law of the United States or by any statute of the State." See *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.,* 276 U. S. 518, 533.

mon-law doctrine of consideration into the contract clause, and to restrict the protection of that clause to promises supported by consideration. *Durkee* v. *Board of Liquidation,* 103 U. S. 646, 648; *Pearsall* v. *Great Northern Ry. Co.,* 161 U. S. 646, 667; *Grand Lodge* v. *New Orleans,* 166 U. S. 143, 146. Compare *Allegheny College* v. *National Chautauqua County Bank,* 246 N. Y. 369, 159 N. E. 173.

Other recognitions of our common-law powers abound in the Constitution.[9]

A federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state. Federal law

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[9] Thus, the Judiciary Article provides that "the Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties" made under their authority. It does not give any definition of what are cases in law and equity; it simply assumes the existence of a jurisprudence from which the courts can ascertain the meaning of those terms.

Particularly in the clauses dealing with the rights of the individual, the Constitution uses words and phrases borrowed from the common law, meaningless without that background, and obviously meant to carry their common-law implications. Thus, we find in it the following: "convicted"; "Indictment"; "Treason, Felony, and Breach of the Peace"; "Piracies and Felonies"; "Privilege of the Writ of habeas Corpus"; "Bill of Attainder or ex post facto Law"; "Bribery"; "original Jurisdiction"; and "appellate Jurisdiction both as to Law and Fact." In the Bill of Rights Amendments, the necessity for resort to the common law for constitutional interpretation is even more obvious. Here we find: "unreasonable searches and seizures"; "Warrants"; "presentment or indictment of a Grand Jury"; "due process of law"; "right to a speedy and public trial by an impartial jury"; "in Suits at common law"; and "no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

is no juridical chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced because of the accidents of service of process and of the application of the venue statutes. It is found in the federal Constitution, statutes, or common law. Federal common law implements the federal Constitution and statutes, and is conditioned by them.[10] Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law in cases such as the present. *Board of Commissioners* v. *United States*, 308 U. S. 343, 350.

The law which we apply to this case consists of principles of established credit in jurisprudence, selected by us because they are appropriate to effectuate the policy of the governing Act. The Corporation was created and financed in part by the United States[11] to bolster the entire banking and credit structure. The Corporation did not simply step into the private shoes of local banks. The purposes sought to be accomplished by it can be accomplished only if it may rely on the integrity of banking statements and banking assets. In this case the Corporation attempted to realize on a note that was a part of the assets at the time it insured the bank. It is met by the plea that the note was a sham knowingly given to enable the bank to conceal the worthlessness of certain bonds which it had bought from the maker, a broker. This deception was not for the single day on which the note was delivered; its purpose and its effect were to

[10] For example, the common-law doctrines of conflict of laws worked out in a unitary system to deal with conflicts between domestic and truly foreign law may not apply unmodified in conflicts between the laws of states within our federal system which are affected by the full faith and credit or other relevant clause of the Constitution.

[11] 12 U. S. C. § 264 (d).

operate as a continuing inducement to existing creditors, and to those who might become creditors, to rely on this note as a $5,000 item counting towards its solvency. It may not have contemplated the then unborn Federal Deposit Insurance Corporation as the particular object of its deception, but its purpose was to conceal a loss from then unknown and unidentified persons who might be or become creditors or banking supervisors on behalf of the public. Under the Act, the Corporation has a dual relation of creditor or potential creditor and of supervising authority toward insured banks.[12] The immunity of such a corporation from schemes concocted by the coöperative deceit of bank officers and customers is not a question to be answered from considerations of geography. That a particular state happened to have the greatest connection, in the conflict of laws sense, with the making of the note involved, or that the subsequent conduct happened to be chiefly centered there, is not enough to make us subservient to the legislative policy or the judicial views of that state.[13]

I concur in the Court's holding because I think that the defense asserted is nowhere admissible against the Corporation and that we need not go to the law of any particular state as our authority for so holding.

I hardly suppose that Congress intended to set us com-

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[12] 12 U. S. C. § 264 (i), (k), (l).

[13] Compare *Central Vermont Ry. Co.* v. *White,* 238 U. S. 507; *Southern Express Co.* v. *Byers,* 240 U. S. 612; *Chesapeake & Ohio Ry. Co.* v. *Kelley,* 241 U. S. 485; *Western Union Telegraph Co.* v. *Boegli,* 251 U. S. 315; *Western Union Telegraph Co.* v. *Esteve Bros. & Co.,* 256 U. S. 566; *Western Union Telegraph Co.* v. *Priester,* 276 U. S. 252; *Chesapeake & Ohio Ry. Co.* v. *Kuhn,* 284 U. S. 44; *Local Loan Co.* v. *Hunt,* 292 U. S. 234; *Jenkins* v. *Kurn,* 313 U. S. 256; *Royal Indemnity Co.* v. *United States,* 313 U. S. 289; *O'Brien* v. *Western Union Telegraph Co.,* 113 F. 2d 539.

pletely adrift from state law with regard to all questions as to which it has not provided a statutory answer. An intention to give persuasive or binding effect to state law has been found to exist in a number of cases similar in that they arose under a law of the United States but were not governed by any specific statutory provision.[14] No doubt many questions as to the liability of parties to commercial paper which comes into the hands of the Corporation will best be solved by applying the local law with reference to which the makers and the insured bank presumably contracted. The Corporation would succeed only to the rights which the bank itself acquired where ordinary and good-faith commercial transactions are involved. But petitioners' conduct here was not intended to confer any right on the bank itself, for as to it the note was agreed to be a nullity. Petitioners' conduct was intended to and did have a direct and independent effect on unknown third parties, among whom the Corporation now appears.[15] The policy of the federal Act does not seem

[14] *Campbell* v. *Haverhill,* 155 U. S. 610; *McClaine* v. *Rankin,* 197 U. S. 154; *Chattanooga Foundry* v. *Atlanta,* 203 U. S. 390; *O'Sullivan* v. *Felix,* 233 U. S. 318; *Seaboard Air Line Ry. Co.* v. *United States,* 261 U. S. 299; *Brown* v. *United States,* 263 U. S. 78; *United States* v. *Guaranty Trust Co.,* 293 U. S. 340; *Board of Commissioners* v. *United States,* 308 U. S. 343; *Rawlings* v. *Ray,* 312 U. S. 96; *Just* v. *Chambers,* 312 U. S. 383.

[15] The reasons given by the opinion of Mr. Justice Frankfurter for declining to apply the doctrine of equitable estoppel seem inadequate. To insist that the $5,000 note in question does not appear from the record to have had "any relation to the bank's insolvency or the Corporation's undertaking as insurer" is to part company with the realities of the period in question, when small banks—and large ones as well—were operating on perilously narrow margins of solvency, if any. To hold that the Corporation is to be judged as a mere private pledgee of a particular piece of paper is to ignore the comprehensive public character of its function. And the wrong to it was sustained when it be-

to me to leave dependent on local law the question whether one may plead his own scheme to deceive a bank's creditors and supervising authorities as against the Corporation. Even though federal criminal sanctions might not be applicable to these facts, and even though the doctrine of *Deitrick* v. *Greaney,* 309 U. S. 190, may not fully comprehend the present case, I think we now may borrow a doctrine of estoppel from the same source from which the Court borrowed it in that case, and to reach the same result.

UNITED STATES ET AL. *v.* CAROLINA FREIGHT CARRIERS CORP.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

No. 197. Argued January 16, 1942.—Decided March 2, 1942.

1. Under the "grandfather clause" of the Motor Carrier Act of 1935, the Interstate Commerce Commission's authorization of operation as a common carrier by motor vehicle within a specified "territory" may permit service to all points in part of the area and to designated points in other parts. P. 480.
2. The precise delineation of the area or the specification of localities which may be served is for the Commission; and only where error is patent may its determination be set aside. P. 480.

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came committed to insure the bank—not later when, as a step to working its way out of loss, it took assets already equitably its own as a pledge and put up money for a plan to continue banking facilities to the community. To say that the note had been charged off is to stress the irrelevant. This was, admittedly, long after the Corporation had become bound as the bank's insurer. It also attributes to the "charge-off" an unwarranted significance. The classification of this paper as inadmissible for a commercial bank would have been justified by its obvious "slow" character, or may have been due to mere lack of information as to the ability of a nonresident debtor to meet it. It is no acknowledgment or notice of a legal defect in the paper.

3. A holding out to serve a specified area does not in itself constitute "bona fide operation" within the meaning of the Act; actual and substantial service is required. P. 480.
4. In the authorization of operation as a common carrier under the "grandfather clause," there is no statutory warrant for applying to irregular route carriers a different or stricter test as to commodities which may be carried than is applied to regular route carriers. P. 484.
5. In authorizing operation as a common carrier under the "grandfather clause" by an irregular route carrier in this case, the Interstate Commerce Commission determined that only certain commodities could be carried and that some could be transported only between designated points in the territory. *Held*, that the basic or essential findings required to support the Commission's order were lacking. P. 488.

(a) If an applicant for common carrier rights under the "grandfather clause" has, during the critical period, carried a wide variety of general commodities, he can not necessarily be denied the right to carry others of the same class merely because he has never carried them before; nor can he necessarily be restricted to those commodities which he carried with more frequency and in greater quantities than he did others. P. 483.

(b) Nor does the fact that some of the articles were carried before June 1, 1935, but not since, necessarily mean that they should be excluded from the permit. P. 484.

(c) The questions are whether the applicant's service within the territory was sufficiently regular and whether his coverage of commodities was sufficiently representative to support a finding that he was in "bona fide operation" as a "common carrier" of the group of commodities or of the class or classes of property during the critical period. P. 484.

(d) If the applicant establishes that he was a "common carrier" of a group of commodities or of an entire class or classes of property and was in "bona fide operation" during the critical period in a specified territory, restrictions as to commodities within such classes which may be moved in any one direction or between designated points are not justified. P. 486.

(e) Once the applicant has established his common carrier status as respects particular commodities, shipments to any parts of the authorized territory, or to any of the authorized points therein, should be permitted, in the absence of evidence that the applicant

as respects carriage between specified points had restricted its undertaking. P. 487.

38 F. Supp. 549, affirmed.

APPEAL from a decree setting aside an order of the Interstate Commerce Commission.

Mr. J. Stanley Payne, with whom *Messrs. Daniel W. Knowlton* and *Nelson Thomas* were on the brief, for the Interstate Commerce Commission; and *Solicitor General Fahy, Assistant Attorney General Arnold,* and *Messrs. Frank Coleman* and *Smith R. Brittingham, Jr.* submitted for the United States, appellants.

Mr. Wilmer A. Hill, with whom *Mr. Harry C. Ames* was on the brief, for appellee.

Messrs. Luther M. Walter, John S. Burchmore, and *Huel D. Belnap* filed a brief on behalf of the Irregular Route Common Carrier Conference of the American Trucking Assns., Inc., as *amicus curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is an appeal under § 210 (28 U. S. C. § 47a) and § 238 of the Judicial Code as amended (28 U. S. C. § 345), to review a final decree of a district court of three judges (28 U. S. C. § 47) which set aside (38 F. Supp. 549) an order of the Interstate Commerce Commission (24 M. C. C. 305) granting appellee a certificate of public convenience and necessity as a common carrier by motor vehicle under the so-called "grandfather clause" (§ 206 (a)) of the Motor Carrier Act of 1935 (49 Stat. 543, 551, 49 U. S. C. § 306), now designated as Part II of the Interstate Commerce Act. 54 Stat. 919.

Appellee's predecessor applied for such a certificate authorizing operation as a "common carrier" by motor

vehicle of "general commodities" [1] between all points "in South Carolina, North Carolina, Delaware, New Jersey, Connecticut, Rhode Island, Massachusetts, those in Virginia east of and including the Shenandoah Valley, those in Maryland and Pennsylvania on and east of U. S. Highway 11, and those in New York east of Binghamton and south of Albany; and between Cherryville (N. C.) and Boston, Mass., through Henderson, N. C., Richmond, Va., Baltimore, Md., Philadelphia, Pa., and New York, over irregular routes." The Commission authorized the issuance of a certificate but restricted its scope in three ways. (1) It cut down the geographical area which could be served by appellee, and in parts of that area limited the service to designated points. (2) It allowed appellee to haul only certain specified commodities out of a larger list previously hauled. (3) It did not permit appellee to haul all of those specified commodities between all of the points in the authorized territory, but allowed it to haul only certain commodities between given points. Its finding containing those restrictions (24 M. C. C., p. 309–310) reads as follows:

"We find that applicant's predecessor in interest was on June 1, 1935, and continuously since it and its predecessor have been, in bona fide operation as a common carrier by motor vehicle, in interstate or foreign commerce (1) of cotton yarn from all points in Gaston, Lincoln, Cleveland, Rutherford, McDowell, Burke, Catawba, Alexander, Iredell, Rowan, Davidson, and Davie Counties, N. C., to Hagerstown, Md., New York, N. Y., Pawtucket and Providence, R. I., all points in Pennsylvania on and east of U. S. Highway 11, and points in Middlesex, Union, Essex, Hud-

[1] With the exception of "commodities of unusual value, those in bulk, those requiring special equipment such as tank or refrigerator trucks, those injurious to other lading, live stock, automobiles and high explosives."

son, Passaic, Bergen, Somerset, and Morris Counties, N. J., (2) of asbestos textile products from Charlotte, N. C., to Philadelphia and North Wales, Pa., Trenton, Newark, Passaic, and Paterson, N. J., New York, N. Y., Middletown, Conn., Providence and Pawtucket, R. I., and Boston and Hudson, Mass., (3) of supplies and materials used in the manufacture of asbestos textile products from Harrison and Perth Amboy, N. J., to Charlotte, N. C., and empty spools and boxes in the reverse direction, (4) of petroleum products in containers from Sewaren, N. J., and Marcus Hook, Pa., to Columbia and Greenville, S. C., and to all points in North Carolina, (5) of linoleum from Paulsboro, N. J., Marcus Hook, Pa., and East Walpole, Mass., to points in North Carolina and to Spartanburg and Greenville, S. C., (6) of canned goods from Baltimore, Md., to Shelby, N. C., (7) of beer and ale from Newark, N. J., to Gastonia and Wadesboro, N. C., and (8) of roofing and screen wire from York, Pa., to all points in North Carolina, all over irregular routes; that applicant is entitled to a certificate authorizing continuation of such operation; and that the application in all other respects should be denied."

The District Court held that such restrictions were not authorized by the statute. It said:

"It is, of course, reasonable to limit the certificate to the type of service rendered by the carrier during the grandfather period, and to limit the territory to that within which substantial service of that type has been rendered; but it is unreasonable to limit the certificate of one who has functioned as a general carrier to the specific commodities carried and the specific points served. The law cannot reasonably be construed as authorizing such limitation."

It further noted that such restrictions have not been imposed on regular route carriers and that Congress has

made no such distinction between them and irregular route carriers like appellee.

I. We think the Commission was justified in the restrictions which it placed on the geographical scope of appellee's operations. Sec. 206 (a) of the Act authorizes the Commission to issue a certificate without a showing of public convenience and necessity if the carrier or its predecessor in interest was "in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time." Sec. 208 (a) requires that the certificate specify "the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate." It is clear from these provisions that the power of the Commission to authorize future operations within a designated "territory," rather than over specified routes or between fixed termini, fits the peculiar requirements of irregular route operators such as appellee. Authority to operate within a specified "territory" may include permission to service all points in that area. On the other hand it may be restricted to designated points therein. Or as in the instant case, it may extend to all points in a part of that area and to selected localities in another part. The precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission. *Alton R. Co.* v. *United States, ante,* p. 15. The Act provides the test of "bona fide operation." That standard carries the connotation of substantiality. It also makes clear that a holding out to serve a specified area is not alone sufficient. It is "actual rather than potential or simulated service" which is required. *McDonald* v. *Thompson,* 305 U. S. 263, 266. Substantial, as

distinguished from incidental, sporadic, or infrequent, service is required. Substantial service actually rendered may have been confined to narrow limits. *Loving* v. *United States*, 32 F. Supp. 464, aff'd 310 U. S. 609. Ability to render the service throughout the wide reaches of the territory, which the applicant professed to be willing to serve, may not have existed. Furthermore, the characteristics of the transportation service rendered are relevant to the territorial scope of the operations which the Commission may authorize. *Alton R. Co.* v. *United States*, *supra*. In addition, the Commission, in determining the precise territory which may be served by a particular carrier, cannot be unmindful of its responsibility to coördinate the various transportation agencies which constitute our national transportation system. S. Rep. No. 482, 74th Cong., 1st Sess.; H. Rep. No. 1645, 74th Cong., 1st Sess. This does not mean that the right to the statutory grant may be withheld or cut down because the Commission disapproves of the competitive conditions which may be created if the application is granted. But its responsibility to bring greater order and stability to the transportation system than had earlier obtained (S. Doc. No. 152, 73d Cong., 2d Sess.) is an additional reason for its insistence upon a showing of substantial service in that territory which is sought to be covered by a certificate under the "grandfather clause."

As we indicated in *Alton R. Co.* v. *United States*, *supra*, the purpose of the "grandfather clause" was to assure those to whom Congress had extended its benefits a "substantial parity between future operations and prior *bona fide* operations." We cannot say that that was denied in this case, if the limitations on the territorial scope of the operations are alone considered. While service to and from all points in the States included in the application was not allowed, the reduction was determined by the standard of substantiality of service. And considera-

tion was given to the characteristics of irregular route carriers and their role in the national transportation system. That involved a weighing of specific evidence in light of the complexities of this transportation service. The judgment required is highly expert. Only where the error is patent may we say that the Commission transgressed. That is not this case.

II. We have doubts, however, as to the restrictions which the Commission has placed on the articles which appellee may carry. Sec. 203 (a) (14) defined [2] the term "common carrier by motor vehicle" as one who "undertakes . . . to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes." The Commission ruled that since a "common carrier" may transport only a "class or classes of property," the authority granted under the "grandfather clause" of § 206 (a) "should reflect any limitation in the undertaking" of the common carrier "as indicated by the service actually rendered on and since the statutory dates." It accordingly proceeded to eliminate commodities which, though of the same general class as the others, had been carried before but not after June 1, 1935. It further restricted future operations to those commodities which prior and subsequent to June 1, 1935, had been carried in substantial amounts and with a degree of regularity. We

[2] In 1940 Congress amended § 203 (a) (14) to read: "The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, . . ." Act of Sept. 18, 1940, c. 722, § 18 (a), 54 Stat. 920. The earlier definition of "common carrier" was in force at the time of the hearing of this case before the Commission.

would not disturb those conclusions if only a question as to the weight of the evidence was involved. But we are not satisfied that the Commission applied the proper criterion in reaching its conclusion that only specified commodities could be carried in the future.

Sec. 206 (a) requires a showing that the applicant, or its predecessor, was "in bona fide operation as a common carrier" on June 1, 1935, and "since that time." By § 208 (a) the certificate must specify "the service to be rendered" by the carrier. As we have noted, a "common carrier by motor vehicle" was defined in § 203 (a) (14) as one who "undertakes" to transport "passengers or property, or any class or classes of property, for the general public." That definition is the same for irregular and regular route carriers. It is plain that a carrier's holding out and actual performance may be limited to a few articles only. That is to say, he may be a common carrier only of a restricted number of commodities. See Galveston Truck Line Corp., 22 M. C. C. 451, 467. Or the service actually rendered may have been confined to such a few commodities that his holding out or willingness to carry a much larger class may be disregarded. *Loving* v. *United States, supra,* was such a case. On the other hand, if the applicant has carried a wide variety of general commodities, he cannot necessarily be denied the right to carry others of the same class merely because he never carried them before. And where he has carried a wide variety of general commodities, he cannot necessarily be restricted to those which he carried with more frequency and in greater quantities than the others. See H. B. Church Truck Service Co., 27 M. C. C. 191, 197; Highway Motor Freight Lines, Inc., 23 M. C. C. 621, 636. The Commission may not atomize his prior service, product by product, so as to restrict the scope of his operations, where there is substantial evidence in addition to his holding out that he

was in "*bona fide* operation" as a "common carrier" of a large group of commodities or of a whole class or classes of property. There might be substantial evidence of such an undertaking though the evidence as to any one article was not substantial. The broad sweep of his prior service may indeed have made the carriage of any one commodity irregular and infrequent. Yet, viewed as a whole rather than as a group of separate and unrelated items, his prior activities may satisfy the test of "bona fide operation" as a "common carrier" within the scope of his holding out. The fact that some of the articles may have been carried before but not after June 1, 1935, may of course indicate an abandonment of the prior undertaking. See *United States* v. *Maher,* 307 U. S. 148. But it does not necessarily mean that they should be stricken from the certificate, since the natural and normal course of his business may reveal a continuous undertaking to transport any or all commodities embraced within the group or the class. That is to say, he may have been a common carrier of a large group of general commodities or of an entire class of property both before and after the critical date though the specific commodities carried varied considerably. The questions are whether his service within the territory in question was sufficiently regular, and whether his coverage of commodities was sufficiently representative, to support a finding that he was in "bona fide operation" as a "common carrier" of the group of commodities, or of the class or classes of property, during the periods in question.

The Commission in this case authorized the carriage of about a dozen kinds of commodities, though in prior operations about three times that number had been carried. It is not our function to weigh the evidence. Hence we intimate no opinion as to whether more commodities should have been included had the proper criterion been employed. But we conclude that there is no

statutory warrant for applying to irregular route carriers a different or stricter test as to commodities which may be carried than is applied to regular route carriers. The difference between those types of carriers may well justify a sharp delimitation of the far flung territory which an irregular route carrier may profess to serve. But, once the territory has been defined, the statutory test of whether an applicant was a "common carrier" by motor vehicle in "bona fide operation" during the critical periods is the same for the irregular and the regular route carrier. We are not confident that the Commission has approached the problem in that way. For it has repeatedly stated, beginning with Powell Brothers Truck Lines, 9 M. C. C. 785, 791–792, that:

"Authority to transport general commodities throughout a wide territory over irregular and unspecified routes pursuant to the 'grandfather' clause of the act should be granted to a carrier only when such carrier's right thereto has been proved by substantial evidence. To do otherwise would create the very ills which regulation is designed to alleviate, namely, congestion of highways, destructive rate practices, and unbridled competition. Common carriers which are expected to maintain regular service for the movement of freight in whatever quantities offered to and from all points on specified routes cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular-route service."

And see Merchants Parcel Delivery Co., 21 M. C. C. 93; Langer Transport Corp., 23 M. C. C. 302; Lett & Co. of Indiana, 26 M. C. C. 159.

Insofar as that view establishes a different test for commodities which may be carried by irregular route operators than for commodities which may be carried by

regular route operators, it is erroneous as a matter of law. For facts sufficient to establish that a person is a "common carrier" by motor vehicle in "bona fide operation" in the one case are sufficient in the other. The statutory differences lie only in the territorial scope and pattern of the operation.

III. It follows from what has been said that a restriction on commodities which may be carried between specified points may not always be justified. If the applicant had established that it was a "common carrier" for a group of commodities or for an entire class or classes of property and was in "bona fide operation" during the critical periods in a specified territory, restrictions on commodities which could be moved in any one direction or between designated points would not be justified. The fact that a particular commodity had never been transported between certain points in that territory would not mean that authority to haul it between them should be withheld. Likewise, if the applicant could establish that it was a "common carrier" only of a limited number of commodities, there would normally be no statutory sanction for limiting the carriage of particular commodities in that group to specified points in the authorized area. Presumptively, one who had established his status of "common carrier" would be entitled to carry all of the commodities embraced in his undertaking to all points to which any shipments of any articles were authorized. On the other hand, an applicant's status may vary from one part of the territory to another or be different in northbound shipments than in southbound shipments. Thus in this case the Commission found that practically all of appellee's northbound shipments consisted of cotton yarn, though a few shipments of other commodities such as tires and tubes, asbestos textile products, spools and empty boxes were also made northbound. With the exception of tires and tubes,

the Commission authorized the shipments of those products on northbound trips. Assuming that finding to be justified under the tests which we have described, it does not necessarily follow that the northbound destinations of those particular commodities should be restricted to the localities designated by the Commission. Once the common carrier status of appellee had been established as respects those commodities, shipments to any parts of the authorized territory, or to any of the authorized points therein, should have been permitted, in absence of evidence that the appellee as respects carriage between specified points had restricted its undertaking to particular commodities. That problem is clearer in this case as respects southbound shipments. The record is plain that appellee held itself out as being willing and able to carry a wide variety of commodities on its return trips to its home base in North Carolina. And the record shows that it carried many different kinds of articles on those southbound journeys. But the Commission drastically limited its rights in that regard. Thus it was permitted to carry beer from Newark, N. J. to two points in North Carolina, but not from Baltimore, Md. In absence of evidence that it had thus limited its undertaking as respects beer, the mere fact that it previously had not carried beer from Baltimore would be immaterial. If it had established by substantial evidence that it was a "common carrier" of beer on southbound trips, it would be entitled to carry it from any of the northern points to any of the southern destinations. For there was no evidence in this case that it had restricted its undertaking as respects beer to shipments from Newark, unless the fact that it had carried beer only from that point is to be conclusive. But to say that that was conclusive or controlling would be to disregard the natural and normal course of business shown by this record. So far as southbound shipments are con-

cerned, it is plain that a wide variety of articles was transported consistently with appellee's holding out that it would carry any of the articles from any of the points. Appellee's "bona fide operation" may possibly be limited only to those articles actually carried. But where it was actively soliciting whatever it could get at any of the points, it does violence to its common carrier status to make the origin or destination of future shipments conform to the precise pattern of the old. Such a pulverization of the prior course of conduct changes its basic characteristics. There is no statutory sanction for such a procedure.

IV. To appellee such matters involve life or death. Empty or partially loaded trucks on return trips may well drive the enterprise to the wall. A restriction in this case of the commodities which may be carried from any one point on southbound trips is a patent denial to appellee of that "substantial parity between future operations and prior bona fide operations" which the Act contemplates. *Alton R. Co.* v. *United States, supra.* Its prior opportunity should not be restricted beyond the clear requirements of the statute. For this Act should be liberally construed to preserve the position which those like appellee have struggled to obtain in our national transportation system. To freeze them into the precise pattern of their prior activities, as was done here, not only may alter materially the basic characteristics of their service, it also may well be tantamount to a denial of their statutory rights.

The precise grounds for the Commission's determination that only certain commodities could be carried and that only a few could be transported between designated points are not clear. It is impossible to say that the standards which we have set forth were applied to the facts in this record. Hence, as in *Florida* v. *United States,* 282 U. S. 194, 215, the defect is not merely one of the absence of a "suitably complete statement" of the reasons for the deci-

sion; it is the "lack of the basic or essential findings required to support the Commission's order." And see *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 464; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510–511. Congress has made a grant of rights to carriers such as appellee. Congress has prescribed statutory standards pursuant to which those rights are to be determined. Neither the Court nor the Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process. If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made "prerequisite to the operation of its statutory command." *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U. S. 126, 144. Hence that requirement is not a mere formal one. Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence. That is why we cannot say that the Commission would be justified in placing the same restrictions on the certificate in this case had a correct construction of the Act been taken.

We express no opinion on the scope of the certificate which should be granted in this case. That entails not

only a weighing of evidence but the exercise of an expert judgment on the intricacies of the transportation problems which are involved. That function is reserved exclusively for the Commission. *United States* v. *Maher, supra; Alton R. Co.* v. *United States, supra.* Our task ends if the statutory standards have been properly applied.

Affirmed.

MR. JUSTICE JACKSON, dissenting:

MR. JUSTICE FRANKFURTER and I are unable to agree with this disposition of the case.

It overturns the exercise of a discretion which Congress has delegated to the Interstate Commerce Commission upon grounds which seem to us so unsubstantial as really to be a reversal on suspicion. The function of determining "grandfather" rights delegated in this case is not unlike the function dealt with in *Gray* v. *Powell*, 314 U. S. 402, in which we said that Congress could have legislated specifically as to individual exemptions but "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" (p. 412). We held that this delegation will be respected and that, unless we can say that a set of circumstances deemed by the Commission to bring a particular applicant within the concept of the statute "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" (p. 413). While the Court pays lip service to this principle, the Commission's decision is upset because, as the opinion states, "We have doubts"; "We are not confident"; and "We are not satisfied." The opinion proceeds as it might do with a burden upon the Commission, although we supposed the burden to be upon those who

complain of an administrative decision to satisfy the Court that the decision is wrong—particularly one dealing with an exemption from a general duty.

We do not agree that a remand to the Commission to make specific findings of the kind required in *Florida* v. *United States,* 282 U. S. 194, 215, is appropriate. In the *Florida* case, the Commission undertook to revise intrastate railroad rates under control of the state and over which, as Chief Justice Hughes said, "the Commission has no general authority." 282 U. S. at 212. It was required to support its jurisdiction to revise rates not within its general control by specific findings as to whether those rates in any way constituted a burden on interstate commerce. The Court had earlier established the rule that an order of the Commission should not be given precedence over a state rate statute otherwise valid "unless, and except so far as, it conforms to a high standard of certainty." *Illinois Central R. Co.* v. *Public Utilities Commission,* 245 U. S. 493, 510. And in this connection the Court pointed out that even an act of Congress is not to be construed to supersede or suspend the exercise of the reserved powers of the state, even where the Constitution permits, "except so far as its purpose to do so is clearly manifested." It is one thing to require the Interstate Commerce Commission to be explicit in finding jurisdictional facts before it invades conceded state power. It is a wholly different thing to read with a hostile eye the Commission's findings that a claim for exemption from conceded federal regulatory authority has not been sustained.

Furthermore, if after this case is returned to the Commission, the Commission should leave no room for doubt that in making the challenged order it acted upon correct notions of law, it may yet be upset because the Court says its findings are not sustained by the evidence, it

had better be said now. We have here a small record and simple facts, which are all before us, giving adequate basis for concluding whether these facts as found by the Commission warranted the order. On this record it is plain what the Commission has done. The only question is—Can it do what it has done? To send the case back to the Commission to be reconsidered or to say that it has already been considered in the light of the legal views which the Court expresses, and then, perhaps, to say that in any event the order is not warranted on the record before us, is really to invite the Commission to express abstract views on law. What this amounts to is that the Court refuses to tell the Commission what it thinks about the evidence until the Commission tells what it thinks about the law. We cannot regard this as the most helpful use of the power of judicial review.

Congress by the Motor Carrier Act of 1935 cast upon the Commission the task of regulating the motor carrier industry. By the enactment, Congress asserted that the public interest in the motor carrier enterprise had become paramount to private interests. The highly individualistic nature of the business and the easy terms upon which equipment could be obtained had promoted a quick growth accompanied by intense and uneconomic competition, both within itself and with other transportation systems. It was not expected that a sprawling, chaotic, and cutthroat industry that had developed entirely in the private interest would be reduced to an orderly and regularized system of transportation in the public interest without stepping on a good many individual toes.[1]

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[1] See Report of Joseph B. Eastman, Federal Coordinator of Transportation, on the Regulation of Transportation Agencies other than Railroads. Sen. Doc. No. 152, 73rd Cong., 2nd Sess., p. 13 *et seq.*

See also Report of the Committee on Interstate Commerce on the Motor Carrier Act, 1935, Sen. Rep. No. 482, 74th Cong., 1st Sess.

In trying to limit the injury caused by transition from a purely private enterprise to a regulated public service industry, the general plan was to preserve to private owners the transportation values evidenced by actual conditions of operation on June 1, 1935, and to exempt them from meeting the requirements of "public convenience and necessity" as to such operation. Those who obtained such "grandfather" rights are not, however, limited to them. They may expand their territory or extend their service by proving that public convenience and necessity will be served thereby. Thus, the scramble for "grandfather" rights represents the effort to pre-empt territory and service privileges without submitting to the test of the public interest. Public regulation would be defeated at its very outset if the Commission permitted the bulk of the industry to escape the public interest test by inflated claims under the "grandfather" clause. The nature of the general task of reducing the claims of "grandfather" rights to defined and reasonable limits consistent with the plan of public regulation is disclosed by the record in this case.

The motor carrier here asked as a matter of right that the Commission certify its "grandfather" privileges to include the carriage of general commodities in a territory comprising substantially the Atlantic seaboard from South Carolina to Massachusetts. That there was some disparity between its hopes and its experience was indicated by the fact that on June 1, 1935, it was operating eight trucks, and by 1936, the number of usable vehicles had fallen to four. After a change of ownership the number was increased, and at the time of hearing the applicant was operating seventeen carrying units.

This carrier did not operate at stated times or over regular routes, but was an irregular route carrier. The backbone of its business consisted of carriage of cotton

yarn from points of origin in the South to points of distribution in the North. Incidental to this carriage it was ready to accept cargo of almost any kind to complete its loads and particularly to provide earnings on return trips. If satisfactory terms could be arrived at, it was willing to carry almost anything almost any place. On the basis of such general holdings-out, this carrier sought certificates that would entitle it as a matter of right to carry nearly everything within the territory described.

The Commission cut down the claims of the applicant by the use of the standard which the Act prescribes: namely, *bona fide* operation as a common carrier by motor vehicle. The Commission reduced the territorial claim to that which the carrier actually served with some regularity, and lopped off territory which had been served only occasionally or by isolated trips. It limited the commodities to be carried to those carried in substantial volume during the period before and after June 1, 1935. We find no basis upon which we can say as matter of law that these general methods of reducing nebulous and extravagant claims to a compass which the Commission could properly certify as representing *bona fide* operation are improper or other than those contemplated by the statute.

The Court is "not confident" that the Commission applied to this irregular route carrier the same test as to commodities that is applied to regular route carriers. We cannot be so confidently unconfident. The Commission seems to have made only the distinction between irregular and the regular route carriers that results from the differences inherent in the two types of enterprise. The Commission has tested both by the regularity and substantiality of their actual operations. It is a test with which they may have unequal ability to comply, but to reach different results on such different facts does not imply

either the use of different legal standards or discriminatory administration.

The administrators of the Motor Carrier Act must be aware, as the framers of it were, that "the grandfather clause as of June 1, 1935, has been fixed in fairness to *bona fide* motor carriers now operating on the highway and limited so as to prevent speculation which is highly important." Report of the Committee on Interstate and Foreign Commerce, H. R. Rep. No. 1645, 74th Cong., 1st Sess., p. 4. When a carrier claims grandfather rights to serve the entire Atlantic seaboard as a general common carrier with equipment consisting on the critical date, of eight trucks, the Commission is obviously forewarned that it must guard against granting franchise privileges that will result in their having a speculative value to the carrier rather than a service value to the public. The Commission was quite right to take the measure of the territory and service of such a claimant and to give him a certificate covering his actual substantial operations. We should not substitute our own wisdom or unwisdom for that of administrative officers who have kept within the bounds of their administrative powers. *A. T. & T. Co.* v. *United States*, 299 U. S. 232, 236.

HOWARD HALL CO., INC. *v.* UNITED STATES ET AL.

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

No. 210. Argued January 16, 19, 1942.—Decided March 2, 1942.

1. A grant by the Interstate Commerce Commission of a certificate of public convenience and necessity for operation as a common carrier by motor vehicle under the "grandfather clause" of the Motor Carrier Act of 1935, authorizing service only from a particular city and all points within a radius of 10 miles thereof, to all points in certain States and to designated points in others, *held* not erroneous. P. 498.

2. In a grant of common carrier rights under the "grandfather clause," that part of the order of the Commission in this case which limits the kinds of commodities which may be carried between specified points, is not supported by the requisite basic or essential findings. *United States* v. *Carolina Freight Carriers, ante,* p. 475. P. 499.

38 F. Supp. 556, reversed.

APPEAL from a decree dismissing the complaint in a suit to enjoin enforcement of an order of the Interstate Commerce Commission.

Mr. Allan Watkins, with whom *Mr. Edgar Watkins* was on the brief, for appellant.

Mr. Nelson Thomas, with whom *Solicitor General Fahy, Assistant Attorney General Arnold,* and *Messrs. Frank Coleman* and *Daniel W. Knowlton* were on the brief, for appellees.

Mr. James W. Wrape filed a brief on behalf of the Regular Common Carrier Conference of the American Trucking Associations, Inc., as *amicus curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case, like *United States* v. *Carolina Freight Carriers Corp., ante,* p. 475, is an appeal from a district court of three judges (38 F. Supp. 556) convened to review an order of the Interstate Commerce Commission (24 M. C. C. 273) granting appellant a certificate of public convenience and necessity as a common carrier by motor vehicle under the so-called "grandfather clause" (§ 206 (a)) of the Motor Carrier Act of 1935. 49 U. S. C. § 306.

Appellant made application as a common carrier of general commodities operating over irregular routes. It

sought authority to operate between all points in a vast territory comprising most of the country east of the Mississippi River, except the New England states. The Commission authorized the issuance of a certificate but limited it in two respects. (1) It restricted the geographical scope of the operations by authorizing service only from Birmingham, Ala., and all points within a radius of 10 miles from that city, to all points in certain states and to designated points in others. (2) Though it permitted appellant to carry general commodities throughout a large segment of the authorized territory, it limited the kinds of commodities which could be carried between specified points. Its finding containing those restrictions (24 M. C. C., p. 277) reads as follows:

"We find that applicant was, on June 1, 1935, and continuously since that time has been, in bona fide operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except commodities of unusual value, high explosives, commodities in bulk, commodities requiring special equipment, and household goods, uncrated or in lift vans in connection with so-called household movings between Birmingham, Ala., and all points within 10 miles thereof, on the one hand, and, on the other, all points in North Carolina, Georgia, Mississippi, and South Carolina, and those in Florida on and north of a line consisting of U. S. Highway 92 from Tampa to Kissimmee, thence U. S. Highway 192 to Melbourne, of paper and paper products from Birmingham to New Orleans, La., and Chattanooga and Knoxville, Tenn., and from Kingsport, Tenn., to Birmingham, of nails, pipe, pipe fittings, steel, and metal ceilings from Canton, Ohio, to Birmingham, of cloth from Alabama City, Ala., to Wheeling, W. Va., and of matches from Wheeling to Chattanooga and Birmingham, all over irregular routes; that by reason of such operation it is

entitled to a certificate authorizing the continuance thereof; and that the application in all other respects should be denied."

The District Court refused to enjoin enforcement of the order and dismissed the complaint. The errors urged here do not relate to the substantiality of the evidence in support of the findings. They involve two questions: (1) whether the Commission was warranted in limiting shipments to and from points located within a 10 mile, rather than a 100 mile, radius of Birmingham; and (2) whether the Commission erred in limiting the operating rights of appellant to the transportation of only a few commodities between certain points.

I. We perceive no error in the limitation which the Commission made on the territorial scope of appellant's operations.

Appellant argues that if it may be authorized to serve all points in one state, say Georgia, without showing that every point in Georgia had been previously served by it, then it must be granted like authority as respects the 100 mile radius around Birmingham. That is a *non sequitur*. Prior operations to several points in a region may or may not justify the Commission in authorizing service throughout the whole region. The precise geographical pattern for future operations is the product of an expert judgment based on the substantiality of the evidence as to prior operations, the characteristics of the particular type of carrier, the capacity or ability of the applicant to render the service, and the like. *Alton R. Co.* v. *United States*, 315 U. S. 15; *United States* v. *Carolina Freight Carriers Corp., supra.* The Commission employed those standards in limiting the territorial scope of appellant's operations. We cannot say that its reduction of the Birmingham area from a radius of 100 miles to a radius of 10 miles was unjustified. The Commission found that

only 55 shipments were transported prior to June 1, 1935, to or from points within 100 miles of Birmingham, as against 875 to or from that city. Only 12 points were served in that large area. After June 1, 1935, 270 shipments moved to or from points within 100 miles of Birmingham, as against 2,030 to or from that city. The Commission reduced the radius to 10 miles in an endeavor to include only the important industrial area surrounding that city. If we were to enlarge that area, we would clearly usurp a function which Congress entrusted to the Commission. Nor can that finding be assailed because permission to serve all points in other areas was allowed. Such a difference in treatment plainly is not erroneous as a matter of law. And nothing has been called to our attention which would even suggest that the record of prior operations or the characteristics of this transportation enterprise precluded the Commission from restricting the territory where shipments mainly originate while being more liberal as respects the territory where destination points are located.

II. We take a different view as respects the limitation on commodities which the Commission imposed in case of shipments between specified points. We do not say that that limitation was unjustified. We merely hold that in this case, as in *United States* v. *Carolina Freight Carriers Corp., supra,* the basic or essential findings to support that part of the order are lacking. The Commission's conclusion that appellant was authorized to transport general commodities between Birmingham and vicinity on the one hand, and all points in designated areas on the other, was based on its finding that prior to and since June 1, 1935, appellant "held itself out to transport general commodities" in that territory and "actually conducted an operation consistent with such holding out." But in case of the limitation which it imposed on the

shipment of certain commodities it merely found that "prior to and since June 1, 1935, applicant transported paper and paper products from Birmingham to New Orleans, La., and Chattanooga and Knoxville, Tennessee, and from Kingsport, Tenn., to Birmingham; nails, pipe, pipe fittings, steel, and metal ceilings from Canton, Ohio, to Birmingham; cloth from Alabama City, Ala., to Wheeling, W. Va., and matches from Wheeling to Chattanooga and Birmingham."

As we indicated in *United States* v. *Carolina Freight Carriers Corp., supra,* if the applicant had established that it was a "common carrier" of general commodities during the critical periods in a specified territory, restrictions on commodities which could be moved between specified points in that territory would not be justified. The mere fact that particular commodities had never been transported between designated points in that territory would not mean that authority to haul them between such points should be withheld. On the other hand, an applicant's status may vary from one part of the territory to another. As respects carriage between designated points, the applicant may have restricted its undertaking to particular commodities. It is not clear, however, that the Commission applied those tests in this case. From all that appears, it may have allowed only paper and paper products to be shipped from Birmingham to New Orleans merely because paper and paper products were the only commodities previously carried between those cities. It is true that the Commission quoted from Reliance Trucking Co., Inc., 4 M. C. C. 594, 595, to the effect that the question is whether there has been an operation within the critical periods consistent with the holding out in the natural and normal course of business, and that a mere holding out without evidence of an operation consistent therewith is not enough. Yet it also seems to have placed considerable

reliance on Powell Brothers Truck Lines, Inc., 9 M. C. C. 785, 791–792, which we have discussed in *United States* v. *Carolina Freight Carriers Corp., supra,* and which apparently treats irregular route carriers differently in this regard from regular route carriers. Since the influence of that view seems to have permeated the findings, we conclude that here, as in *United States* v. *Carolina Freight Carriers Corp., supra,* the case should be remanded to the Commission so that the basic or essential findings required under the rule of *Florida* v. *United States,* 282 U. S. 194, 215, may be made.

Reversed.

MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON dissent for the reasons stated in their dissenting opinion in *United States* v. *Carolina Freight Carriers Corp., ante,* p. 475.

BUTLER BROTHERS *v.* McCOLGAN, FRANCHISE TAX COMMISSIONER OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 283. Argued February 12, 1942.—Decided March 2, 1942.

1. In the application of a state statute imposing on corporations doing business within and without the State a franchise tax measured by a percentage of the net income derived from business within the State, a formula which is "fairly calculated" to allocate to the State that portion of the net income "reasonably attributable" to the business done there satisfies the requirements of the Fourteenth Amendment. P. 506.
2. One who attacks a formula for determining, under a taxing statute, the amount of net income allocable to the State, has the burden of showing by clear and cogent evidence that it results in extraterritorial values being taxed. P. 507.
3. A wholesale merchandise corporation operated, as a unitary business, stores in several States, including one in California. It maintained a central buying division which served all the stores.

In 1935, it had a substantial profit, although the California store, on a separate accounting basis, showed a loss. The tax commissioner of California allocated to that State a percentage of the net income, and based thereon a tax under the state Bank and Corporation Franchise Tax Act. That percentage was determined by averaging the percentages which (a) value of real and tangible personal property, (b) wages, salaries, commissions and other compensation of employees, and (c) gross sales, less returns and allowances, attributable to the California store bore to the corresponding items of all the stores. *Held:*

(1) That the formula of apportionment did not violate the Fourteenth Amendment. P. 506.

(2) The fact that the accounting system of the California branch attributed no net income to that State did not prove that the tax was on extra-territorial values, since accounting practices for income statements may vary considerably according to the problem at hand; and a particular accounting system, though useful or necessary as a business aid, may not fit the different requirements when a State seeks to tax values created by business within its borders. P. 507.

4. The ruling in *Saunders* v. *Shaw,* 244 U. S. 317, relative to lack of due process where a state supreme court finally disposed of a case on a new point against which the defeated party had had no opportunity or occasion to make defense, *held* inapplicable to the situation in the case at bar, in which it was claimed that the appellate court departed from provisions of the stipulation of facts upon which the case was tried. P. 510.

17 Cal. 2d 664, 111 P. 2d 334, affirmed.

APPEAL from the affirmance of a judgment against the appellant in a suit to recover the amount of a state tax.

Mr. Leland K. Neeves, with whom *Mr. James S. Moore, Jr.* was on the brief, for appellant.

Mr. Valentine Brookes, Deputy Attorney General of California, with whom *Messrs. Earl Warren,* Attorney General, and *H. H. Linney,* Deputy Attorney General, were on the brief, for appellee.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is an appeal (Judicial Code § 237 (a), 28 U. S. C. § 344 (a)) from a final judgment of the Supreme Court of California sustaining the validity of a statute of California against the claim that as construed and applied to appellant it violated the Fourteenth Amendment. 17 Cal. 2d 664, 111 P. 2d 334. The statute in question is the Bank and Corporation Franchise Tax Act. 2 Gen. L., Act 8488, p. 3851; Stat. 1929, p. 19; amended, Stat. 1931, p. 2226; Stat. 1935, p. 965. Sec. 4 (3) of that Act provides for an annual corporate franchise tax payable by a corporation doing business within the State. The tax is measured by the corporation's net income and is at the rate of four per cent "upon the basis of its net income" for the preceding year. The minimum annual tax is $25. Sec. 10 prescribes the method for computing the net income on which the tax is laid. It provides in part:

"If the entire business of the bank or corporation is done within this State, the tax shall be according to or measured by its entire net income; and if the entire business of such bank or corporation is not done within this State, the tax shall be according to or measured by that portion thereof which is derived from business done within this State. The portion of net income derived from business done within this State, shall be determined by an allocation upon the basis of sales, purchases, expenses of manufacturer, pay roll, value and situs of tangible property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the State the portion of net income reasonably attributable to the business done within this State and to avoid subjecting the taxpayer to double taxation."

The tax in dispute is for the calendar year 1936. Appellant paid the minimum tax of $25, asserting that it operated

in California during 1935 at a loss of $82,851. The tax commissioner made an additional assessment of $3,798.43 which appellant paid, together with interest, under protest. This suit was brought to recover back the amount so paid on the theory that the method of allocation employed by the tax commissioner attributed to California income derived wholly from business done without that State.

The facts are stipulated and show the following. Appellant is an Illinois corporation qualified to do business in California. Its home office is in Chicago, Illinois. It is engaged in the wholesale dry goods and general merchandise business, purchasing from manufacturers and others and selling to retailers only. It has wholesale distributing houses in seven states, including one at San Francisco, California. Each of its houses in the seven states maintains stocks of goods, serves a separate territory, has its own sales force, handles its own sales and all solicitation, credit and collection arrangements in connection therewith, and keeps its own books of account. For the period in question, all receipts from sales in California were credited to the San Francisco house. Appellant maintains a central buying division through which goods for resale are ordered, the goods being shipped by manufacturers to the houses for which they are ordered. All purchases made by appellant for sale at its various houses are made through that central buying division. The cost of the goods and the transportation charges are entered on the books of the house which receives the goods. No charges are made against any house for the benefit of appellant or any of its other houses by reason of the centralized purchasing. But the actual cost of operating the centralized buying division is allocated among the houses. The greater part of appellant's other operating expenses is incurred directly and exclusively at the respective houses. Certain items of expense are incurred and paid by appel-

lant for the benefit of all the houses and allocated to them. No question exists as to the accuracy of the amounts of such expense or the method of allocation. The latter admittedly followed recognized accounting principles. For the year 1935 the amount of such allocated expense charged to the San Francisco house was $100,091. For purposes of this suit it was agreed that approximately 75% of that amount would have been incurred even though the San Francisco house was not operated. The accuracy and propriety of the basis of allocation of those common expenses for 1935 were admitted. Included in such expenses were executive salaries, certain accounting expenses, the cost of operating a central buying division, and a central advertising division. Except for such common expenses, each house is operated independently of each other house. Appellant computed its income from the San Francisco house for the period in question by deducting from the gross receipts from sales in California the cost of such merchandise, the direct expense of the San Francisco house, and the indirect expense allocated to it. By that computation a loss of $82,851 was determined. In the year 1935, the operations of all houses of appellant produced a profit of $1,149,677. The tax commissioner allocated to California 8.1372 per cent. of that amount. That percentage was determined by averaging the percentages which (a) value of real and tangible personal property, (b) wages, salaries, commissions and other compensation of employees, and (c) gross sales, less returns and allowances, attributable to the San Francisco house bore to the corresponding items of all houses of appellant. No other factor or method of allocation was considered. The propriety of the use of that formula is not questioned if by reason of the stipulated facts a formula for allocation to California of a portion of appellant's income from all sources is proper.

The stipulation also states that, in the year 1935, the total sales made by appellant at all its houses amounted to $66,326,000, of which $5,206,000 were made by the San Francisco house. The purchases made for the account of that house were substantially in the same proportion to total purchases. By reason of the volume of purchases made by appellant, "more favorable prices are obtained than would be obtainable in respect of purchases for the account of any individual house." The addition of purchases "in an amount equal to the purchases made for the account of the San Francisco house results in no more favorable prices than could be obtainable in respect of purchases in an amount equal to the purchases which would be made" by appellant for its other houses if the San Francisco house was not in existence; and "a reduction in the volume of purchases in an amount equal to the purchases made for the San Francisco house would result in no less favorable prices being obtainable in respect of the purchases which would be made for the remaining houses" of appellant.

Hans Rees' Sons v. *North Carolina,* 283 U. S. 123, constitutes appellant's chief support in its attack on the formula employed and the tax imposed by California. Appellant maintains that the use of the formula in question resulted in converting a loss of $82,851 into a profit of over $93,500 and that the difference of some $175,000 has either been created out of nothing or has been appropriated by California from other states.

We take a different view. We read the statute as calling for a method of allocation which is "fairly calculated" to assign to California that portion of the net income "reasonably attributable" to the business done there. The test, not here challenged, which has been reflected in prior decisions of this Court, is certainly not more exacting. *Bass, Ratcliff & Gretton, Ltd.* v. *Tax Commission,* 266 U. S. 271; *Ford Motor Co.* v. *Beau-*

champ, 308 U. S. 331. Hence, if the formula which was employed meets those standards, any constitutional question arising under the Fourteenth Amendment is at an end.

One who attacks a formula of apportionment carries a distinct burden of showing by "clear and cogent evidence" that it results in extraterritorial values being taxed. See *Norfolk & Western Ry. Co.* v. *North Carolina,* 297 U. S. 682, 688. This Court held in *Hans Rees' Sons* v. *North Carolina, supra,* p. 135, that that burden had been maintained on a showing by the taxpayer that "in any aspect of the evidence" its income attributable to North Carolina was "out of all appropriate proportion to the business" transacted by the taxpayer in that State. No such showing has been made here.

It is true that appellant's separate accounting system for its San Francisco branch attributed no net income to California. But we need not impeach the integrity of that accounting system to say that it does not prove appellant's assertion that extraterritorial values are being taxed. Accounting practices for income statements may vary considerably according to the problem at hand. Sanders, Hatfield & Moore, A Statement of Accounting Principles (1938), p. 26. A particular accounting system, though useful or necessary as a business aid, may not fit the different requirements when a State seeks to tax values created by business within its borders. Cf. Hamilton, Cost as a Standard for Price, 4 Law & Contemporary Problems 321. That may be due to the fact, as stated by Mr. Justice Brandeis in *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 121, that a State in attempting to place upon a business extending into several States "its fair share of the burden of taxation" is "faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders." Furthermore, the particular system

used may not reveal the facts basic to the State's determination. *Bass, Ratcliff & Gretton, Ltd.* v. *Tax Commission, supra,* p. 283. In either aspect of the matter, the results of the accounting system employed by appellant do not impeach the validity or propriety of the formula which California has applied here.

At least since *Adams Express Co.* v. *Ohio,* 165 U. S. 194, this Court has recognized that unity of use and management of a business which is scattered through several States may be considered when a State attempts to impose a tax on an apportionment basis. As stated in *Hans Rees' Sons* v. *North Carolina, supra,* p. 133, "... the enterprise of a corporation which manufactures and sells its manufactured product is ordinarily a unitary business, and all the factors in that enterprise are essential to the realization of profits." And see *Bass, Ratcliff & Gretton, Ltd.* v. *Tax Commission, supra,* p. 282. By the same token, California may properly treat appellant's business as a unitary one. Cf. *Great Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412. There is unity of ownership and management. And the operation of the central buying division alone demonstrates that functionally the various branches are closely integrated. Admittedly, centralized purchasing results in more favorable prices being obtained than if the purchases were separately made for the account of any one branch. What the savings were and what portion is fairly attributable to the volume contributed by the San Francisco branch do not appear. But the concession that a reduction or addition of purchases "in an amount equal to the purchases made for the San Francisco house" would not result in higher or lower purchase prices respectively does not aid appellant's case. There is no justification on this record for singling out the San Francisco branch rather than another and concluding that it made no contribution to those savings. As aptly stated by the Supreme Court of California, "If the omission of the California sales would

have no effect on the purchasing power, the omission of sales in an equal amount wherever made would likewise have no effect on the company's ability to purchase at a saving. Thus, by proceeding in turn from state to state, it could be shown that none of the sales in any of the states should be credited with the income resulting from the purchasing of goods in large quantities." Nor are there any facts shown which permit the conclusion that the other advantages of centralized management (*Great Atlantic & Pacific Tea Co.* v. *Grosjean, supra*) are attributable to other branches but not to the one in California. The fact of the matter is that appellant has not shown the precise sources of its net income of $1,149,677. If factors which are responsible for that net income are present in other States but not present in California, they have not been revealed. At least in absence of that proof, California was justified in assuming that the San Francisco branch contributed its aliquot share to the advantages of centralized management of this unitary enterprise and to the net income earned.

We cannot say that property, pay roll, and sales are inappropriate ingredients of an apportionment formula. We agree with the Supreme Court of California that these factors may properly be deemed to reflect "the relative contribution of the activities in the various states to the production of the total unitary income," so as to allocate to California its just proportion of the profits earned by appellant from this unitary business. And no showing has been made that income unconnected with the unitary business has been used in the formula.

The stipulation of facts states that, if "the Court deems that it is bound by any inference or presumption respecting the assessment made by the Commissioner, or that this stipulation fails to establish any fact necessary to a decision, the case shall be reopened for the taking of further proofs in respect thereof." Appellant in its petition for

rehearing before the Supreme Court of California relied on that part of the stipulation in urging that the cause be remanded for a further hearing since that Court concluded that "appellant has not furnished any explanation of why its California business differs so from the average that the formula produced an erroneous result." The petition for rehearing was denied. Appellant now asserts that it has been denied procedural due process under the rule of *Saunders* v. *Shaw*, 244 U. S. 317. We do not agree. The Supreme Court of California created no innovation and sprung no surprise when it placed on appellant the burden of establishing that the formula taxed extraterritorial values. As we have noted, that is settled doctrine. Appellant had a full opportunity to be heard on the issues which it tendered.

Affirmed.

UNITED STATES *v.* NEW YORK.*

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

No. 238. Argued February 2, 1942.—Decided March 2, 1942.

1. Under §§ 801 and 802 of Title VIII of the Social Security Act, an employer is required to collect the tax laid on the wage incomes of his employees, but is liable for its payment whether or not he collects it. P. 515.
2. This liability of the employer is a tax, and a claim thereon is entitled to priority as for a tax under § 64 (a) (4) of the Bankruptcy Act. P. 515.
3. A tax for the purposes of § 64 (a) (4) of the Bankruptcy Act includes any pecuniary burden upon individuals or property for the purpose of supporting the Government. P. 515.

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*Together with No. 251, *New York* v. *United States*, also on writ of certiorari, 314 U. S. 592, to the Circuit Court of Appeals for the Second Circuit.

4. The provision of § 902 of Title IX of the Social Security Act allowing the employer to credit against his tax, under § 901, the amount of his contributions to state unemployment funds up to 90% of the tax, does not make the tax to that extent a penalty, within the meaning of § 57 (j) of the Bankruptcy Act, as applied to an employer who has failed to make such contributions. P. 516.
5. In determining the amounts distributable to the United States on its tax claim and to the State for its unemployment fund, under §§ 901 and 902 of Title IX of the Social Security Act, from a bankrupt estate whose assets were insufficient to satisfy these and other claims of priority, *held* that the allowance to be made for the state fund should be credited against the total tax claim of the United States under § 901, rather than against the amount actually available for such claim. P. 520.

118 F. 2d 537, reversed.

CERTIORARI, 314 U. S. 592, on cross-petitions, to review a judgment reversing part of an order of the District Court, 38 F. Supp. 976, for the distribution of assets of a bankrupt estate.

Mr. J. Louis Monarch, with whom *Solicitor General Fahy, Assistant Attorney General Clark,* and *Mr. Alvin J. Rockwell* were on the brief, for the United States.

Mr. William Gerard Ryan, Assistant Attorney General of the State of New York, with whom *Messrs. John J. Bennett, Jr.,* Attorney General, and *Henry Epstein,* Solicitor General, were on the brief, for the State of New York.

MR. JUSTICE BYRNES delivered the opinion of the Court.

The United States and the State of New York seek review of a judgment of the Circuit Court of Appeals for the Second Circuit reversing in part a District Court order for the distribution of the assets of a bankrupt estate. The Independent Automobile Forwarding Corporation was adjudicated a bankrupt on April 26, 1938. A total of $3,053.20 eventually became available for distribution.

This amount was insufficient even to meet those claims of the federal and state governments which were assertedly entitled to priority as taxes under § 64 (a) (4) of the Bankruptcy Act.[1] The federal claims of this character were for amounts due under §§ 801 and 802 of Title VIII and under § 901 of Title IX of the Social Security Act,[2] and for certain taxes as to which no question is raised in this case. The state claims were for payments due its unemployment insurance fund, and for taxes not in issue here.

The state's appeal from the District Court's first order of distribution was discontinued by agreement of the

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[1] "Section 64. Debts which have priority.—a. 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 . . . (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof . . ." U. S. C., Title 11, § 104.

[2] c. 531, 49 Stat. 636, 639.

"Section 801. Income tax on employees. In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in § 811) received by him after December 31, 1936, with respect to unemployment (as defined in § 811) after such date: (1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum." U. S. C., Title 42, § 1001.

"Section 802. (a) The tax imposed by § 801 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. Every employer required so to deduct the tax is hereby made liable for the payment of such tax, and is hereby indemnified against the claims and demands of any person for the amount of any such payment made by such employer." U. S. C., Title 42, § 1002.

"Sec. 901. On and after January 1, 1936, every employer (as defined in § 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in § 907) payable by him (regardless of the time of payment) with respect to employment (as defined in § 907) during such calendar year: . . . (2) with respect to employment during the calendar year 1937 the rate shall be 2 per centum. . . ." U. S. C., Title 42, § 1101.

parties because the Social Security Act had been extensively amended while the appeal was pending.[3] A second order was thereupon entered by the District Court. The State again appealed to the Circuit Court of Appeals. It contended that the share of the assets granted to the federal government was excessive for three reasons: (1) the claim based on § 801 of Title VIII of the Social Security Act was a claim for a debt rather than for taxes and thus was not entitled to priority under § 64 (a) (4) of the Bankruptcy Act; (2) no more than 10% of the claim based on § 901 of Title IX of the Social Security Act was entitled to allowance because the balance constituted a claim for a penalty rather than a tax and thus fell within the prohibition of § 57 (j) of the Bankruptcy Act;[4] and (3) the credit against the Title IX claim provided for in § 902 was incorrectly calculated. The Circuit Court of Appeals sustained the state's contention with respect to the Title VIII claim and reversed to that extent the order of the District Court, but rejected the state's arguments with respect to the claim under Title IX.

First. The claim based on Title VIII. Section 801 bears the heading "Income tax on employees" and provides for a tax "upon the income of every individual" equal to 1 per centum of the wages received by him with respect to employment during 1937.[5] Section 802 (a) provides that this tax "shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid." The employer is made

[3] c. 666, 53 Stat. 1360, 1399. See notes 9 and 10, *infra*.

[4] "Section 57 (j). Debts owing to the United States or any State or subdivision thereof 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." U. S. C., Title 11, § 93 (j).

[5] Both the pertinent state and federal claims are for the year 1937.

liable for the payment of the tax. By regulation, pursuant to Title VIII,[6] the Treasury Department has explicitly ruled that the tax may be assessed against the employer, regardless of whether he has in fact deducted it from the employee's wages. The Circuit Court of Appeals held that the employer was liable "only as an agent bound to pay whether its duty to collect was performed or not" and that his liability was for a debt rather than for taxes. 118 F. 2d 537.

As authority for this view, it relied upon its decision of the same date in *City of New York* v. *Feiring,* 118 F. 2d 329. The city sales tax involved in that case was laid upon receipts from sales of personal property. The vendor was required to collect the amount of the tax from the vendee separately from the sales price. He was obliged to report periodically concerning his receipts from sales and to turn over to the City Comptroller the taxes due, whether or not he had actually collected them from the purchasers. If the vendor failed to collect the tax, the vendee was required to report the transaction and to pay the tax directly. Thus, the procedure contemplated was that the purchaser should bear the burden of the tax, but that the seller should collect and transmit it to the Comptroller. If the seller did not obtain it from the purchaser, however, the Comptroller was authorized to proceed to collect it from either of them. The Circuit Court of Appeals held that the claim of the City against a bankrupt vendor for the amount of the sales tax outstanding was a claim for a debt and not for taxes, within the meaning of § 64 (a) (4). We reversed this decision and held that the burden imposed upon the seller by the city taxing act had "all the characteristics of a tax entitled to priority" under § 64 (a) (4). 313 U. S. 283.

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[6] Treasury Regulations 91, Article 505.

We think that our decision in the *Feiring* case is controlling here. The New York City sales tax involved in that case and the obligation imposed by §§ 801 and 802 of Title VIII of the Social Security Act cannot be distinguished in any material respect. It was observed in the *Feiring* case that, while the sales tax was intended to rest upon the purchaser "in its normal operation," "both the vendor and the vendee are made liable for payment of the tax *in invitum* . . . and the tax may be summarily collected by distraint of the property of either the seller or the buyer." 313 U. S. 283, at 287. The burden of the tax provided for by §§ 801 and 802 likewise will normally rest upon the employee, but the Commissioner of Internal Revenue may proceed to collect it from the employer whether or not he has deducted it from the wages of the employee.

Two distinctions between the cases are urged by the State. One is that § 802 (a) of Title VIII provides that the tax "shall be collected by the employer of the taxpayer" and thus reveals a Congressional intent that only a claim against the employee should be treated as one for a tax. The other asserted distinction is that Title VIII in its entirety is designed to impose two distinct taxes; § 801 imposes an "income tax" upon the employee, while § 804 imposes an "excise tax" upon the employer.[7] But a tax for purposes of § 64 (a) (4) includes any "pecuniary burden laid upon individuals or property for the purpose of supporting the Government," by whatever name it may

[7] "Section 804. Excise tax on employers. In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in § 811) paid by him after December 31, 1936, with respect to employment (as defined in § 811) after such date: (1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum." U. S. C., Title 42, § 1004.

be called. *New Jersey* v. *Anderson,* 203 U. S. 483, 492. Although he may not be referred to in §§ 801 and 802 as the taxpayer, and although he may also be subject to the "excise tax" prescribed by § 804, the plain fact is that the employer is liable for the § 801 tax whether or not be has collected it from his employees. We therefore hold that the Title VIII claim of the United States against the estate of this bankrupt employer is entitled to the priority afforded by § 64 (a) (4).

Second. The claim under Title IX. Section 901 imposes upon this employer, in addition to the obligations discussed above, an "excise tax" equal to 2 per centum of the total wages payable by him during 1937. Section 902, however, permits him to credit "against the tax imposed by § 901" the amount of his 1937 contributions to the state unemployment fund, but provides that the total credit "shall not exceed 90 per centum of the tax against which it is credited."

(a) The State contends that § 902 (a) in effect exacts a penalty, equal to 90% of the amount of the tax levied by § 901, from an employer who fails to make the payments to the state unemployment fund required by state law. Since § 57 (j) of the Bankruptcy Act provides that claims by the United States for penalties are not allowable,[8] it argues, only 10% of the tax imposed by § 901 is actually a tax for purposes of § 64 (a) (4) of the Bankruptcy Act. There is no merit to this contention. While the issue here is cast in somewhat different terms, it is similar in outline to that raised by the constitutional objection to the Act which was set to rest in *Steward Machine Co.* v. *Davis,* 301 U. S. 548. There it was argued that the 90% credit provisions amounted to coercion of the States which was repugnant to the Tenth Amendment and to the federal system. The Court recognized that the effect of the scheme was to encourage the States to

[8] See note 4, *supra.*

establish and maintain unemployment insurance funds and thus to coöperate with the federal government in meeting a common problem. It observed that "every rebate from a tax when conditioned upon conduct is in some measure a temptation" but it concluded that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties," and to accept "a philosophical determinism by which choice becomes impossible." 301 U. S. at 589–590. These considerations are equally pertinent to the suggestion that the 90% rebate arrangement constitutes the imposition of a "penalty" within the meaning of § 57 (j) upon an employer who fails or refuses to contribute to a state fund. The amount of the tax assessable under § 901 is definite and fixed, once the single variable, the total of the wages paid during the year, is determined. Although the employer is free to obtain a credit against it by contributing to his state fund, it cannot be said that it is any the less a tax because the employer has failed, either through choice or lack of resources, to make such a contribution. Either the state or the federal government must provide the money to meet the requirements of relief to the unemployed. By his contributions to the State, an employer has diminished the demand upon the financial resources of the federal government. But by his failure to contribute, the employer has increased this demand and sharpened the necessity for obtaining the revenues required to satisfy it. The effort by the United States to obtain the revenue by denying the credit must be regarded as the levying of a tax and not as the exaction of a penalty.[9]

[9] In 1939 Congress undertook to put an end to any doubts on this question by providing in § 902 (i) of the amendments to the Social Security Act that no part of the tax imposed by Title IX should be deemed a penalty or forfeiture within the meaning of § 57 (j) of the Bankruptcy Act. C. 666, 53 Stat. 1360, 1400.

(b) Finally the State contends that the District Court applied an incorrect formula in determining the amount of the credit deductible under § 902. Section 902 provides: "The taxpayer may credit against the tax imposed by § 901 of this chapter the amount of contributions, with respect to employment during the taxable year, paid by him (before the date of filing his return for the taxable year) [10] into an unemployment fund under a state law. The total credit allowed to a taxpayer under this section for all contributions paid into unemployment funds with respect to employment during such taxable year shall not exceed 90 per centum of the tax against which it is credited . . ." In the case of a bankrupt who has not made any contribution to the state unemployment fund at the time of adjudication and whose assets are insufficient to meet the total of the claims of equal priority, the calculation of the credit is beset with some difficulty. The amount available for the state's claim for its unemployment insurance fund is contingent upon the sums allowed on the other claims, including that of the federal government under § 901. The amount to be allowed on the claim of the United States is in turn dependent upon the credit deductible from it under the terms of § 902. And this credit under § 902 is determined by the sum granted on the state's unemployment insurance fund claim.

Because of this mutual dependence, the courts below have accepted and approved an algebraic solution of the

[10] This condition had not been complied with in the present case. However, the 1939 amendments to the Social Security Act, which resulted in the dismissal of the first appeal by stipulation, provided that the credit should be allowed on payments to the state fund "without regard to the date of payment, if the assets of the taxpayer are, at any time during the fifty-nine-day period following such date of enactment, in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction." § 901 (a) (3). C. 666, 53 Stat. 1360, 1399. This bankrupt estate qualified under this provision.

problem. Under this solution, the claim for the tax assessed under § 901 is diminished by subtracting from it an amount equal to the sum allowed to the State for its unemployment fund. The formula by which this is accomplished is reducible to a quadratic equation capable of solution by the recognized method.

As against this algebraic solution, the State urges an arithmetical calculation which would afford it a larger share of the assets. In brief, the state's theory is as follows: The amount of each of the several claims of the State and of the United States should be divided by the total of such claims. The percentage of the assets due on each claim is thus determined. The total of the assets available is then multiplied in turn by these percentages, and the actual sum to be allowed on each claim is found. However, the amount allowed on the federal government's claim under § 901 is then multiplied by 10%. The sum equal to this 10% is thereupon conclusively granted to the United States. But the remaining amount, equal to 90%, is returned to the estate as a second fund to be divided among all the claims in the same manner. The share of this second fund which by this computation would go to the United States on its § 901 claim is again multiplied by 10%, with the balance of 90% returning to form a third fund. The process is repeated until the still undistributed assets reach a vanishing point.

It will be observed that while the one solution is algebraic and the other arithmetic, there is little to choose between them in terms of complexity. The obvious fact is that neither the Bankruptcy Act nor the Social Security Act affords the courts any meaningful assistance in solving the problem raised by this case. And their legislative history is equally barren.

The State objects to the formula applied below because its effect is to accord the United States a larger sum in dollars and cents on its § 901 claim than it would

receive if the available assets were sufficient to discharge in full all of the priority claims. This is true because, under § 902, the United States would be entitled to no more than 10% of its § 901 claim if the unemployment fund claim of the State was paid in full. We agree that this result is somewhat incongruous. However, the method of computation urged by the State embodies so basic an error that we cannot accept it. Section 902 permits the credit "against the tax imposed by § 901." Under the state's formula the credit is reckoned in terms of a sum determined by that formula to be *actually available* to the United States on its § 901 claim rather than in terms of the whole amount *actually due* under that section. We think that the words "the tax imposed" must mean "the tax demanded" or "assessed" or "due." It can hardly be thought to mean "the tax paid" or "the amount available for payment of the tax." The formula adopted by the District Court avoids this error by crediting the undetermined sum available to the state unemployment fund against the total tax assessed or claimed under § 901. We therefore hold that the District Court and the Circuit Court of Appeals did not err in adopting and using that formula.

The judgment of the Circuit Court of Appeals is reversed with respect to the claim under Title VIII, but is otherwise affirmed. The case is remanded to permit the reinstatement of the judgment of the District Court.

Reversed.

UNITED STATES *v.* LOCAL 807 OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN & HELPERS OF AMERICA ET AL.*

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

No. 131. Argued January 7, 1942.—Decided March 2, 1942.

Section 2 of the Federal Anti-Racketeering Act provides, *inter alia*, that "any person" who, in connection with or in relation to any act affecting interstate commerce or any article or commodity moving in such commerce, obtains or attempts to obtain by use or threat of force, violence or coercion, the payment of money, "not including, however, the payment of wages by a *bona fide* employer to a *bona fide* employee," shall be guilty of a felony. *Held:*

1. That the legislative history of the Act shows that it was intended to suppress terroristic activities of professional gangsters, and not to interfere with traditional labor union activities. P. 530.

2. The exception is not limited to those who had acquired the status of employees prior to the time when they obtained, or attempted or conspired to obtain, the payment. P. 531.

3. The exception is applicable to an agreement by members of a city union of truck drivers, who, for the purpose of obtaining employment at union wages in connection with "over-the-road" trucks entering the city, agree to tender their services in good faith to each truck owner and to do the work if he accepts their offer, but agree further that, should he refuse it, they will nevertheless, for the protection of their union interests, require him to pay them the wages, even by resort to threats and violence. P. 534.

The test of the applicability of the exception in such case is whether the objective of the conspirators was to obtain "the payment of wages by a *bona fide* employer to a *bona fide* employe," and not

*Together with No. 132, *Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America et al.* v. *United States*, also on writ of certiorari, 314 U. S. 596, to the Circuit Court of Appeals for the Second Circuit.

whether the intent of the truck owner in making payment was to pay for services rather than for protection. P. 532.

4. Labor union activities such as those disclosed by the record in this case are not beyond the reach of federal legislative control; and the use of violence such as that here disclosed is subject to the ordinary criminal law. P. 536.

118 F. 2d 684, reversed.

CROSS-PETITIONS for certiorari, 314 U. S. 592, to review a judgment reversing convictions of a labor union, and individual members of it, on charges of conspiracy to violate § 2 (a) and other sections of the Federal Anti-Racketeering Act of June 8, 1934.

Assistant Attorney General Arnold, with whom *Solicitor General Fahy* and *Messrs. Richard H. Demuth* and *Charles H. Weston* were on the brief, for the United States.

The provision of the statute exempting "wages paid by a bona-fide employee" confers immunity where compensation is paid for services rendered pursuant to a genuine employer-employee relationship, but not where payments are made to secure protection against unlawful interference with business operations, whatever the guise in which such payments are made. In determining which of these situations exists, the test is not whether some service has been rendered but whether, under all the circumstances, the payments have been made for labor or for protection.

A mere applicant for employment is not an "employee"; nor is money which is paid to him "wages." The reason which the court gave for adopting this construction was that it would be an absurd result if the statute gave immunity to wage payments where the employment had originally been procured by coercion but failed to give immunity to payments where coercion had been used by persons unsuccessfully seeking employment. Those who use coercion to secure genuine employment are engaged in a legitimate labor objective; their activities, although per-

haps constituting breaches of the peace, do not partake of the nature of extortion. But it is difficult, if not impossible, to conceive of a situation in which a person can succeed in obtaining money from a prospective employer by a mere proffer of services and without entering upon a genuine employment relationship unless his activities do partake of the nature of extortion. For an employer who, under threat of violence, pays a person whose proffered services he rejects must be paying only for protection against violence.

The proviso in § 6 does not, like the wage exemption, directly grant any immunity. It applies only if "rights" expressed in "existing statutes of the United States" are in some manner impaired. Section 6 of the Clayton Act is inapplicable because the rights it confers are limited to certain relief against prohibitions of the "antitrust laws." Likewise, there was no infringement in this case of the right to strike, picket, boycott, or to assemble peaceably, given protection by § 20 of the Clayton Act. For the same reason, the provisions of the Norris-LaGuardia Act limiting the jurisdiction of federal courts with respect to such activities are inapposite. There was also no impairment of the public policy declared in the Norris-LaGuardia Act, since there was no interference or coercion by employers with defendants' right to organize or to select collective-bargaining representatives.

Furthermore, the proviso in § 6 is inapplicable because the defendants' activities were not directed toward a legitimate objective.

The legislative history of the statute is not opposed to our contentions.

The Anti-Racketeering Act is patently constitutional. The Act does not deprive the States of power to punish acts of violence which may likewise constitute offenses under the Act. Federal legislation enacted pursuant to the commerce power of Congress does not bar complemen-

tary state legislation unless Congress has manifested a purpose to preëmpt the entire field; and the Anti-Racketeering Act is obviously not a preëmption of the entire field of regulation.

The Act applies to Local 807. The word "person" when used in federal legislation may include juristic as well as natural persons.

This is not a case where the language of the statute is ambiguous. Indeed, it would be difficult to frame language more clearly confined to payments made as compensation for labor actually performed than the words "wages paid by a bona-fide employer to a bona-fide employee." The mention of "wages" alone would have conveyed the thought, since the word "wages" is universally defined as the payment of compensation for services.

Mr. Louis B. Boudin, with whom *Messrs. Edward C. Maguire* and *James D. C. Murray* were on the brief, for Local 807 of International Brotherhood of Teamsters, etc., et al.; and *Messrs. James D. C. Murray* and *Edward C. Maguire* submitted for William Campbell et al.—respondents in No. 131 and petitioners in No. 132.

MR. JUSTICE BYRNES delivered the opinion of the Court.

This case comes here on cross-petitions for certiorari to review a judgment of the Circuit Court of Appeals reversing the conviction of Local 807 and 26 individuals on charges of conspiracy to violate §§ 2 (a), 2 (b) and 2 (c) of the Anti-racketeering Act of June 18, 1934.[1] The

[1] 48 Stat. 979, U. S. C., Title 18, § 420 (a). Local 807 and the 26 individuals were also convicted of conspiracy to violate § 1 of the Sherman Act (26 Stat. 209, U. S. C. Title 15, § 1). The Circuit Court of Appeals reversed the convictions under this indictment as well, but the Government does not seek review of this part of its judgment.

Government asks that the judgments of conviction be reinstated. In their cross-petition the defendants seek dismissal of the indictment. We do not regard this as a correct disposition of the case. Since the correctness of the views concerning the meaning of the statute on which the trial court submitted the case to the jury goes to the root of the convictions and their reversal by the Circuit Court of Appeals, we shall confine our consideration of these cases to that issue. Consequently, we are concerned only with whether the defendants were tried in a manner consistent with the proper meaning and scope of the pertinent provisions of § 2 of the Act, which provide:

"Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

"(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

"(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

"(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); . . ."

The proof at the trial showed that the defendant Local 807 includes in its membership nearly all the motor truck drivers and helpers in the city of New York, and that during the period covered by the indictment defendants Campbell and Furey held office in the Local as delegates in charge of the west side of Manhattan and the other de-

fendants were members. Large quantities of the merchandise which goes into the city from neighboring states are transported in "over-the-road" trucks, which are usually manned by drivers and helpers who reside in the localities from which the shipments are made and who are consequently not members of Local 807. Prior to the events covered by this indictment, it appears to have been customary for these out-of-state drivers to make deliveries to the warehouses of consignees in New York and then to pick up other merchandise from New York shippers for delivery on the return trip to consignees in the surrounding states.

There was sufficient evidence to warrant a finding that the defendants conspired to use and did use violence and threats to obtain from the owners of these "over-the-road" trucks $9.42 for each large truck and $8.41 for each small truck entering the city. These amounts were the regular union rates for a day's work of driving and unloading. There was proof that in some cases the out-of-state driver was compelled to drive the truck to a point close to the city limits and there to turn it over to one or more of the defendants. These defendants would then drive the truck to its destination, do the unloading, pick up the merchandise for the return trip and surrender the truck to the out-of-state driver at the point where they had taken it over. In other cases, according to the testimony, the money was demanded and obtained, but the owners or drivers rejected the offers of the defendants to do or help with the driving or unloading. And in several cases the jury could have found that the defendants either failed to offer to work, or refused to work for the money when asked to do so. Eventually many of the owners signed contracts with Local 807 under whose terms the defendants were to do the driving and unloading within the city and to receive regular union rates for the work. No serious question is raised by the evidence

as to the ability of the defendants to perform the labor involved in these operations.

The first count of the indictment was based upon § 2 (a) of the Act and charged a conspiracy "to obtain the payment of money . . . [from the owners] by the use of, attempt to use and threat to use, force, violence and coercion." The second count accused the defendants of conspiring to obtain the property of the owners "with their consent induced by wrongful use of force and of fear," in violation of § 2 (b). The third and fourth counts alleged a conspiracy to violate § 2 (c), in that the defendants agreed "to commit and threatened to commit acts of physical violence and of physical injury to the persons and property" of their victims, in furtherance of the general scheme to violate §§ 2 (a) and 2 (b). Local 807 and all of the individual defendants were convicted on the first count; the Local and 17 individuals on the second; and the Local and 11 individuals on the third and fourth.

The question in the case concerns that portion of § 2 (a) which excepts from punishment any person who "obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, . . . the payment of wages by a bona-fide employer to a bona-fide employee." [2] The Circuit Court of Appeals reversed because it believed that the trial court had failed to instruct the jury properly with respect to this exception.

To ascertain the limits of the exception is a difficult undertaking. Always assuming the presence of violence and threats, as we must in the face of this record, three interpretations of varying restrictive force require consideration: (1) The exception applies only to a defendant

[2] This exception does not appear in § 2 (b). But we agree with the Circuit Court of Appeals that it too is subject to the exception. The trial judge's instructions show that he shared this view. And the definition of terms in § 3 (b) was apparently intended to achieve this result.

who has enjoyed the status of a bona fide employee prior to the time at which he obtains or attempts to obtain the payment of money by the owner. (2) Assuming that this is incorrect and that the exception may affect a defendant who has not been a bona fide employee prior to the time in question, it does not apply if the owner's intention in making the payment is to buy "protection" and not to buy service, even though the defendant may intend to perform the service or may actually perform it. We understand this to be the position adopted by the Government in its brief and argument in this Court. (3) Assuming that both (1) and (2) are incorrect, the exception is not applicable to a defendant who obtains the payment of money if the owner rejects his genuine offer of service. We understand this to be the theory of the dissenting judge below.

Confronted with these various interpretations, we turn for guidance to the legislative history of the statute. Pursuant to a Senate Resolution of May 8, 1933,[3] a sub-committee of the Senate Committee on Interstate Commerce which became known as the Copeland Committee, undertook an investigation of "rackets" and "racketeering" in the United States. After conducting hearings in several large cities, the committee introduced 13 bills, of which S. 2248 was one.[4] As introduced, as reported by the Senate Judiciary Committee,[5] and as passed without debate by the Senate,[6] S. 2248 embodied very general prohibi-

[3] S. Res. 74, 73d Cong., 1st Sess.

[4] See 78 Cong. Rec. 457, 73d Cong., 2d Sess.

[5] S. Rep. No. 532, 73d Cong., 2d Sess. The report included a memorandum from the Department of Justice in which it was stated: "The provisions of the proposed statute are limited so as not to include the usual activities of capitalistic combinations, bona fide labor unions, and ordinary business practices which are not accompanied by manifestations of racketeering."

[6] 78 Cong. Rec. 5735, 73d Cong., 2d Sess.

tions against violence or coercion in connection with interstate commerce and contained no specific mention of wages or labor. After the bill had passed the Senate, however, representatives of the American Federation of Labor expressed fear that the bill in its then form might result in serious injury to labor,[7] and the measure was redrafted by officials of the Department of Justice after conferences with the President of the Federation. In the course of this revision, the bill assumed substantially the form in which it was eventually enacted. In particular, the exception concerning "the payment of wages by a bona-fide employer to a bona-fide employee" was added, and a proviso preserving "the rights of bona-fide labor organizations" was incorporated in what became § 6 of the Act as finally passed.[8] In its favorable reports on this revised bill,[9] the House Committee on the Judiciary set forth without comment a letter from the Attorney General to the Committee, dated May 18, 1934. In this letter the Attorney General informed the Committee that the draft of the substitute bill had been "definitely approved" by the President of the American Federation of Labor and his counsel. The letter continued:

"We believe that the bill in this form will accomplish the purposes of such legislation and at the same time meet the objections made to the original bill.

"The original bill was susceptible to the objection that it might include within the prohibition the legitimate and bona fide activities of employers and employees. As the

[7] 78 Cong. Rec. 5859, 73d Cong., 2d Sess.

[8] "*Provided*, That no court of the United States shall construe or apply any of the provisions of this Act in such manner as to impair, diminish, or in any manner affect the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States." U. S. C., Title 18, § 420 (d).

[9] H. Rep. No. 1833, 73d Cong., 2d Sess.

purpose of the legislation is not to interfere with such legitimate activities but rather to set up severe penalties for racketeering by violence, extortion, or coercion, which affects interstate commerce, it seems advisable to definitely exclude such legitimate activities.

"As the typical racketeering activities affecting interstate commerce are those in connection with price fixing and economic extortion directed by professional gangsters, we have inserted subparagraphs (a) and (b), making such activities unlawful when accompanied by violence and affecting interstate commerce."

The substitute was agreed to by both the House and Senate without debate, when assurances were given that the approval of organized labor had been obtained.[10] Thereafter, while the bill awaited the signature of the President, Senator Copeland submitted a report [11] in which he referred to S. 2248 as one of eleven bills which had been enacted "to close gaps in existing Federal laws and to render more difficult the activities of predatory criminal gangs of the Kelly and Dillinger types."

This account of the legislative proceedings obviously does not provide specific definition of "wages," "bona-fide employer," or "bona-fide employee," as those terms are used in § 2 (a). But it does contain clear declarations by the head of the Department which drafted the section and by the sponsor of the bill in Congress, first, that the elimination of terroristic activities by professional gangsters was the aim of the statute, and second, that no interference with traditional labor union activities was intended.

It may be true that professional rackets have sometimes assumed the guise of labor unions, and, as the Circuit Court of Appeals observed, that they may have

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[10] 78 Cong. Rec. 10867, 11402–11403, 11482, 73d Cong., 2d Sess.

[11] S. Rep. No. 1440, 73d Cong., 2d Sess.

"covered their practices by the pretence that the tribute collected was pay for services rendered." And it may also be true that labor organizations of good repute and honest purpose can be misdirected and become agencies of blackmail. Nevertheless, Congress plainly attempted to distinguish militant labor activity from the other and to afford it ample protection. With this legislative purpose uppermost in mind, we return to test the three theories of interpretation of § 2 (a) to which we have referred.

(1) We hold that the exemption is not restricted to a defendant who has attained the status of an employee prior to the time at which he obtains or attempts or conspires to obtain the money. In the first place, we agree with the observation of the court below that "practically always the crux of a labor dispute is who shall get the job, and what the terms shall be . . ." To exclude this entire class of disputes from the protection of the exception would be unjustifiably to thwart the purpose of Congress as we understand it. In the second place, the structure and language of § 2 (a) itself is persuasive against so narrow an interpretation. It does not except "*a bona fide employee* who obtains or attempts to obtain the payment of wages from a bona-fide employer." Rather, it excepts "*any person* who . . . obtains or attempts to obtain . . . the payment of wages from a bona-fide employer to a bona fide employee." Certainly, an outsider who "attempts" unsuccessfully by violent means to achieve the status of an employee and to secure wages for services falls within the exception. And where, as here, the offense charged is conspiracy to violate the section, the defendants are entitled to immunity if their objective is to become bona fide employees and to obtain wages in that capacity, even though they may fail of their purpose.

(2) The Government contends, as we have said, that the test is "whether, under all the circumstances, it ap-

pears that the money has been paid for labor or for protection." If the defendants do not offer to work, or if they refuse to work, or if their offer to work is rejected by the owners, the Government argues that any payment made to them must be for protection rather than for services. And even if the defendants actually perform some work, it is said, this circumstance should be regarded as relevant but not controlling in determining "the one crucial issue in every case such as this—namely, whether the money was paid for labor or for protection."

We take this to mean that the intent of the owners in making the payment is to be regarded as controlling. We cannot agree. The state of mind of the truck owners cannot be decisive of the guilt of these defendants. On the contrary, their guilt is determined by whether or not their purpose and objective was to obtain "the payment of wages by a bona-fide employer to a bona-fide employee." And, of course, where the defendants are charged with conspiracy as they were here, it is particularly obvious that the nature of their plan and agreement is the crux of the case. The mischief of a contrary theory is nowhere better illustrated than in industrial controversies. For example, the members of a labor union may decide that they are entitled to the jobs in their trade in a particular area. They may agree to attempt to obtain contracts to do the work at the union wage scale. They may obtain the contracts, do the work, and receive the money. Certainly Congress intended that these activities should be excepted from the prohibitions of this particular Act, even though the agreement may have contemplated the use of violence. But it is always an open question whether the employers' capitulation to the demands of the union is prompted by a desire to obtain services or to avoid further injury or both. To make a fine or prison sentence for the union and its members contingent upon a finding by the jury

that one motive or the other dominated the employers' decision would be a distortion of the legislative purpose.

We are told, however, that under this view such a common law offense as robbery would become an innocent pastime, inasmuch as it is an essential element of that crime that the victim be moved by fear of violence when he parts with his money or property. This objection mistakes the significance of this requirement of proof in the case of robbery. Its true significance is that it places an added burden upon the prosecutor rather than upon the accused. That is, the prosecutor must first establish a criminal intent upon the part of the defendant and he must then make a further showing with respect to the victim's state of mind. The effect of this rule is to render conviction of robbery more, rather than less, difficult. There is no such restrictive evidentiary requirement in prosecutions under this Act. If the objective that these defendants sought to attain by the use of force and threats is not the objective to which the exception in § 2 (a) affords immunity, they are guilty and nothing further need be shown concerning the actual motive of the owners in handing over the money. On the other hand, if their objective did enjoy the protection of that exception, they are innocent and their innocence is not affected by the state of mind of the owners. We shall consider in a moment, in point (3) below, the legal consequences which flow from the owners' actual rejection of proffered services. But it needs to be emphasized here that for the owners to reject an offer of services amounts to an overt act on their part. It is conduct or behavior as distinct from intention or state of mind. It is an event which alters the external situation in which the defendants find themselves. The latter must then decide whether they will continue to push their demands for the money. Whether or not they are guilty of an offense under this

Act if they choose to do so we shall presently discuss. But that decision must be made in terms of their motives and purposes and objectives rather than those of the owners.

We do not mean that an offer to work or even the actual performance of some services necessarily entitles one to immunity under the exception. A jury might of course find that such an offer or performance was no more than a sham to disguise an actual intention to extort and to blackmail. But the inquiry must nevertheless be directed to whether this was the purpose of the accused or whether they honestly intended to obtain a chance to work for a wage.

(3) There remains to be considered the difficult issue which divided the court below. The whole court agreed that the payment of money to one who refuses to perform the services is not "the payment of wages by a bona-fide employer to a bona-fide employee," within the meaning of § 2 (a); it also agreed that payments to one who has been permitted actually to perform the services do fall within the exception. But it divided over the question whether the payment of money to one whose sincere offer to work is rejected constitutes the payment of "wages" to a "bona-fide employee." Since the offence charged here is conspiracy, these questions must be put somewhat differently. Thus, there is no conspiracy to violate the Act if the purpose of the defendants is actually to perform the services in return for the money, but there is a punishable conspiracy if their plan is to obtain money without doing the work. The doubtful case arises where the defendants agree to tender their services in good faith to an employer and to work if he accepts their offer, but agree further that the protection of their trade union interests requires that he should pay an amount equivalent to the prevailing union wage even if he rejects their proffered services.

We think that such an agreement is covered by the exception. The terms "wages," "bona-fide employee" and "bona-fide employer" are susceptible of more than one meaning, and the background and legislative history of this Act require that they be broadly defined. We have expressed our belief that Congress intended to leave unaffected the ordinary activities of labor unions. The proviso in § 6 safeguarding "the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof," although obscure indeed, strengthens us somewhat in that opinion.[12] The test must therefore be whether the particular activity was among or is akin to labor union activities with which Congress must be taken to have been familiar when this measure was enacted. Accepting payments even where services are refused is such an activity. The Circuit Court has referred to the "stand-by" orchestra device, by which a union local requires that its members be substituted for visiting musicians, or, if the producer or conductor insists upon using his own musicians, that the members of the local be paid the sums which they would have earned had they performed. That similar devices are employed in other trades is well known. It is admitted here that the stand-by musician has a "job" even though he renders no actual service. There can be no question that he demands the payment of money regardless of the management's willingness to accept his labor. If, as it is agreed, the musician would escape punishment under this Act even though he obtained his "stand-by job" by force or threats, it is certainly difficult to see how a teamster could be punished for engaging in the same practice. It is not our province either to approve or disapprove such tactics. But we do believe that they are not "the activities of

[12] See note 8, *supra*.

predatory criminal gangs of the Kelly and Dillinger types" at which the Act was aimed, and that on the contrary they are among those practices of labor unions which were intended to remain beyond its ban.

This does not mean that such activities are beyond the reach of federal legislative control. Nor does it mean that they need go unpunished. The power of state and local authorities to punish acts of violence is beyond question. It is not diminished or affected by the circumstance that the violence may be the outgrowth of a labor dispute. The use of violence disclosed by this record is plainly subject to the ordinary criminal law.

As we have said, the evidence with respect to the crucial issues was conflicting. Thus, the jury might have believed that in some instances the defendants refused to do any driving or unloading when requested to do so, that in other cases they did not offer to work, that in other cases their offers were rejected, and that in still other cases they actually did some or all of the driving and unloading. In the early stages, written contracts were not in existence; later, a number of the owners signed contracts and the defendants performed the services for which they called.

The jury's task was difficult. The trial lasted six weeks. The jury required two days in which to reach a verdict, and twice during that period it sought further instructions from the court, particularly with reference to the law relating to labor activity. In such circumstances, where acts of violence naturally would influence the minds of the jury, the instructions were of vital importance, especially as they affected the question of whether the payments which the defendants conspired to obtain fell within the exception contained in § 2 (a). The trial judge made a number of statements which were

relevant to this issue, but we agree with the Circuit Court that the following were decisive:

"If the jury find that the sums of money paid by the truck operators were not wages so paid in return for services performed by such defendants, but were payments made by the operators in order to induce the defendants to refrain from interfering unlawfully with the operation of their trucks, then the sums in question may not be regarded as wages paid by a bona fide employer to a bona fide employee.

"The fact that any defendant may have done some work on a truck of an operator is not conclusive as to whether payments received by such defendants were wages; the jury may consider the performance of work by a defendant as evidence of the nature of the relationship between the defendant and the operator as establishing the status of a bona fide employer and a bona fide employee. If, however, what the operator was paying for was not labor performed but merely for protection from interference by the defendants with the operation of operator's trucks, the fact that a defendant may have done some work on an operator's truck is not conclusive."

These instructions embody the rule for which the Government contends, and which we think is erroneous for the reasons we have given. Under them the jury was free to return a verdict of guilty if it found that the motive of the owners in making the payments was to prevent further damage and injury rather than to secure the services of the defendants. Whether or not the defendants were guilty of conspiracy thus became contingent upon the purposes of others and not upon their own aims and objectives. Moreover, the charge failed correctly to explain the legal consequences of proof that the owners had rejected bona fide offers by the defendants to perform

the services. As we have said, the jury was bound to acquit the defendants if it found that their objective and purpose was to obtain by the use or threat of violence the chance to work for the money but to accept the money even if the employers refused to permit them to work. While the 48th, 49th and 58th instructions requested by the defendants, all of which were refused, do not constitute a complete exposition of the rules which we regard as applicable to this case, they cover a good deal of the ground and should have been granted. The 48th states that "it is not an offense under the Anti-Racketeering Act for anyone to obtain employment by the use or threat of violence if the intention is to actually work for the pay received, and to give an honest day's work for a day's wage." The 49th declared that "it is not the purpose of the Anti-Racketeering Act to prevent labor unions from attempting to obtain employment for their members, . . . and that the use of violence or the threat of violence for such purposes, while punishable under the laws, is not punishable under the Anti-Racketeering Act." The 58th requested charge read as follows:

"I charge you that in order that the defendants herein may be convicted under any one of the four counts of the Anti-Racketeering indictment, you must find a conspiracy under such counts; and that in order to sustain the charge of conspiracy under any one of the counts under the Anti-Racketeering indictment, the proof must show not only that individual defendants obtained money without rendering adequate service, but that it was the aim and object of the conspiracy that . . . [they][13] should obtain money without rendering adequate service therefor."

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[13] The words "all of the conspirators," rather than "they," appeared in the requested instruction as submitted to the trial judge. We think that as so expressed the charge would have been erroneous, but that with this change it states the correct rule.

Since the instructions denied, and the misleading instructions actually given, go to what is indeed the heart of the case, we hold that the convictions cannot stand and that the judgment of the Circuit Court of Appeals must be

Affirmed.

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

MR. CHIEF JUSTICE STONE, dissenting:

I think the judgment should be reversed, and the convictions affirmed, subject only to an examination of the sufficiency of the evidence as to some of the respondents, and to a consideration of whether the union itself is a "person" within the meaning of the statute.

Respondents, who are members of a labor union, were convicted of conspiracy to violate the Anti-Racketeering Act. They, or some of them, lay in wait for trucks passing from New Jersey to New York, forced their way onto the trucks, and by beating or threats of beating the drivers procured payments to themselves from the drivers or their employers of a sum of money for each truck, $9.42 for a large truck and $8.41 for a small one, said to be the equivalent of the union wage scale for a day's work. In some instances they assisted or offered to assist in unloading the trucks; and in others they disappeared as soon as the money was paid, without rendering or offering to render any service.

The Anti-Racketeering Act condemns the obtaining or conspiracy to obtain the payment of money or delivery of property by "the use of . . . force, violence, or coercion . . ." To this definition of the offense Congress added two—and only two—qualifications. It does not embrace the "payment of wages by a bona fide employer to a bona fide employee," and the provisions of the Act are

not to be applied so as to "affect the rights of bona fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States."

There is abundant evidence in the record from which the jury could have concluded that respondents, or some of them, conspired to compel by force and violence the truck drivers or their employers to pay the sums of money to respondents or some of them; that the payments were made by the drivers or truck owners to purchase immunity from the violence of respondents and for no other reason; and that this was the end knowingly sought by respondents.

I can only conclude that such conduct accompanied by such a purpose constitutes a violation of the statute even though the defendants stood ready to unload the trucks in the event that they were hired to do so. Unless the language of the statute is to be disregarded, one who has rejected the proffered service and pays money only in order to purchase immunity from violence is not a bona fide employer and is not paying the extorted money as wages. The character of what the drivers or owners did and intended to do—pay money to avoid a beating—was not altered by the willingness of the payee to accept as wages for services rendered what he in fact intentionally exacted from the driver or owner as the purchase price of immunity from assault, and what he intended so to exact whether the proffered services were accepted or not. It is no answer to say that the guilt of a defendant is personal and cannot be made to depend upon the acts and intention of another. Such an answer if valid would render common law robbery an innocent pastime. For there can be no robbery unless the purpose of the victim in handing over the money is to avoid force. Precisely as under the present statute, the

robber's use of force and its intended effect on the victim are essential elements of the crime both of which the prosecutor must prove. Under this statute when both are present the crime is complete, irrespective of other motives which may actuate the offender, if he is also aware, as we must take it the jury found, that the money is not in fact paid as wages by a bona fide employer. It is a contradiction in terms to say that the payment of money forcibly extorted by a payee who is in any case a lawbreaker, and paid only to secure immunity from violence, without establishment of an employment relationship or the rendering of services, is a good faith payment or receipt of wages.

Even though the procuring of jobs by violence is not within the Act, and though this includes the "stand-by" job where no actual service is rendered, the granted immunity, unless its words be disregarded, does not extend to the case where the immediate objective is to force the payment of money regardless of the victim's willingness to accept and treat the extortioner as an employee. It was for the jury to say whether such was the objective of respondents and whether they were aware that the money was paid because of their violence and not as wages.

When the Anti-Racketeering Act was under consideration by Congress, no member of Congress and no labor leader had the temerity to suggest that such payments, made only to secure immunity from violence and intentionally compelled by assault and battery, could be regarded as the payment of "wages by a bona fide employer" or that the compulsion of such payments is a legitimate object of a labor union, or was ever made so by any statute of the United States. I am unable to concur in that suggestion now. It follows that all the defendants who conspired to compel such payments by force and violence, regardless of the willingness of the

victims to accept them as employees, were rightly convicted.

If I am right in this conclusion, there was no error in the instructions to the jury. All the counts of the indictment were for conspiracy to violate the statute. The jury was told that to convict it must find conspiracy or agreement by respondents to violate the statute and that they must have the purpose or intention to commit the crime which it defined. As I have said, the intention to commit the offense includes the intention to use force and violence on the victim and the intention that the victim shall pay because of it. The jury was then instructed that the offense defined by the statute was the obtaining of money or property by force and violence but that "the jury may not find the defendants guilty on any count of the Anti-Racketeering Act indictment if the money which they are charged with having obtained from truck owners through the use of force and violence or threats of force and violence was paid as wages, and if the defendants who received the money were bona fide employees and the truck operators who paid the money were bona fide employers . . . If the jury find that the sums of money paid by the truck operators were not wages so paid in return for services performed by such defendants, but were payments made by the operators in order to induce the defendants to refrain from interfering unlawfully with the operation of their trucks, then the sums in question may not be regarded as wages paid by a bona fide employer to a bona fide employee . . . If, however, what the operator was paying for was not labor performed but merely for protection from interference by the defendants with the operation of the operator's trucks, the fact that a defendant may have done some work on an operator's truck is not conclusive."

Respondents' 48th and 49th requests were rightly refused. So far as they involved a ruling that the obtaining

of employment by force and violence does not constitute the offense, the court had already ruled specifically that there could be no substantive offense unless the payment of money or property had been obtained by force. But, in any case, both requests were erroneous because they made respondents' willingness to work the test of guilt, regardless of the intended and actual effect of the violence on the victims in compelling them to pay the money not as wages but in order to secure immunity from assault. The first part of the 58th request likewise had already been charged. The rest was plainly defective, since it required an acquittal unless it was the aim and object of the conspiracy that "all of the conspirators should obtain money without rendering adequate service therefor." Upon any theory of the meaning of the statute, it was not necessary for the Government to show that it was the object of the conspiracy that "all the conspirators" should receive payments of money. They would be equally guilty if they had conspired to procure the payments to some.

PEARCE v. COMMISSIONER OF INTERNAL REVENUE.

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

No. 306. Argued February 5, 1942.—Decided March 9, 1942.

1. A divorced wife when taxed on payments received from an annuity provided by her former husband by way of settlement in connection with their divorce can rebut the presumption sustaining the tax by merely raising doubts and uncertainties as to whether the payments were made pursuant to a continuing obligation of the husband to support her. P. 547.

The husband, on the other hand, to avoid the tax, if laid upon him, bears the burden of proving clearly and convincingly that the payments were not made pursuant to any such continuing obligation.

2. Anticipating divorce, a husband made an agreement with his wife for the termination of his obligation to pay for her support, in the event that he purchased for her a certain annuity. After their divorce (in Texas) the annuity was purchased in accordance with the agreement and the annuity payments which she received were taxed as her income by the federal Government. *Held:*

(1) The wife's contention that the tax on the payments should have been laid on the husband can not be based on a continuing contractual obligation to contribute to her support, because the agreement and its fulfillment terminated his personal obligation to make payments. P. 547.

(2) Assuming that the power of the Texas court to make future divisions of property as between the husband and wife is equivalent to a power to provide permanent alimony, yet the wife failed to rebut the presumption of correctness sustaining the tax, not having shown that it was at least doubtful and uncertain whether that court, as an incident to its power to require the husband to support her, retained control over the annuity contract or the income from it. P. 549.

3. A property settlement made for the purpose of maintaining or supporting a divorced wife may be treated for income tax purposes as mere security for the husband's continuing obligation, dependent on such considerations as whether it contains, or is interrelated with, contractual obligations of the husband for her support; whether the court has a reserved power to alter or modify it; or whether the husband retains any substantial interest in the property conveyed. Where the settlement carries some of the earmarks of a security device, then the power of the court to add to the husband's personal obligations may be especially significant. P. 552.

4. But where the settlement appears to be absolute and outright, and on its face vests in the wife the indicia of complete ownership, it will be treated as that which it purports to be, in absence of evidence that it was only a security device for the husband's continuing obligation to support. P. 552.

5. In this case the wife made no showing whatsoever that the Texas court retained the power to reallocate the income from the annuity contract or to control it in any way as an incident of its power to require the husband to support the wife; nor did she show that the court imposed any personal obligation on the husband in respect to the settlement in question. P. 552.

6. Proof that the Texas court might add to the husband's personal obligations as an incident to a future property settlement is no substitute for proof that the court had the power to remake the property settlement actually consummated. P. 553.

120 F. 2d 228, affirmed.

CERTIORARI, 314 U. S. 593, to review a judgment affirming a decision of the Board of Tax Appeals sustaining a deficiency assessment. 42 B. T. A. 91.

Mr. Gordon S. P. Kleeberg for petitioner.

Mr. Gordon B. Tweedy, with whom *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Michael H. Cardozo, IV,* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner and her husband separated in 1913. There was an agreement providing for monthly payments by the husband for her support. That agreement was amended in 1916 so as to provide monthly payments to her of $500 for life. Her husband, however, was given an option to terminate the arrangement by purchasing an annuity contract from a life insurance company which would pay petitioner $500 a month for the rest of her life. In 1917 petitioner obtained an absolute divorce in Texas, her husband entering a personal appearance. Neither alimony nor a property settlement was mentioned in the divorce decree. There were no children. Several months after the divorce, Mr. Pearce purchased an annuity from an insurance company for petitioner's benefit. The annuity provided for a payment of $500 per month during her life.

Neither petitioner nor Mr. Pearce included the $6,000 received by her under the annuity contract in their federal

income tax returns for 1935 and 1936. The Commissioner sent deficiency notices to both of them. Each appealed to the Board of Tax Appeals. At the hearing the Commissioner contended that the payments were income of petitioner. The Board upheld that contention. 42 B. T. A. 91. The Circuit Court of Appeals affirmed the judgment of the Board, one judge dissenting. 120 F. 2d 228. We granted the petition for certiorari because of the manner in which that court applied the rule of *Helvering* v. *Fitch*, 309 U. S. 149, and *Helvering* v. *Leonard*, 310 U. S. 80, in case the ex-wife rather than the husband was sought to be taxed on alleged alimony payments.

The Circuit Court of Appeals reached the conclusion that petitioner was liable by the following line of reasoning. The determination of the Commissioner that the monthly payments were income of petitioner was presumptively correct; the burden to show error rested on petitioner. *Welch* v. *Helvering*, 290 U. S. 111, 115. Error might be shown by submitting "clear and convincing proof" (*Helvering* v. *Fitch*, *supra*, p. 156) that the payments were made pursuant to a continuing obligation of her former husband to provide for her support, so as to make the rule of *Douglas* v. *Willcuts*, 296 U. S. 1, applicable. The burden of establishing error is not sustained by a divorced wife merely by showing that an obligation of her former husband might have continued despite the divorce. Since it is doubtful and uncertain under Texas law whether petitioner's former husband was discharged of his marital obligation by the settlement in question, petitioner failed to show that the presumptively correct determination that she was liable was erroneous.

We do not think that that was a correct application of the rule of the *Fitch* and *Leonard* cases. Those cases hold that the income is taxable to the former husband, not only

where it is clear that payments to his ex-wife were made pursuant to a continuing liability created by his contract or by local law, but also where his undertaking or local law makes that question doubtful or uncertain. Those cases, like *Douglas* v. *Willcuts, supra,* involved situations where the divorced husband was sought to be taxed on payments to his ex-wife. But the rule which they express supplies the criteria for determining, in absence of a different statutory formula, whether payments received by the ex-wife are properly taxable to her or to her divorced husband. If the Commissioner proceeds against the ex-wife, she sustains her burden of rebutting his presumptively correct determination merely by showing doubts and uncertainties as to whether the payments were made pursuant to her former husband's continuing obligation to support her. If the Commissioner proceeds against her former husband, he sustains his burden by submitting clear and convincing proof that the payments were not made pursuant to any such continuing obligation. *Helvering* v. *Fuller,* 310 U. S. 69. The other course would make the liability of the divorced wife or the divorced husband wholly dependent on the election of the Commissioner to proceed against one rather than the other where, for example, local law was uncertain. But the rule of *Douglas* v. *Willcuts, supra,* rests on a more substantial basis. Its roots are in local law and the undertakings of the husband. It calls for the use of the same criteria whether the husband or the wife is sought to be taxed.

We think, however, that petitioner has not maintained her burden in this case. Her former husband was not under a continuing contractual obligation to contribute to her support. For, the agreement made in 1916 provided for the termination of his personal obligation to make payments to her in the event that he purchased

the designated annuity. And so far as Texas law is concerned, she has not maintained her burden. Her showing as to Texas law is illustrated by the following.

By statute in Texas, alimony may be awarded during the pendency of a suit for a divorce "until a final decree shall be made in the case." 13 Vernon's Civil Stats., Art. 4637. "This statute is exclusive in its very nature, and no alimony can be decreed by any court in this state except under its express terms." *Martin* v. *Martin,* 17 S. W. 2d 789, 791–792. It has been broadly stated in *Phillips* v. *Phillips,* 203 S. W. 77, 79 that, "In this state the legal duty of the husband to support his wife ceases upon the severance of the marital bonds, nor has a court the power to decree that a husband or his property may be subjected to such support after divorce. Permanent alimony is not provided for by Texas statute." And see *Pape* v. *Pape,* 13 Tex. Civ. App. 99, 35 S. W. 479; *Boyd* v. *Boyd,* 22 Tex. Civ. App. 200, 54 S. W. 380. It is, however, provided by statute that the divorce court shall order "a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any." 13 Vernon's Civil Stats., Art. 4638. That power extends not only to community property but to the separate property of the husband. *Ex parte Scott,* 133 Tex. 1, 123 S. W. 2d 306; *Clark* v. *Clark,* 35 S. W. 2d 189; *Berg* v. *Berg,* 115 S. W. 2d 1171; *Keton* v. *Clark,* 67 S. W. 2d 437. At times the divorce court has made such a division of the estate as apparently to impose on the husband a personal obligation to make stated payments to his wife. *Wiley* v. *Wiley,* 33 Tex. 358. Furthermore, a divorce decree which does not settle the rights of the parties to community property may not preclude a subsequent suit by the wife to establish her rights in it. See *Gray* v. *Thomas,* 83 Tex. 246, 18 S. W. 721. And the decree may

be corrected to conform to the intention of the parties. *Keller* v. *Keller,* 135 Tex. 260, 141 S. W. 2d 308. The power of the court to modify a property settlement previously approved, so as to give the wife an interest in property not covered by the earlier decree, has been denied in absence of fraud or mistake. *Cannon* v. *Cannon,* 43 S. W. 2d 134. Petitioner challenges the reliability of the latter case because on appeal the case was dismissed for want of jurisdiction (121 Tex. 634), which meant either disagreement with the reasoning but approval of the result, or lack of jurisdiction. 3 Vernon's Civil Stats., Art. 1728. And see *Republic Ins. Co.* v. *School Dist.,* 133 Tex. 545, 125 S. W. 2d 270.

We need not, however, endeavor to resolve that doubt. Nor need we speculate as to the power of the court at some future time to order a division of property in this case, and as an incident thereto to impose on petitioner's husband a personal obligation, as was apparently done by the divorce decree in *Wiley* v. *Wiley, supra.* See 6 Tex. L. Rev. 344 discussing *Helm* v. *Helm,* 291 S. W. 648. For even though petitioner established that the divorce court retained that broad power, not specifically reserved, and even though we assume that the power to make a division of property is the equivalent of a power to provide permanent alimony, she has not maintained her burden of rebutting the presumptively correct determination of the Commissioner that the income from this annuity contract was taxable to her. In order to maintain that burden, she would have to show that it was at least doubtful and uncertain whether the Texas court, as an incident of its power to require the husband to support his wife, retained control over this annuity contract or the income from it. That at least is the result unless we are to broaden the base on which the *Fitch, Fuller,* and *Leonard* cases rest.

Those cases involved so-called alimony trusts. In each, the trust was irrevocable. In each, the husband had an obligation to support his wife.

In the *Fitch* case, the trust provided that the wife was to receive, during her life, $600 a month from the income of the trust property; the husband, the balance. We held that the husband had not shown by "clear and convincing proof" that "in Iowa divorce law the court has lost all jurisdiction to alter or revise the amount of income payable to the wife from an enterprise which has been placed in trust. For all that we know it might retain the power to reallocate the income from that property even though it lacked the power to add to or subtract from the corpus or to tap other sources of income. If it did have such power, then it could be said that a decree approving an alimony trust of the kind here involved merely placed upon the pre-existing duty of the husband a particular and specified sanction." 309 U. S. at p. 156. And in speaking of the alimony trust involved in *Douglas* v. *Willcuts, supra,* we stated (pp. 151–152):

"It is plain that there the alimony trust, which was approved by the divorce decree, was merely security for a continuing obligation of the taxpayer to support his divorced wife. That was made evident not only by his agreement to make up any deficiencies in the $15,000 annual sum to be paid her under the trust. It was also confirmed by the power of the Minnesota divorce court subsequently to alter and revise its decree and the provisions made therein for the wife's benefit. Likewise consistent with the use of the alimony trust as a security device was the provision that on death of the divorced wife the corpus of the trust was to be transferred back to the taxpayer."

In the *Leonard* case, income from the trust was to be paid to the wife for her life, which together with income from other property was estimated at $30,000 a year. A separa-

tion agreement provided that the husband would pay his wife an additional $35,000 each year during her life, so that her aggregate net income for the maintenance of herself and her children would be $65,000 a year. The separation agreement also provided that, in the event the husband's ability to make the annual payment of $35,000 became impaired, he might apply to a court for a reduction of his obligation of not less than $10,000 a year. We held that the husband had not sustained his burden of showing that "local law and the alimony trust" gave him "a full discharge" from his obligation to support his wife. 310 U. S., p. 86. The trust and the undertaking in the separation agreement were integral parts of an arrangement by which the "maintenance and support" of the wife "were secured." p. 85. We noted that it was not clear, under New York law, whether or not such a settlement could be remade by the court, though there was some authority which indicated that the divorce court's reserved power might be exercised "where the provision in the separate agreement, approved by the decree, is for support and maintenance." pp. 86–87. In view of that fact and the nature of the settlement, we concluded that the husband had not shown that the trust was not mere security for his continuing obligation to support his wife.

In the *Fuller* case, it was clear, under Nevada law, that the court retained no control over the divorce decree which approved the trust settlement. Since there was no such reserved power, and since the trust contained no contractual undertaking by the husband for support of the wife, we concluded that his obligation to support had been *pro tanto* discharged. We held, however, that the husband was taxable on a $40 weekly payment which he had agreed to make to his wife. But that fact did not make him taxable on income from the trust also, since the provision for weekly payments and the trust "were not so interrelated or interdependent as to make the trust a security for the

weekly payments." p. 73. We also noted (p. 76) that, though "the divorce decree extinguishes the husband's preëxisting duty to support the wife, and though no provision of the trust agreement places such obligation on him, that agreement may nevertheless leave him with sufficient interest in or control over the trust as to make him the owner of the corpus for purposes of the federal income tax," under the rule of *Helvering* v. *Clifford,* 309 U. S. 331.

Thus, a property settlement made for the purpose of maintaining or supporting the wife may be treated for income tax purposes as mere *security* for the husband's continuing obligation, dependent on such considerations as whether it contains, or is interrelated with, contractual obligations of the husband for her support; whether the court has a reserved power to alter or modify it; or whether the husband retains any substantial interest in the property conveyed. Where the settlement carries some of the earmarks of a security device, then the power of the court to add to the husband's personal obligations may be especially significant. See *Helvering* v. *Leonard, supra.* But where, as here, the settlement appears to be absolute and outright, and on its face vests in the wife the indicia of complete ownership, it will be treated as that which it purports to be, in absence of evidence that it was only a security device for the husband's continuing obligation to support. There may be difficulty in placing a particular case on one side of the line rather than the other. But as stated by Mr. Justice Holmes in *Irwin* v. *Gavit,* 268 U. S. 161, 168, "That is the question in pretty much everything worth arguing in the law." And see *Harrison* v. *Schaffner,* 312 U. S. 579, 583.

As we have said, petitioner has made no showing whatsoever that the Texas court retained the power to reallocate the income from this annuity contract or to control it in any way as an incident of its power to require the husband

to support the wife. She has not shown that the divorce court imposed any personal obligation on the husband in respect to the settlement in question. And she is not aided by those cases which enforce agreements of the husband to make periodic payments to the wife. See *Johnson* v. *Johnson,* 14 S. W. 2d 805. There is no such agreement here. Proof that the Texas court might add to the husband's personal obligations as an incident to a future property settlement is no substitute for proof that the court had the power to remake this property settlement after it was consummated. Hence there is no ground for concluding that this settlement, which is absolute on its face, is mere security for an obligation of a husband to support his wife.

"The correct ground for refusing to tax such income to the husband is merely that it is the lump sum which discharges him and not the future income received by the wife." Paul, Five Years with *Douglas* v. *Willcuts,* 53 Harv. L. Rev. 1, 17, note 44. We noted in *Helvering* v. *Fuller, supra,* p. 74, that outright transfers of property to the wife, though providing for her maintenance and support, were no different from cases "where any debtor, voluntarily or under the compulsion of a court decree, transfers securities, a farm, an office building, or the like, to his creditor in whole or partial payment of his debt." We do not think that it would be proper to extend the rule of *Douglas* v. *Willcuts, supra,* to such a situation. The possibility that the divorce court might add to the husband's personal obligation does not alter the result. As in the *Fuller* case, the transfer of property to the wife might result only in a partial discharge of the husband's obligation. If the husband undertook, or was directed, to make other payments, he might be taxable on them. But the fact that he is taxable on a part of the payments received by the wife does not necessarily make him taxable on all. *Helvering* v.

Fuller, supra, p. 73. Hence the statement in *Helvering* v. *Fitch, supra,* 309 U. S. at p. 156, that it must be clear "that local law and the alimony trust have given the divorced husband a full discharge and leave no continuing obligation however contingent" is to be read in light of the fact that the alimony trust in that case was deemed to be a mere security device for the husband's continuing obligation to support. For the husband was relieved from payment of the tax on income from the property settlement in the *Fuller* case though he had a continuing obligation to pay the wife $40 a week.

If the rule of *Douglas* v. *Willcuts, supra,* is not to be extended to this type of case, then, on the showing which has been made, the husband would have sustained his burden in case the Commissioner had proceeded against him. Cf. Mitchell v. Commissioner, 38 B. T. A. 1336. Clearly, then, the wife may not escape.

Such cases as *Helvering* v. *Horst,* 311 U. S. 112, *Helvering* v. *Eubank,* 311 U. S. 122, and *Harrison* v. *Schaffner, supra,* are not opposed to this result. Those cases dealt with situations where the taxpayer had made assignments of income from property. He was held taxable on the income assigned by reason of the principle "that the power to dispose of income is the equivalent of ownership of it and that the exercise of the power to procure its payment to another, whether to pay a debt or to make a gift, is within the reach" of the federal income tax law. *Harrison* v. *Schaffner, supra,* p. 580. But in those cases the donor or grantor had "parted with no substantial interest in property other than the specified payments of income." *Id.* p. 583. Here he has parted with the corpus. And "the tax is upon income as to which, in the general application of the revenue acts, the tax liability attaches to ownership." *Blair* v. *Commissioner,* 300 U. S. 5, 12. Finally, there is no barrier under the income tax laws to taxing the holder of

an annuity on the income received, however his interest in the fund which produces the income may be described. Cf. *Irwin* v. *Gavit, supra.*

Affirmed.

MR. JUSTICE FRANKFURTER, dissenting:

The social fact that a husband is normally under a responsibility to provide for his wife even after they are divorced, is the basis for the rule that monies received by a wife under a divorce settlement are presumed to be in discharge of a continuing obligation of the husband. I therefore agree with the decision of the Court to the extent that it reinforces this rule as a rule of policy, and not one of caprice varying with the sex of the taxpayer against whom the Commissioner chooses to proceed. I agree that if the Commissioner proceeds against the wife, "she sustains her burden of rebutting his presumptively correct determination merely by showing doubts and uncertainties as to whether the payments were made pursuant to her former husband's continuing obligation to support her," and that if, on the other hand, the Commissioner determines that the payments are taxable to the husband, the latter sustains his burden only "by submitting clear and convincing proof that the payments were not made pursuant to any such continuing obligation." But I do not agree that the petitioner has failed to make the showing which is required under the rule professed by the Court.

Local law may provide that the transfer of property under a divorce settlement finally and definitively terminates a husband's obligation to support his wife, and that, once such a settlement is made, the wife loses her right to apply to a court for an order requiring the husband to support her. If the local law gives the settlement such effect, it is immaterial what the nature of the

transferred property is. For, in such a case, the income derived from the property cannot be regarded as conferring any benefit upon the husband, and it is therefore taxable to the wife. On the other hand, local law may provide that, even though a husband has made a complete, irrevocable transfer of property, he has nevertheless not obtained a full discharge of his marital obligations to his wife, and that, where circumstances in the future may warrant, a court can order the husband to make further contributions to her support. In such a case, the husband is still under a "continuing obligation however contingent," *Helvering* v. *Fitch,* 309 U. S. 149, 156; *Helvering* v. *Leonard,* 310 U. S. 80, 84, and, since the income received by the wife from the property contributes to her support and thus serves to discharge the obligation which under local law the husband still owes her, the income should be taxable to him. "The dominant purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid." *Helvering* v. *Horst,* 311 U. S. 112, 119; and see *Harrison* v. *Schaffner,* 312 U. S. 579.

The fact that the wife may, years after the settlement, have to go to court for an order requiring the husband to make additional payments for her support is of no legal consequence if the husband may be required to make such payments. A legal obligation may continue, even though its burden is contingent upon future judicial action. A wife's receipt of income from property settled upon her may make it unnecessary to her ever to apply for a court order. But it does not follow that, unless and until she goes to court for such an order, her husband is under no legal obligation to support her. If the income from the property should dwindle to the point where the wife can no longer maintain herself,

and the law has continued its hold upon the husband so that he may be required to make further contributions to her support, then plainly the husband is still under a "continuing obligation however contingent." The determinative fact is that the law has continued its hold upon the husband, not that it has reserved the power to modify the particular settlement.

It is utterly immaterial whether the property transferred was an irrevocable trust, as in the *Fitch* and *Leonard* cases, or an annuity contract, as we have here. For the annuity is taxable income, *Irwin* v. *Gavit,* 268 U. S. 161, and the procurement, by the husband's purchase, of its payment to his wife renders the annuity taxable income to him if it is in discharge of his obligation, quite as much as if he had procured the payment by creating a trust of his property. *Harrison* v. *Schaffner, supra.*

In every case, the decisive inquiry is whether the husband's obligation subsists after the divorce settlement, or whether, as a result of the settlement, he is quits of his wife, once and for all, for better or for worse. If he is under a continuing obligation, the property transferred, whether it be an irrevocable trust or an annuity contract, is a security device only in the sense that it operates to secure the fulfillment of the obligation. If the fact that the husband has divested himself of control over the transferred property were determinative, certainly the *Fitch* and *Leonard* cases, at least, would have been decided the other way. For in each of these cases the husband conveyed an absolutely irrevocable trust, over which he had no greater control than the husband has over the annuity in the case before us. These cases show that if a husband is under a continuing obligation to support his wife, income from the property is taxable to him, not because he has retained any interest in or control over the property, but because the income dis-

charges *pro tanto* a legal obligation which he owes and thus confers a taxable benefit upon him. The ultimate criterion of taxability, therefore, is not whether a state court has reserved power to control the property transferred by a husband under a divorce settlement, but whether "the court lacks the power to add to his personal obligations." *Helvering* v. *Leonard,* 310 U. S. 80, 87.

In law, as in life, lines have to be drawn. But the fact that a line has to be drawn somewhere does not justify its being drawn anywhere. The line must follow some direction of policy, whether rooted in logic or experience. Lines should not be drawn simply for the sake of drawing lines.

The decisions of this Court dealing with the question before us have turned upon whether local law was uncertain as to the existence of a continuing obligation on the part of the husband to support the wife. The opinion of the Court now introduces another element, namely, whether the local law is uncertain as to the power of the state courts to remake the particular settlement. This, it seems to me, has no valid relation to the basic principle of tax liability that "he who receives benefits should be taxed." Whether a husband is benefited from the payment of monies to his divorced wife depends upon his obligation to her which the payment of the monies served to discharge, not upon the nature of the wife's interest in the property he has transferred to her. To introduce such an unwarranted refinement is to clog the administration of the revenue laws.

But, in any event, all of the judges of the Circuit Court of Appeals were agreed that "the law of Texas is uncertain as to whether the taxpayer's husband discharged himself of his marital liability by the settlement at bar." 120 F. 2d 228, 230. This general uncertainty as to Texas law is

controverted now, not by controlling Texas authority but by extended argumentation and speculation. The Court suggests that, had the Commissioner gone against the husband, he would have sustained the burden as heretofore defined, namely, of showing, "by submitting clear and convincing proof," that under local law he was under no continuing obligation. Support for the proposition is drawn not from any Texas authority, whether statute or decision, but from a decision of the Board of Tax Appeals, Mitchell *v.* Commissioner, 38 B. T. A. 1336. But, in that case there was a division of property between husband and wife, which included property belonging to the wife under an earlier arrangement entirely unrelated to the husband's marital obligations. The Board held that the income from such property could not, therefore, be taxed to the husband. As its opinion shows, the decision did not turn on the Texas law of divorce: "We think that the trust income which was paid to her [the wife] was her separate income. It was not paid in satisfaction of any legal obligation of J. A. Mitchell [the husband] and it is not taxable to him." 38 B. T. A. at 1342.

The Court's exegesis of Texas law shows it to be no less uncertain than was the Iowa law in the *Fitch* case, or the New York law in the *Leonard* case. The effect of the Court's ruling that the wife, in order to escape tax liability, must clearly establish that the state court has reserved the power to modify the terms of the particular property settlement is to reject the rule of policy enunciated earlier in its opinion. For there is no clear Texas authority, and under the rule of the *Fitch* and *Leonard* cases, which the Court does not purport to modify, the husband would be unable to show, "not by mere inference and conjecture but by 'clear and convincing proof' " (*Helvering* v. *Leonard, supra,* at 86; see *Helvering* v. *Fitch, supra,* at 156), that the payments made to his wife did not discharge a con-

tinuing obligation which he owed her. Therefore, liability under the tax law is made actually to depend upon whether the Commissioner elects to go against the husband or the wife. Having closed the front door to determination of tax liability by caprice, the Court allows caprice to enter through the back door of "presumption."

We brought this case here in order to clarify an important question arising under the federal revenue laws, not to re-examine the correctness of the lower court's finding regarding the uncertainty of Texas law as applied to this case. The general uncertainty of Texas law with respect to control over divorce settlements is conceded—and that is the decisive factor for our purpose. The absence of specific Texas authority dealing with such an annuity settlement as we have here does not lessen or remove that uncertainty, or justify us in making assumptions regarding the Texas law affecting such a settlement. Where prophecy as to a state court's ruling on its local law is not imperatively required of us, experience counsels abstention from prophecy. No ruling of ours can make Texas law.

I believe therefore that the judgment below should be reversed because of the ruling on federal law as to which we all agree, and that Texas law should be left where the Circuit Court of Appeals found it.

The CHIEF JUSTICE joins in this dissent.

STONITE PRODUCTS CO. *v.* MELVIN LLOYD CO. ET AL.

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

No. 321. Argued February 10, 1942.—Decided March 9, 1942.

1. Venue in patent infringement suits is governed exclusively by Jud. Code § 48, which provides that, in such suits, the District Courts shall have jurisdiction in the district of which the defendant is an inhabitant, or in any district in which the defendant shall have committed acts of infringement and have a regular and established place of business. P. 563.

   In a suit for patent infringement brought in one of two districts in the same State, an individual who has no regular and established place of business in that district and who is an inhabitant of the other district can not properly be joined as a defendant.

2. The provision of Jud. Code § 52 permitting suits, not of a local nature, against two or more defendants residing in different judicial districts within the same State to be brought in either district, is inapplicable to patent infringement suits. P. 566.

119 F. 2d 883, reversed.

CERTIORARI, 314 U. S. 594, to review a decree which reversed the action of the District Court in dismissing, as to one of two defendants, a bill alleging infringement of a patent. 36 F. Supp. 29. The other defendant defaulted.

Messrs. A. D. Caesar and *Charles W. Rivise* for petitioner.

Mr. Isaac J. Silin for respondents.

MR. JUSTICE MURPHY delivered the opinion of the Court.

The only question presented for our determination is whether § 48 of the Judicial Code (28 U. S. C. § 109) is the sole provision governing the venue of patent infringement litigation, or whether that section is supplemented

by § 52 of the Judicial Code (28 U. S. C. § 113). Section 48 gives jurisdiction of suits for patent infringement to the United States district courts in the district of which the defendant is an inhabitant, or in any district in which the defendant shall have committed acts of infringement and have a regular and established place of business. Section 52 permits suits, not of a local nature, against two or more defendants, residing in different judicial districts within the same state, to be brought in either district.[1]

Petitioner, Stonite Products Company, an inhabitant of the Eastern District of Pennsylvania without a regular

[1] Section 48 provides:

"In suits brought for the infringement of letters patent the district courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought."

Section 52 provides:

"When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same State."

and established place of business in the Western District of that State, was sued jointly with Lowe Supply Company, an inhabitant of the Western District, in the Western District for infringement of Patent No. 1,777,759 for a boiler stand. Petitioner was served with process in the Eastern District, entered a special appearance in the action in the Western District, and moved to dismiss or quash the return of service because venue was laid in the wrong district. The district court granted the motion and dismissed the cause as to petitioner.[2] 36 F. Supp. 29 The Circuit Court of Appeals reversed. 119 F. 2d 883. We granted certiorari because of an asserted conflict with *Motoshaver, Inc.* v. *Schick Dry Shaver, Inc.*, 100 F. 2d 236 (C. C. A. 9).

We hold that § 48 is the exclusive provision controlling venue in patent infringement proceedings.

Section 48 is derived from the Act of March 3, 1897, c. 395, 29 Stat. 695, and its scope can best be determined from an examination of the reasons for its enactment.

Section 11 of the Judiciary Act of September 24, 1789, c. 20, 1 Stat. 79, permitted civil suits to be brought in the federal courts against a person only in the district of which he was an inhabitant or in which he was found at the time of serving the writ. That section applied to suits for patent infringement. *Chaffee* v. *Hayward*, 20 How. 208, 216; *Allen* v. *Blunt*, 1 Blatchf. 408, Fed. Cas. No. 215. The Act of March 3, 1875, c. 137, 18 Stat. 470, retained the provision allowing suit wherever the defendant could be found. The abuses engendered by this extensive venue prompted the Act of March 3, 1887, c. 373, 24 Stat. 552, which, as amended by the Act of August 13, 1888, c. 866, 25 Stat. 433, permitted civil suits to be instituted only in the district of which the defendant was an inhabitant, except

[2] Lowe Supply Company defaulted and the suit proceeded to judgment against it.

that in diversity jurisdiction cases suit could be started in the district of the plaintiff's or the defendant's residence. The substance of those provisions was reënacted as § 51 of the Judicial Code (28 U. S. C. § 112).

After the holding of *In re Hohorst,* 150 U. S. 653, that the Act of 1887 as amended did not apply to a suit against an alien or a foreign corporation, "especially in a suit for the infringement of a patent right," the lower federal courts became uncertain as to the applicability of the Act of 1887 to patent infringement proceedings.[3] In explanation of *Hohorst's* case, it was said in *In re Keasbey & Mattison Co.,* 160 U. S. 221, 230, that "It was a suit for infringement of a patent right, exclusive jurisdiction of which had been granted to the Circuit Courts of the United States . . .; and was therefore not affected by general provisions regulating the jurisdiction of the courts of the United States, concurrent with that of the several States." Thereafter the lower federal courts, for the most part, took the position that the Act of 1887 as amended did

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[3] Prior to the Hohorst case the lower federal courts seem to have been unanimous in assuming that the Act of 1887 as amended governed patent infringement litigation. See *Reinstadler* v. *Reeves,* 33 F. 308; *Miller-Magee Co.* v. *Carpenter,* 34 F. 433; *Halstead* v. *Manning, Bowman & Co.,* 34 F. 565; *Gormully & Jeffrey Mfg. Co.* v. *Pope Mfg. Co.,* 34 F. 818; *Preston* v. *Fire-Extinguisher Mfg. Co.,* 36 F. 721; *Adriance, Platt & Co.* v. *McCormick Harvesting Mach. Co.,* 55 F. 287; *National Typewriter Co.* v. *Pope Mfg. Co.,* 56 F. 849; *Bicycle Stepladder Co.* v. *Gordon,* 57 F. 529; *Cramer* v. *Singer Mfg. Co.,* 59 F. 74.

After the Hohorst decision conflict developed. *Union Switch & Signal Co.* v. *Hall Signal Co.,* 65 F. 625, relying on *Galveston, H. & S. A. Ry. Co.* v. *Gonzales,* 151 U. S. 496, interpreted *In re Hohorst* as limited to infringement suits against aliens or foreign corporations. Accord, *Donnelly* v. *United States Cordage Co.,* 66 F. 613. Contra, *Smith* v. *Sargent Mfg. Co.,* 67 F. 801.

not apply to suits for patent infringement, and that infringers could be sued wherever they could be found.[4]

The Act of 1897 was adopted to define the exact jurisdiction of the federal courts in actions to enforce patent rights, and thus eliminate the uncertainty produced by the conflicting decisions on the applicability of the Act of 1887, as amended, to such litigation.[5] That purpose indicates

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[4] *National Button Works* v. *Wade*, 72 F. 298; *Noonan* v. *Chester Park Athletic Club Co.*, 75 F. 334; *Earl* v. *Southern Pacific Co.*, 75 F. 609; *Westinghouse Air-Brake Co.* v. *Great Northern Ry. Co.*, 88 F. 258. Contra, *Gorham Mfg. Co.* v. *Watson*, 74 F. 418.

[5] See H. Rept. No. 2905, 54th Cong., 2d Sess.

The remarks of Mr. Mitchell who reported the bill for the House Committee on Patents are significant (29 Cong. Rec. 1900–1901):

"Mr. Speaker, the necessity for this law grows out of the acts of 1887 and 1888 which amended the judiciary act. Conflicting decisions have even arisen in the different districts in the same States as to the construction of these acts of 1887 and 1888, and there is great uncertainty throughout the country as to whether or not the act of 1887 as amended by the act of 1888 applied to patent cases at all.

"The bill is intended to remove this uncertainty and to define the exact jurisdiction of the circuit courts in these matters.

"The committee have been extremely careful in the investigation of the matter before reporting the bill.

"As the bill was referred to me, I wrote to a great many patent lawyers in different parts of the country, in order to get their views and objections, if any, and I find that they are all unanimously in favor of the bill as it is now reported, and state that it would tend not only to define the jurisdiction of the circuit courts not now defined, but also limit that jurisdiction and so clearly define it that in the future there will be no question with regard to the application of the acts of 1887 and 1888.

. . . . . .

". . . The trouble has arisen in this matter that under the act of 1888 some of the courts were uncertain whether or not the law did or did not apply to patent cases, and therefore this special bill relating to patents solely has been brought up because of the indefiniteness and uncertainty arising from different constructions of the act of 1888 as applied to patent cases."

that Congress did not intend the Act of 1897 to dovetail with the general provisions relating to the venue of civil suits, but rather that it alone should control venue in patent infringement proceedings.

Section 52 is derived from R. S. § 740, which in turn stems from the Act of May 4, 1858, c. 27, 11 Stat. 272, a general act intended to do away with the insertion of special provisions preserving statewide venue in acts dividing a state into two or more judicial districts,[6] and the Act of February 24, 1863, c. 54 § 9, 12 Stat. 662. Respondents insist that § 52 applies to patent infringement suits because it antedates § 48, excludes from its purview only suits of a local nature, and is consistent with and complementary to § 48, since it deals with the problem of venue in the geographical sense rather than in terms of specified classes of litigation. We cannot agree.

Even assuming that R. S. § 740 covered patent litigation prior to the Act of 1897, we do not think that its application survived that act, which was intended to define the exact limits of venue in patent infringement suits.[7] Furthermore, the Act of 1897 was a restrictive measure, limiting a prior, broader venue. *General Electric Co.* v.

[6] See the remarks of Senator Pugh who reported the bill for the Senate Judiciary Committee. 36 Cong. Globe 936, 35th Cong., 1st Sess.

[7] As a matter of fact there was some uncertainty as to whether R. S. § 740 survived the general venue provisions of the Acts of 1875 and 1887. See *Greeley* v. *Lowe*, 155 U. S. 58, 72; *Petri* v. *Creelman Lumber Co.*, 199 U. S. 487, 497; *Camp* v. *Gress*, 250 U. S. 308, 315. It was held that it did in *East Tennessee, V. & G. R. Co.* v. *Atlanta & F. R. Co.*, 49 F. 608; *Goddard* v. *Mailler*, 80 F. 422; and *Doscher* v. *United States Pipe Line Co.*, 185 F. 959. But compare *New Jersey Steel & Iron Co.* v. *Chormann*, 105 F. 532, and *Seybert* v. *Shamokin & Mt. C. Electric Ry. Co.*, 110 F. 810.

Marvel Co., 287 U. S. 430, 434–435; *Bowers* v. *Atlantic, G. & P. Co.*, 104 F. 887; *Cheatham Electric Switching Co.* v. *Transit Co.*, 191 F. 727.[8] Thus there is little reason to assume that Congress intended to authorize suits in districts other than those mentioned in that Act.

The reënactment of the Act of 1897 as § 48, and of R. S. § 740 as § 52 of the Judicial Code, by the Act of March 3, 1911, c. 231, 36 Stat. 1100–1101, is not indicative of any Congressional understanding that the two sections are complementary. Quite the contrary, for § 52 appears in the Judicial Code as an exception to § 51, the general venue provision derived from the Act of 1887, as amended. See *Camp* v. *Gress*, 250 U. S. 308, 315. Section 51 is, of course, not applicable to patent infringement proceedings. *General Electric Co.* v. *Marvel Co., supra.*[9] Since § 48 is wholly independent of § 51, there is an element of incongruity in attempting to supplement § 48 by resort to § 52, an exception to the provisions of § 51. Cf. *Connecticut Fire Ins. Co.* v. *Lake Transfer Corp.*, 74 F. 2d 258.

Reversed.

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[8] *Zell* v. *Erie Bronze Co.*, 273 F. 833, is to the contrary, but apparently overlooks the trend of the lower federal courts after *In re Keasbey & Mattison*, 160 U. S. 221, was decided. See note 4, *ante*.

[9] This is apparent from the legislative history of the Act of 1897 from which § 48 is derived. See note 5, *ante*.

Section 51 is likewise inapplicable to suits for copyright infringement. *Lumiere* v. *Wilder, Inc.*, 261 U. S. 174.

CHAPLINSKY *v.* NEW HAMPSHIRE.

APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE.

No. 255. Argued February 5, 1942.—Decided March 9, 1942.

1. That part of c. 378, § 2, of the Public Laws of New Hampshire which forbids under penalty that any person shall address "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place," or "call him by any offensive or derisive name," was construed by the Supreme Court of the State, in this case and before this case arose, as limited to the use in a public place of words directly tending to cause a breach of the peace by provoking the person addressed to acts of violence. *Held:*

   (1) That, so construed, it is sufficiently definite and specific to comply with requirements of due process of law. P. 573.

   (2) That as applied to a person who, on a public street, addressed another as a "damned Fascist" and a "damned racketeer," it does not substantially or unreasonably impinge upon freedom of speech. P. 574.

   (3) The refusal of the state court to admit evidence offered by the defendant tending to prove provocation and evidence bearing on the truth or falsity of the utterances charged is open to no constitutional objection. P. 574.

2. The Court notices judicially that the appellations "damned racketeer" and "damned Fascist" are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace. P. 574.

91 N. H. 310, 18 A. 2d 754, affirmed.

APPEAL from a judgment affirming a conviction under a state law denouncing the use of offensive words when addressed by one person to another in a public place.

Mr. Hayden C. Covington, with whom *Mr. Joseph F. Rutherford* was on the brief, for appellant. *Mr. Alfred A. Albert* entered an appearance.

Mr. Frank R. Kenison, Attorney General of New Hampshire, with whom *Mr. John F. Beamis, Jr.* was on the brief, for appellee.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Appellant, a member of the sect known as Jehovah's Witnesses, was convicted in the municipal court of Rochester, New Hampshire, for violation of Chapter 378, § 2, of the Public Laws of New Hampshire:

"No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."

The complaint charged that appellant, "with force and arms, in a certain public place in said city of Rochester, to wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat, the words following, addressed to the complainant, that is to say, 'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists,' the same being offensive, derisive and annoying words and names."

Upon appeal there was a trial *de novo* of appellant before a jury in the Superior Court. He was found guilty and the judgment of conviction was affirmed by the Supreme Court of the State. 91 N. H. 310, 18 A. 2d 754.

By motions and exceptions, appellant raised the questions that the statute was invalid under the Fourteenth Amendment of the Constitution of the United States, in that it placed an unreasonable restraint on freedom of speech, freedom of the press, and freedom of worship, and because it was vague and indefinite. These contentions were overruled and the case comes here on appeal.

There is no substantial dispute over the facts. Chaplinsky was distributing the literature of his sect on the streets

of Rochester on a busy Saturday afternoon. Members of the local citizenry complained to the City Marshal, Bowering, that Chaplinsky was denouncing all religion as a "racket." Bowering told them that Chaplinsky was lawfully engaged, and then warned Chaplinsky that the crowd was getting restless. Some time later, a disturbance occurred and the traffic officer on duty at the busy intersection started with Chaplinsky for the police station, but did not inform him that he was under arrest or that he was going to be arrested. On the way, they encountered Marshal Bowering, who had been advised that a riot was under way and was therefore hurrying to the scene. Bowering repeated his earlier warning to Chaplinsky, who then addressed to Bowering the words set forth in the complaint.

Chaplinsky's version of the affair was slightly different. He testified that, when he met Bowering, he asked him to arrest the ones responsible for the disturbance. In reply, Bowering cursed him and told him to come along. Appellant admitted that he said the words charged in the complaint, with the exception of the name of the Deity.

Over appellant's objection the trial court excluded, as immaterial, testimony relating to appellant's mission "to preach the true facts of the Bible," his treatment at the hands of the crowd, and the alleged neglect of duty on the part of the police. This action was approved by the court below, which held that neither provocation nor the truth of the utterance would constitute a defense to the charge.

It is now clear that "Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state

action." *Lovell* v. *Griffin,* 303 U. S. 444, 450.[1] Freedom of worship is similarly sheltered. *Cantwell* v. *Connecticut,* 310 U. S. 296, 303.

Appellant assails the statute as a violation of all three freedoms, speech, press and worship, but only an attack on the basis of free speech is warranted. The spoken, not the written, word is involved. And we cannot conceive that cursing a public officer is the exercise of religion in any sense of the term. But even if the activities of the appellant which preceded the incident could be viewed as religious in character, and therefore entitled to the protection of the Fourteenth Amendment, they would not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute. We turn, therefore, to an examination of the statute itself.

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances.[2] There are certain well-defined and narrowly limited classes of speech, the prevention

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[1] See also *Bridges* v. *California,* 314 U. S. 252; *Cantwell* v. *Connecticut,* 310 U. S. 296, 303; *Thornhill* v. *Alabama,* 310 U. S. 88, 95; *Schneider* v. *State,* 308 U. S. 147, 160; *De Jonge* v. *Oregon,* 299 U. S. 353, 364; *Grosjean* v. *American Press Co.,* 297 U. S. 233, 243; *Near* v. *Minnesota,* 283 U. S. 697, 707; *Stromberg* v. *California,* 283 U. S. 359, 368; *Whitney* v. *California,* 274 U. S. 357, 362, 371, 373; *Gitlow* v. *New York,* 268 U. S. 652, 666.

Appellant here pitches his argument on the due process clause of the Fourteenth Amendment.

[2] *Schenck* v. *United States,* 249 U. S. 47; *Whitney* v. *California,* 274 U. S. 357, 373 (Brandeis, J., concurring); *Stromberg* v. *California,* 283 U. S. 359; *Near* v. *Minnesota,* 283 U. S. 697; *De Jonge* v. *Oregon,* 299 U. S. 353; *Herndon* v. *Lowry,* 301 U. S. 242; *Cantwell* v. *Connecticut,* 310 U. S. 296.

and punishment of which have never been thought to raise any Constitutional problem.[3] These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[4] It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[5] "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Cantwell* v. *Connecticut,* 310 U. S. 296, 309–310.

The state statute here challenged comes to us authoritatively construed by the highest court of New Hampshire. It has two provisions—the first relates to words or names addressed to another in a public place; the second refers to noises and exclamations. The court said: "The two provisions are distinct. One may stand separately from the other. Assuming, without holding, that the second were unconstitutional, the first could stand if constitutional." We accept that construction of severability and limit our consideration to the first provision of the statute.[6]

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[3] The protection of the First Amendment, mirrored in the Fourteenth, is not limited to the Blackstonian idea that freedom of the press means only freedom from restraint prior to publication. *Near* v. *Minnesota,* 283 U. S. 697, 714–715.

[4] Chafee, Free Speech in the United States (1941), 149.

[5] Chafee, *op. cit.,* 150.

[6] Since the complaint charged appellant only with violating the first provision of the statute, the problem of *Stromberg* v. *California,* 283 U. S. 359, is not present.

On the authority of its earlier decisions, the state court declared that the statute's purpose was to preserve the public peace, no words being "forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed."[7] It was further said: "The word 'offensive' is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker—including 'classical fighting words', words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."

We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. Cf. *Cantwell* v. *Connecticut,* 310 U. S. 296, 311; *Thornhill* v. *Alabama,*

[7] *State* v. *Brown,* 68 N. H. 200, 38 A. 731; *State* v. *McConnell,* 70 N. H. 294, 47 A. 267.

310 U. S. 88, 105. This conclusion necessarily disposes of appellant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law. Cf. *Fox* v. *Washington*, 236 U. S. 273, 277.[8]

Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech. Argument is unnecessary to demonstrate that the appellations "damned racketeer" and "damned Fascist" are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

The refusal of the state court to admit evidence of provocation and evidence bearing on the truth or falsity of the utterances, is open to no Constitutional objection. Whether the facts sought to be proved by such evidence constitute a defense to the charge, or may be shown in mitigation, are questions for the state court to determine. Our function is fulfilled by a determination that the challenged statute, on its face and as applied, does not contravene the Fourteenth Amendment.

Affirmed.

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[8] We do not have here the problem of *Lanzetta* v. *New Jersey*, 306 U. S. 451. Even if the interpretative gloss placed on the statute by the court below be disregarded, the statute had been previously construed as intended to preserve the public peace by punishing conduct, the direct tendency of which was to provoke the person against whom it was directed to acts of violence. *State* v. *Brown*, 68 N. H. 200, 38 A. 731 (1894).

Appellant need not therefore have been a prophet to understand what the statute condemned. Cf. *Herndon* v. *Lowry*, 301 U. S. 242. See *Nash* v. *United States*, 229 U. S. 373, 377.

Syllabus.

FEDERAL POWER COMMISSION ET AL. *v.* NATURAL GAS PIPELINE CO. ET AL.*

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

No. 265. Argued February 10, 11, 1942.—Decided March 16, 1942.

1. Provisions of the Natural Gas Act of 1938, for regulating the prices at which natural gas originating in one State and transported to another shall be sold to distributors at wholesale, *held* consistent with the due process clause of the Fifth Amendment, and within the commerce power. P. 582.
2. Under §§ 5 (a) and 16 of the Natural Gas Act of 1938, the Federal Power Commission, when upon due hearing it has found the existing rates of an interstate gas pipeline company to be unjust and unreasonable, may make an *interim* order requiring the utility to file a new schedule of rates which shall effect a prescribed decrease in operating revenues. P. 583.
3. The Natural Gas Act of 1938 commands that the rates of natural gas companies subject to it shall be just and reasonable; declares that rates which are not just and reasonable are unlawful; provides that the Federal Power Commission shall determine the just and reasonable rate to be observed and fix the same by order and that the Commission may order a decrease where existing rates are unjust, unlawful, or are not the "lowest reasonable rates." §§ 4 (a) and 5 (a). On review of the Commission's orders by a Circuit Court of Appeals, as authorized by § 19 (b), the Commission's findings of fact, if supported by substantial evidence, "shall be conclusive." *Held:*

   (1) "Lowest reasonable rate" is the lowest rate which may be fixed without being confiscatory in the constitutional sense. P. 585.

   (2) The Congressional standard prescribed by this statute coincides with that of the Constitution; and the courts are without authority under the statute to set aside as too low any "reasonable rate" adopted by the Commission which is consistent with constitutional requirements. P. 586.
4. Rate-making bodies are not required by the Constitution to follow any single formula or combination of formulas. Once a full hearing

* Together with No. 268, *Natural Gas Pipeline Co. et al.* v. *Federal Power Commission et al.*, also on writ of certiorari, 314 U. S. 593, to the Circuit Court of Appeals for the Seventh Circuit.

has been given, proper findings made and the statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied and viewed in its entirety, produces no arbitrary result, the Court's inquiry is at an end. P. 586.

5. There is no constitutional requirement that going-concern value, even when it is an appropriate element to be included in a rate base, must be separately stated and appraised as such. Pp. 586–589.
6. Where a valuation for rate purposes is of the business as a whole without separate appraisal of the going-concern element, the burden rests on the regulated utility to show that this item has not been included in the rate base, and that it was not recouped from prior earnings of the business. P. 589.
7. The property of a utility is not confiscated by denial of the privilege of capitalizing the maintenance cost of excess plant capacity during a period before the rates were regulated, which would allow it to earn a return and amortization allowance upon such costs during the entire subsequent life of the business. P. 590.
8. Regulation does not insure that the business shall produce net revenues, nor does the Constitution require that the losses of the business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance are to be earned. P. 590.
9. Denial of the right to earn for the future a "fair return" and amortization on the costs of maintaining initial excess capacity, and of advertising and acquiring new business, which they failed to show had not been recouped from earnings, did not deprive the utilities concerned in this case of their property. P. 590.
10. Where the business the rates of which are regulated could exist for only a limited period, an amortization base computed at cost and including property already retired, the allowances on which would restore the undepreciated capital investment, less salvage, at the end of that period, involved no deprivation of property, even though during the period the cost of reproducing the property might be more than its actual cost. The Constitution does not require that the owner who embarks in a wasting-asset business of limited life shall receive at the end more than he has put into it. P. 592.
11. In the case of a wasting business the rates of which were first regulated after it had operated for a number of years, *held* proper, and consistent with due process, in determining its fair return, to adopt as the amortization period the entire estimated life of the

business, including the period of earlier operation, and to require that there be credited in the amortization account so much of the earnings of that period as would be appropriately allocable to it. P. 592.

12. A provision for annual amortization allowances which, if accumulated at a 6½% compound interest rate during the estimated life of the business, will be sufficient to restore the total investment less salvage, and which leaves the allowances in the business as a sinking fund reserve but permits the utility to earn each year in addition to the allowance, 6½% on both the amortized and unamortized portions of the rate base—*held* not objectionable upon the ground that the rate of interest used should have been lower—comparable to that obtainable if the allowances were to be invested in securities in a separate sinking fund—or upon the ground that the arrangement adopted subjects the utility to greater business risks. P. 595.
13. The Federal Power Commission's finding that 6½% is a fair annual rate of return upon the rate base allowed in this case is supported by substantial evidence. P. 596.
14. The question of proper disposition of the excess charges impounded under a stay order of the court below is not presented for determination upon the record before this Court. P. 598.

120 F. 2d 625, reversed.

CERTIORARI, 314 U. S. 593, to review a judgment vacating an order of the Federal Power Commission, on a petition to review, under § 19 (b) of the Natural Gas Act of 1938.

Messrs. George I. Haight and *S. A. L. Morgan,* with whom *Messrs. J. J. Hedrick* and *William E. Lucas* were on the brief, for the Natural Gas Pipeline Co. et al.

Mr. Richard H. Demuth and *Solicitor General Fahy* for the Federal Power Commission, and *Mr. Albert E. Hallett,* Assistant Attorney General of Illinois, for the Illinois Commerce Commission. *Assistant Attorney General Shea* and *Messrs. Melvin H. Siegel, Harry R. Booth, Archibald Cox, Richard J. Connor, George Slaff,* and *George F. Barrett,* Attorney General of Illinois, were with them on the brief.

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Mr. John E. Benton filed a brief on behalf of the National Association of Railroad and Utilities Commissioners, as *amicus curiae,* in support of the Federal Power Commission.

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

This is a rate case involving numerous questions which arise out of the Federal Power Commission's regulation, under §§ 5 (a) and 13 of the Natural Gas Act of 1938, 52 Stat. 821, 15 U. S. C. § 717, of the rates to be charged for the sale of natural gas by cross-petitioners, Natural Gas Pipeline Company of America and Texoma Natural Gas Company.

The two companies are engaged in business as a single enterprise. They produce natural gas from their own reserves in the Panhandle gas fields in Texas, and purchase gas produced there by others. They transport the gas by their own pipeline in interstate commerce to Illinois, where they sell the bulk of it at wholesale to utilities, which distribute and sell it for domestic, commercial and industrial uses.

The companies began operations in 1932 with a capital structure of $60,000,000 of six per cent bonds, later increased by $999,000, and $3,500,000 of common stock, of which $500,000 is stock of the Texoma Company, a non-profit corporation paying no dividends on its stock. During the first seven years of operation, beginning January 1, 1932, and extending through 1938, the companies charged against gross income various depreciation and depletion deductions aggregating $13,077,488,[1] and in addition

[1] These charges against income are slightly in excess of the accumulated reserves for depreciation and depletion—$12,557,892—shown by the books at the end of 1938. The excess of $519,596 is apparently due to the fact that during the period $7,000,918 of property, on

charged $6,481,322 for "retirements" of property. In that period they paid dividends amounting in all to $9,150,000. Although there were book deficits in earnings for the first two years, the total "net profit" available for dividends and surplus after payment of interest on the bonds was $8,224,436,[2] or an annual average of $1,174,919, which is 33.6% per annum on the $3,500,000 stock. The earnings available during the period for return on the capital investment of both stockholders and bondholders—after taking out of income $19,558,810 for depreciation, depletion and retirements—totalled $34,040,883; this makes an average of $4,862,983 annually, which is about 8% on the book figures for investment undepreciated, or 8.8% after deducting from investment the average depreciation and depletion reserves actually charged to earnings by the companies.[3] At the time of the hearing, over one-fourth of the bonds issued had been retired out of earnings.

On complaint of the Illinois Commerce Commission, and on its own motion, the Power Commission began separate investigations of the companies' rates. These proceedings were consolidated and after extensive hearings the Commission, for the purpose of issuing an interim order, accepted the companies' statement that the book cost of their property existing at the end of 1938 was $60,172,843, including working capital of $975,000.

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the basis of book cost, was retired, while the annual retirement charges had aggregated only $6,481,322. The balance of the retirements, $519,596, apparently had been charged to the depreciation and depletion accounts.

[2] This includes a negligible item, "non-operating income," which for the seven-year period came to only $194,600.

[3] The book figures (which are on a cost basis) for invested capital average slightly under $61,000,000 if working capital is included. The depreciation and depletion reserves are taken from the accounts for which the aggregate figure, $12,557,892, is given in note 1, *supra*.

Likewise for the purpose of the order, it accepted the companies' estimate that the value of all physical property—calculated at reproduction cost new (except for gas reserves taken on the companies' statement to have a present value of $13,334,775)—was $74,420,424, which the Commission adopted as the rate base. It took the companies' own estimate of twenty-three years ending in 1954 as the life of the business, and for the amortization base used their cost figure of $78,284,009 for the total past and estimated future investment after deduction of estimated salvage. It calculated the "annual amortization expense" on that amount for the twenty-three year period, at a 6½% sinking fund interest rate, as $1,557,852, which it allowed.

The Commission also accepted, for the purpose of its interim order, the companies' estimate of prospective income available for amortization and return for the period 1939 to 1942 inclusive, as averaging $9,511,454 per annum. But making allowance for higher income tax rates under the Revenue Act of 1940, it found that the income available for amortization and return would be decreased to $9,362,032. It concluded that the companies' estimate of return, less the amortization allowance, ($9,362,032 less $1,557,852),—or $7,804,180—exceeded the fair return, $4,837,328 (which is 6½% of the rate base of $74,420,424), by $2,966,852, which amount was available for reduction of net revenues. Taking into account the decrease of $783,909 in federal income taxes which would result from such a decline in revenues, the Commission decided there was a total of $3,750,000 annually available for reduction of rates. It found the existing rates were "unjust, unreasonable and excessive," and made its interim order directing the companies to file a new schedule of rates and charges effective after September 1, 1940, which would bring about an annual reduction of $3,750,000 in operating revenues. The

order also provided that the record should "remain open" for such further proceedings as the Commission may deem necessary or desirable.

On the companies' petition for review of the order pursuant to § 19 (b) of the Act, the Court of Appeals for the Seventh Circuit, 120 F. 2d 625, upheld the validity of the rate regulation provisions of the Act, and the Commission's authority under the statute to issue the interim order directing reduction of the rates and requiring respondents to file new schedules reflecting that reduction. But the court vacated the Commission's order on the sole grounds that "going concern value" to the extent of $8,500,000 should have been included in the rate base, and that the amortization period for the entire property, instead of the full twenty-three year estimated life of the business taken by the Commission, should have been dated from the passage of the Act or the time of the Commission's order.

We granted certiorari, 314 U. S. 593, because of the novelty and importance of the questions presented upon the Commission's petition challenging the grounds of reversal below, and on the companies' cross petition assailing the constitutionality of the Act, the authority of the Commission to make the interim order, the prescribed 6½% return, the computation of the amortization allowance on the same rate of interest as the fair rate of return, and other features of the Commission's order presently to be discussed.

The Natural Gas Act declares that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest," and that federal regulation of interstate commerce in natural gas "is necessary in the public interest." § 1 (a). The Act directs that all rates and charges in connection with the transportation or sale of natural gas, subject to the jurisdiction of the Commission, shall be "just and rea-

sonable" and declares to be unlawful any rate or charge which is not just and reasonable. § 4 (a). By § 5 the Commission, on its own motion or the complaint of a State, municipality, state commission or gas distributing company, is empowered to investigate the rates charged by any natural gas company in connection with any transportation or sale of any natural gas subject to the jurisdiction of the Commission, and after a hearing to determine just and reasonable rates.

Constitutionality of the Act. The argument that the provisions of the statute applied in this case are unconstitutional on their face is without merit. The sale of natural gas originating in one State and its transportation and delivery to distributors in any other State constitutes interstate commerce, which is subject to regulation by Congress. *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.,* 314 U. S. 498. It is no objection to the exercise of the power of Congress that it is attended by the same incidents which attend the exercise of the police power of a State. The authority of Congress to regulate the prices of commodities in interstate commerce is at least as great under the Fifth Amendment as is that of the States under the Fourteenth to regulate the prices of commodities in intrastate commerce. Compare *United States* v. *Carolene Products Co.,* 304 U. S. 144; *United States* v. *Rock Royal Co-op.,* 307 U. S. 533, 569; *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 393–97; *United States* v. *Darby,* 312 U. S. 100, with *Nebbia* v. *New York,* 291 U. S. 502; *Olsen* v. *Nebraska,* 313 U. S. 236.

The price of gas distributed through pipelines for public consumption has been too long and consistently recognized as a proper subject of regulation under the Fourteenth Amendment to admit of doubts concerning the propriety of like regulations under the Fifth. *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19; *Cedar Rapids*

Gas Co. v. *Cedar Rapids*, 223 U. S. 655; *Railroad Commission* v. *Pacific Gas Co.*, 302 U. S. 388. And the fact that the distribution here involved is by wholesale rather than retail sales presents no differences of significance to the protection of the public interest which is the object of price regulation. Cf. *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co., supra.* The business of cross-petitioners is not any the less subject to regulation now because the Government has not seen fit to regulate it in the past. Cf. *Nebbia* v. *New York, supra,* 538–39.

Validity of the Interim Order. The companies contend that the Federal Power Commission has no authority under the Act to enter the type of order now under review, and that the order is invalid because the Commission did not itself fix reasonable rates as required by the Act but instead merely directed the companies to file a new rate schedule which would result in the prescribed reduction in operating revenues. Section 5 (a) of the Act provides: "Whenever the Commission, after a hearing . . ., shall find that any rate . . . is injust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate . . . and shall fix the same by order." It also contains a proviso that the Commission shall not have power to order an increase of rates on file unless in accordance with a new schedule filed by the company. But without mention of new rate schedules the proviso adds that the Commission "may order a decrease where existing rates are unjust . . . or are not the lowest reasonable rates." And § 16 gives the Commission "power to . . . issue . . . such orders . . . as it may find necessary or appropriate to carry out the provisions of this Act."

The first prerequisite to an order by the Commission is that it shall be preceded by a hearing and findings. In this case, while the proceedings were not ended by the

interim order, the companies had full opportunity to offer all their evidence both direct and in rebuttal, and full opportunity to cross-examine every witness offered by both the Federal Power Commission and the Illinois Commerce Commission. All the evidence tendered was received and considered by the Commission, and before the interim order was entered counsel for the companies stated to the Commission that they had concluded the direct testimony in support of their case. So far as the order is supported by the evidence, the companies cannot complain that they were denied a full hearing because they had not been able to examine on redirect their own witnesses who had not been cross-examined or because they had no opportunity to cross-examine or rebut witnesses who were not offered by the Commission. The right to a full hearing before any tribunal does not include the right to challenge or rely on evidence not offered or considered. See *New England Divisions Case,* 261 U. S. 184, 201.

The establishment of a rate for a regulated industry often involves two steps of different character, one of which may appropriately precede the other. The first is the adjustment of the general revenue level to the demands of a fair return. The second is the adjustment of a rate schedule conforming to that level so as to eliminate discriminations and unfairness from its details. Such an orderly procedure for establishing the rates prescribed by the Act would seem to be an appropriate means of carrying out its provisions. Section 5 of the Act was modelled on the provisions of the Transportation Act, 49 U. S. C. §§ 13, 15, which have been interpreted as giving to the Interstate Commerce Commission authority to establish a general level of rates and divisions in advance of a schedule to be filed by the carriers. See *New England Divisions Case, supra,* 201–202, 203, n. 21. Cf. Sharfman, The Interstate Commerce

Commission, vol. 2, pp. 381–82; *Driscoll* v. *Edison Co.*, 307 U. S. 104.

We think that the proviso of § 5, already quoted, contemplates that, when existing rates are found to be unjust and unreasonable, an order decreasing revenues may be filed without establishing a specific schedule of rates. Since such an order may be in the interests of the public, as well as the regulated company, and is in harmony with the purposes of the Act, it is one which the Commission has discretion to make under § 16 as appropriate to carry out the provisions of the Act.

The Scope of Judicial Review of Rates Prescribed by the Commission. The ultimate question for our decision is whether the rate prescribed by the Commission is too low. The statute declares, § 4 (a), that the rates of natural gas companies subject to the Act "shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." Section 5 (a) directs the Commission to "determine the just and reasonable rate" to be observed, and requires the Commission to "fix the same by order." It also provides that "the Commission may order a decrease where existing rates are unjust . . . unlawful, or are not the lowest reasonable rates." On review of the Commission's orders by a Circuit Court of Appeals as authorized by § 19 (b), the Commission's findings of fact "if supported by substantial evidence, shall be conclusive."

By long standing usage in the field of rate regulation, the "lowest reasonable rate" is one which is not confiscatory in the constitutional sense. *Los Angeles Gas Co.* v. *Railroad Commission*, 289 U. S. 287, 305; *Railroad Commission* v. *Pacific Gas Co., supra*, 394, 395; *Denver Stock Yard Co.* v. *United States*, 304 U. S. 470, 475. Assuming that there is a zone of reasonableness within which the Commission is free to fix a rate varying in amount and higher than a confiscatory rate, see *Banton* v. *Belt*

Line Ry. Corp., 268 U. S. 413, 422, 423; *Columbus Gas Co.* v. *Commission*, 292 U. S. 398, 414; *Denver Stock Yard Co.* v. *United States, supra*, 483, the Commission is also free under § 5 (a) to decrease any rate which is not the "lowest reasonable rate." It follows that the Congressional standard prescribed by this statute coincides with that of the Constitution, and that the courts are without authority under the statute to set aside as too low any "reasonable rate" adopted by the Commission which is consistent with constitutional requirements.

The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end.

Going Concern Value. The companies insist that their business has a going concern value of $8,500,000, which the Commission did not include in the rate base and on which they are entitled to earn a return. In establishing the rate base for the purposes of the interim order the Commission "reluctantly" accepted the estimates of value, presented by the companies' own witnesses, as follows:

Reproduction Cost New of Physical Properties (exclusive of Gas Reserves).....	$56,302,250[4]
Value of Gas Reserves as of June 1, 1939..	13,334,775

[4] The estimates submitted by the companies stated that there should be deducted from this figure for "viewed depreciation" $2,866,758. However, in setting a rate base for the interim order, the Commission

Capital Additions from June 1, 1939, to December 31, 1942	$3,808,399 [5]
Working Capital	975,000
Total Rate Base	$74,420,424

While no item for going concern value is separately stated in the rate base, the computation of cost new of physical equipment included—in addition to labor and cost of materials—large amounts for overhead, interest, taxes, administration, legal and supervisory charges, and expenses paid or incurred in assembling the plant as that of a going concern.

The Commission spoke of the rate base thus arrived at as "liberal" and as a "generous allowance." That the estimate of reproduction costs new is liberal is indicated by the circumstances that the companies' structures other than gas reserves were built in 1930–1931 at a time, as the record shows, of relatively high prices, and that their reproduction cost depreciated is greater than actual cost, which was about $50,000,000. And the allowed "present value" of leases as of June 1, 1939, $13,334,775, is approximately $4,000,000 more than book cost, even without taking into account a substantial reduction for depletion reserves of $1,152,854, which the companies had accrued on

did not make this conceded deduction—perhaps because it held, contrary to the companies' contention, that the properties should be amortized over the entire life of the business.

[5] The companies estimated that the cost of additional property, not including replacements, during the future life of the enterprise, subsequent to June 1, 1939, would be $9,145,083. On this basis, they claimed that there should be included in the rate base $6,046,286, which they said would be the estimated average investment. The Commission included in the rate base only $3,808,399, which was the companies' estimated outlay for capital additions through the end of 1942. This reduction does not appear to be challenged. In any event, the refusal to include in the rate base capital expenditures not yet made can not involve confiscation.

their own books by the end of 1938. The Commission declined to include going concern value as an additional item in the rate base.

The companies urge, as the Court of Appeals held, that there are items of cost or expense incurred in the establishment and development of the business during the seven-year period prior to regulation, which were not included in the companies' estimate of value accepted by the Commission, and which, in view of the special characteristics of the business, should be capitalized and added to the rate base to the extent of $8,500,000 for going concern value. They include, in amounts not now material, the following: expenditures for securing new business; interest on money invested in non-productive plant capacity; taxes paid on non-productive capacity; fixed operating expenses attributable to non-productive capacity, and depreciation on non-productive capacity.[6] The companies' contentions with respect to all these items are predicated upon the limited life of the business, twenty-three years, and on testimony that in anticipation of its growth larger gas mains and facilities were constructed than were required during the earlier years of the business. The reproduction cost new of this excess of equipment is admittedly included in the rate base.

None of these items appears in the companies' capital account. With the possible exception of expenditures for securing new business, they are synthetic figures arrived at by estimating the amount of expense attributable to the current cost of maintenance of the excess capacity of the plant during periods when the excess capacity was not

[6] The item for depreciation on non-productive capacity, amounting to $382,833, is obviously provided for in the Commission's allowance for depreciation. The value of the companies' entire plant, whether fully productive or not, is included in the rate base and, as will presently appear, provision was made by the Commission's order for its amortization on a cost basis from earnings.

used. But the interest charges, taxes and other costs of maintaining this excess capacity during the period when not in use have not been capitalized by the companies on their books and so far as appears were paid from current earnings. The same is true of the expenditure for advertising and other expenses of acquiring new business.

The novel question is thus presented whether confiscation, proscribed by Congress as well as the Constitution, results from the exclusion from the rate base of the previous costs of maintaining excess plant capacity and of getting new business. The Commission gave full consideration to this contention. It said: "The companies' claim for $8,500,000 for going concern value must be disallowed. The amount obviously is an arbitrary claim, not supported by substantial evidence warranting its allowance. Its allowance would mean the acceptance of a deceptive fiction, resulting in an unfair imposition upon consumers. We are convinced that we are allowing in our rate base more than an adequate amount to cover all elements of value."

There is no constitutional requirement that going concern value, even when it is an appropriate element to be included in a rate base, must be separately stated and appraised as such. This Court has often sustained valuations for rate purposes of a business assembled as a whole, without separate appraisal of the going concern element. *Columbus Gas Co.* v. *Commission,* 292 U. S. 398, 411; *Dayton P. & L. Co.* v. *Commission,* 292 U. S. 290, 309; *Denver Stock Yard Co.* v. *United States, supra,* 478–480; *Driscoll* v. *Edison Co., supra,* 117. When that has been done, the burden rests on the regulated company to show that this item has neither been adequately covered in the rate base nor recouped from prior earnings of the business. *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153, 166.

The total value of the companies' plant, including equipment in excess of immediate needs when beginning business, has been included in the rate base adopted. If rightly included, as the Commission has assumed for purposes of the order, the companies would have been entitled to earn a fair return upon its value, had the business been regulated from the start. But it does not follow that the companies' property would be confiscated by denying to them the privilege of capitalizing the maintenance cost of excess plant capacity, which would allow them to earn a return and amortization allowance upon such costs during the entire life of the business. It is only on the assumption that excess capacity is a part of the utility's equipment used and useful in the regulated business, that it can be included as a part of the rate base on which a return may be earned. When so included, the utility gets its return not from capitalizing the maintenance cost, but from current earnings by rates sufficient, having in view the character of the business, to secure a fair return upon the rate base, provided the business is capable of earning it. But regulation does not insure that the business shall produce net revenues, nor does the Constitution require that the losses of the business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned. *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388; *San Diego Land & Town Co.* v. *Jasper,* 189 U. S. 439, 446–47. The deficiency may not be thus added to the rate base, for the obvious reason that the hazard that the property will not earn a profit remains on the company in the case of a regulated, as well as an unregulated, business.

Here the companies, though unregulated, always treated their entire original investment, together with subsequent additions, as capital on which profit was to be earned.

They charged the out-of-pocket cost of maintenance of plant, whether used to capacity or not, as operating expenses deductible from earnings before arriving at net profits. They have thus treated the items now sought to be capitalized in the rate base as operating expenses to be compensated from earnings, as in the case of regulated companies. The history of the first seven years of operation before regulation shows an average annual return,[7] after deduction of operating expenses, of approximately 8% on the undepreciated investment. This high return was earned during a period which included the severest depression in our history.

Whether there is going concern value in any case depends upon the financial history of the business. *Houston* v. *Southwestern Tel. Co.*, 259 U. S. 318, 325. This is peculiarly true of a business which derives its estimates of going concern value from a financial history preceding regulation. That history here discloses no basis for going concern value, both because the elements relied upon for that purpose could rightly be rejected as capital investment in the case of a regulated company, and because in the present case it does not appear that the items, which have never been treated as capital investment, have not been recouped during the unregulated period.

We cannot say that the Commission has deprived the companies of their property by refusing to permit them to earn for the future a fair return and amortization on the costs of maintenance of initial excess capacity—costs which the companies fail to show have not already been recouped from earnings before computing the substantial "net profits" earned during the first seven years. The items for advertising and acquiring new business have been treated in the same way by the companies, and do

[7] Besides $8,244,435 of "net profits," the companies paid out of gross income $23,994,030 as interest on the bonds.

not, in the circumstances of this case, stand on any different footing. Cf. *West Ohio Gas Co.* v. *Commission*, 294 U. S. 63, 72.

The Amortization Base. The Commission took as the amortization base the sum of $78,284,009. This was made up of the companies' total investment, at the end of 1938, of $67,173,761 (without deduction of property retirements already made), plus estimated future capital additions through 1954, including replacements, amounting to $12,159,380,[8] less estimated salvage at the predicted end of the project in 1954. It is not questioned that the Commission's annual amortization allowance of $1,557,852, accumulated at the sinking fund interest rate of 6½% adopted by the order, will be sufficient in 1954 to restore the capital investment so computed.

The companies argue that the amortization base, computed on a basis of reproduction cost, should be $84,341,218[9] rather than cost plus estimated future capital additions. But the purpose of the amortization allowance and its justification is that it is a means of restoring from current earnings the amount of service capacity of the business consumed in each year. *Lindheimer* v. *Illinois*

[8] We do not intimate any approval of the inclusion in the amortization base of all the estimated future capital additions.

[9] The companies' proposed amortization base was made up of the following items:

Reproduction cost new, excluding gas reserves	$56,302,250
Viewed depreciation (deduct)	2,866,758
Value of gas reserves	13,334,775
Cost of additional property	9,145,083
Going concern value	8,500,000
Working capital	975,000
	$85,390,350
Less salvage	1,049,132
	$84,341,218

Tel. Co., 292 U. S. 151, 167. When the property is devoted to a business which can exist for only a limited term, any scheme of amortization which will restore the capital investment at the end of the term involves no deprivation of property. Even though the reproduction cost of the property during the period may be more than its actual cost, this theoretical accretion to value represents no profit to the owner, since the property dedicated to the business, save for its salvage value, is destined for the scrap-heap when the business ends. The Constitution does not require that the owner who embarks in a wasting-asset business of limited life shall receive at the end more than he has put into it. We need not now consider whether, as the Government urges, there can in no circumstances be a constitutional requirement that the amortization base be the reproduction value rather than the actual cost of the property devoted to a regulated business. Cf. *United Railways Co.* v. *West*, 280 U. S. 234, 265. It is enough that here the business, by hypothesis, will end in 1954, and that the amortization base, computed at cost and including property already retired, will be completely restored by 1954 by the annual amortization allowances. As the Commission declared: "The amounts of amortization are recognized and treated as operating expenses. Operating expenses are stated on the basis of cost. . . . We refuse to make an allowance of amortization in excess of cost. To do so would not be the computation of a proper expense, but instead the allowance of additional profit over and above a fair return. Manifestly such an additional return would unjustly penalize consumers."

The Amortization Period. The court below held that, since the business was unregulated for the first seven years, the adoption by the Commission of the estimated twenty-three year life of the business as the amortization period involved a denial of due process. In view of the estimate by the Commission and the companies that the

gas properties would be exhausted in about sixteen years from the date of the Act, the court thought, as the companies argue, that a rate of return would be confiscatory which would not provide, in addition to a fair return, an annual amortization allowance sufficient to restore the total investment over the final sixteen-year period. But this argument overlooks the fact that the depreciation of physical property attributed to use, and the obsolescence of the entire property attributable to lapse of time in the case of a business having a limited life, had been taking place during the seven years before regulation and that those items must be recouped if at all from earnings. Capital investment loss at the end of the life of a business can only be avoided by restoration of the investment from earnings, and is avoidable so far as is humanly possible only by an appropriate charge of amortization to earnings as they accrue.

Here, there is no question but that the Commission's annual amortization allowance, if applied over the entire twenty-three year life of the business, is sufficient to restore the total capital investment at the end, or that earnings of the past and those estimated for the future together are sufficient to provide for the amortization allowance and a fair return, given an appropriate rate base and rate of return. Making that assumption, we cannot say that adequate provision has not been made for restoration of the companies' investment from earnings, and a fair return on the investment. Even though the companies were unregulated for seven years, earnings during that period were available and adequate for amortization. In fact, the companies' charges to earnings, for depreciation, depletion and retirements, totalled $19,558,810, or an average of $2,794,115 per annum. This was in conformity with the established business practice, in the case of unregulated as well as regulated businesses, to make such a depreciation or amortization

allowance chargeable annually to earnings as an operating expense in order to provide adequately for annual consumption of capital in the business. *Lindheimer* v. *Illinois Tel. Co., supra.*

The companies are not deprived of property by a requirement that they credit in the amortization account so much of the earnings received during the prior period as are appropriately allocable to it for amortization. Only by that method is it possible to determine the amount of earnings which may justly be required for amortization during the remaining life of the business.

Amortization Interest Rate. The annual amortization allowances of $1,557,852, if accumulated at a 6½% compound interest rate until the assumed exhaustion of the gas reserves in 1954, will be sufficient to restore the undepreciated total investment less the salvage value of the property. The companies urge that the interest rate should have been lower, say 2%, on the assumption that only some such lower rate would be earned by a hypothetical sinking fund to be created from the annual amortization allowances. But the argument ignores the fact that the amortization method adopted by the Commisssion contemplates not a sinking fund of segregated securities purchased with cash withdrawn from the business, but merely a sinking fund reserve charged to earnings and not distributable as ordinary dividends. Under this method there is no deduction of the amortization allowances from the rate base on which a fair return—6½% under the current interim order—is to be allowed during the life of the business.

The companies are thus allowed to earn in each year, in addition to the amortization allowance, 6½% on both the amortized and the unamortized portions of the base. If the amortization interest were computed at a 2% rate without deducting the amortized portion from the rate base, the companies would continue to receive a 6½%

instead of only a 2% return on that portion of the investment. True, the method of amortization adopted means that the companies look to the earnings of the business for the hypothetical interest on amortization reserve. This, it is argued, may involve more business risk than a method of amortization contemplating the actual withdrawal from the business of the amortization allowances and their investment in segregated securities bearing a lower rate of interest. But here the 6½% rate of return allowed on the amortized portion of the rate base includes compensation for the business risk, and the risk is an incident of the business in which the companies have hazarded their capital and in which they propose to invest additional capital. The Commission declared it adopted this method to avoid the inequitable result which would follow if the companies were permitted to include in their charges to the public 6½% on the amortized portion of the base, while treating it as earning only 2%. The Commission's conclusion that this is an appropriate method is supported by the evidence, and in any case it does not appear that it has deprived or will deprive the companies of property.

Fair Rate of Return. The Commission found that "6½ per cent is a fair annual rate of return upon the rate base allowed," which it had characterized as "a generous allowance." The courts are required to accept the Commission's findings if they are supported by substantial evidence. § 19(b). We cannot say, on this record, that the Commission was bound to allow a higher rate.

The evidence shows that profits earned by individual industrial corporations declined from 11.3% on invested capital in 1929 to 5.1% in 1938. The profits of utility corporations declined during the same period from 7.2% to 5.1%. For railroad corporations, the decline was from 6.4% to 2.3%. Interest rates were at a low level on all forms of investment, and among the lowest that have

ever existed. The securities of natural gas companies were sold at rates of return of from 3% to 6%, with yields on most of their bond issues between 3% and 4%. The interest on large loans ranged from 2% to 3.25%.

The regulated business here seems exceptionally free from hazards which might otherwise call for special consideration in determining the fair rate of return. Substantially all its product is distributed in the metropolitan area of Chicago, a stable and growing market, through distributing companies which own 26% of the investment of the Natural Gas Pipeline Company. Ninety per cent of its gas is taken under contract by the Chicago District Pipeline Company. The contract runs until 1946 or until 1951, at the option of the companies. Under it the District Company is bound to take, or at least pay for, 66⅔% of the companies' gas, and performance is guaranteed by the three companies distributing the gas in Chicago.

The danger of early exhaustion of the gas field was fully taken into account in the estimate of its life, and the companies' estimate was accepted. Provision for the complete amortization of the investment within that period affords a security to the investment which is lacking to those industries whose capital investments must be continued for an indefinite period. The companies' affiliation with the six large corporations which directly or indirectly own all the stock, places them in a strong position for their future financing. The business is in the same position as other similar businesses with respect to increased taxation, inflation and costs of operation. Other factors, such as credit risks, risks of technological changes, varying demands for product, relatively small labor requirements, and conversion of inventory into cash, compare more favorably. After a full consideration of all of these factors and of expert testimony, the Commission concluded that the prescribed reduction in

revenues was just and reasonable, and that the 6½% was a fair rate of return.

Disposition of Excess Charges Collected Since the Commission's Order. The Circuit Court of Appeals stayed the Commission's order pending appeal. The companies state that, as a condition of the stay, the court required them to give a bond in the sum of $1,000,000, conditioned upon their refund of excess charges to customers, in the event that the Commission's order should be sustained. The bond is not in the record and its precise terms are not before us.

The companies point out that substantially all the gas affected by the reduction in revenues is sold to wholesalers who distribute it for ultimate consumption. They argue that the purpose of the rate regulation is the protection of consumers, and that the purposes of the Act will not be effectuated by the refunds to wholesalers. They insist that such refunds, being the wholesalers' profits from past business, cannot be resorted to for reducing future rates to the consumers. Cf. *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 14; *Galveston Electric Co.* v. *Galveston, supra,* 258 U. S. at 395.

Of this contention it is enough to say that the question of the disposition of the excess charges is not before us for determination on the present record. Cf. *Morgan* v. *United States,* 304 U. S. 1, 26. Amounts collected in excess of the Commission's order are declared to be unlawful by § 4 (a) of the Act. If there is any basis, either in the bond or the circumstances relied upon by the companies, for not compelling the companies to surrender these illegal exactions, it does not appear from the record.

We have considered but find it unnecessary to discuss other objections of lesser moment to the Commission's order. We sustain the validity of the order and reverse the judgment below.

Reversed.

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

I

We concur with the Court's judgment that the rate order of the Federal Power Commission, issued after a fair hearing upon findings of fact supported by substantial evidence, should have been sustained by the court below. But insofar as the Court assumes that, regardless of the terms of the statute, the due process clause of the Fifth Amendment grants it power to invalidate an order as unconstitutional because it finds the charges to be unreasonable, we are unable to join in the opinion just announced.

Rate making is a species of price fixing. In a recent series of cases, this Court has held that legislative price fixing is not prohibited by the due process clause.[1] We believe that, in so holding, it has returned, in part at least, to the constitutional principles which prevailed for the first hundred years of our history. *Munn* v. *Illinois*, 94 U. S. 113; *Peik* v. *Chicago & N. W. Ry. Co.*, 94 U. S. 164. Cf. *McCart* v. *Indianapolis Water Co.*, 302 U. S. 419, 427–

[1] Some of these cases arose under the Fifth, some under the Fourteenth, Amendment. *Nebbia* v. *New York*, 291 U. S. 502 (state statute authorizing a milk control board to fix minimum and maximum retail prices for milk); *Mulford* v. *Smith*, 307 U. S. 38 (federal statute imposing penalties on tobacco auction warehousemen for marketing tobacco in excess of prescribed quota); *United States* v. *Rock Royal Co-op.*, 307 U. S. 533 (federal statute authorizing Secretary of Agriculture to fix minimum prices to be paid producers for milk sold to dealers); *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381 (federal statute authorizing Bituminous Coal Commission to fix maximum and minimum prices for bituminous coal); *United States* v. *Darby*, 312 U. S. 100 (federal statute fixing minimum wages (and maximum hours) for employees engaged in production of goods for interstate commerce); *Olsen* v. *Nebraska*, 313 U. S. 236 (state statute fixing maximum compensation to be collected by private employment agencies).

428. The *Munn* and *Peik* cases, decided in 1877, Justices Field and Strong dissenting, emphatically declared price fixing to be a constitutional prerogative of the legislative branch, not subject to judicial review or revision.

In 1886, four of the Justices who had voted with him in the *Munn* and *Peik* cases no longer being on the Court, Chief Justice Waite expressed views in an opinion of the Court which indicated a yielding in part to the doctrines previously set forth in Mr. Justice Field's dissenting opinions, although the decision, upholding a state regulatory statute, did not require him to reach this issue. See *Railroad Commission Cases,* 116 U. S. 307, 331. For an interesting discussion of the evolution of this change of position, see Swisher, Stephen J. Field, 372–392. By 1890, six Justices of the 1877 Court, including Chief Justice Waite, had been replaced by others. The new Court then clearly repudiated the opinion expressed for the Court by Chief Justice Waite in the *Munn* and *Peik* cases, in a holding which accorded with the views of Mr. Justice Field. *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,* 134 U. S. 418. Under those views, first embodied in a holding of this Court in 1890, "due process" means no less than "reasonableness judicially determined."[2] In accordance with this elastic meaning which, in the words of Mr. Justice Holmes, makes the sky the limit[3] of judicial power to declare legislative acts unconstitutional, the conclusions of judges, substituted for those of legislatures, become a broad and varying standard of constitutionality.[4] We

[2] See *Polk Company* v. *Glover,* 305 U. S. 5, 12–19. Cf. *Chambers* v. *Florida,* 309 U. S. 227, 235–238.

[3] "As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable." *Baldwin* v. *Missouri* 281 U. S. 586, 595.

[4] To hold that the Fourteenth Amendment was intended to and did provide protection from state invasions of the right of free speech

shall not attempt now to set out at length the reasons for our belief that acceptance of such a meaning is historically unjustified and that it transfers to courts powers which, under the Constitution, belong to the legislative branch of government. But we feel that we must record our disagreement from an opinion which, although upholding the action of the Commission on these particular facts, nevertheless gives renewed vitality to a "constitutional" doctrine which we are convinced has no support in the Constitution.

The doctrine which makes of "due process" an unlimited grant to courts to approve or reject policies selected by legislatures in accordance with the judges' notion of reasonableness had its origin in connection with legislative attempts to fix the prices charged by public utilities. And in no field has it had more paralyzing effects.[5]

II

We have here, to be sure, a statute which expressly provides for judicial review. Congress has provided in § 5 of the Natural Gas Act that the rates fixed by the Commission shall be "just and reasonable." The provision for judicial review states that the "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." § 19 (b). But we are not satisfied that the opinion of the Court properly delimits the scope of that review under this Act. Furthermore, since this case starts

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and other clearly defined protections contained in the Bill of Rights, *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287, 301–302, is quite different from holding that "due process," an historical expression relating to procedure, *Chambers* v. *Florida*, *supra*, confers a broad judicial power to invalidate all legislation which seems "unreasonable" to courts. In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other, they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people.

[5] *McCart* v. *Indianapolis Water Co.*, *supra*.

a new chapter in the regulation of utility rates, we think it important to indicate more explicitly than has been done the freedom which the Commission has both under the Constitution and under this new statute. While the opinion of the Court erases much which has been written in rate cases during the last half century, we think this is an appropriate occasion to lay the ghost of *Smyth* v. *Ames*, 169 U. S. 466, which has haunted utility regulation since 1898. That is especially desirable lest the reference by the majority to "constitutional requirements" and to "the limits of due process" be deemed to perpetuate the fallacious "fair value" theory of rate making in the limited judicial review provided by the Act.

Smyth v. *Ames* held (pp. 546-547) that "the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

(1) This theory derives from principles of eminent domain. See Mr. Justice Brewer, *Ames* v. *Union Pacific Ry.*

Co., 64 F. 165, 177; *West* v. *Chesapeake & Potomac Telephone Co.*, 295 U. S. 662, 671; Hale, Conflicting Judicial Criteria of Utility Rates, 38 Col. L. Rev. 959. In condemnation cases the "value of property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner." *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 328, 329. Cf. *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510, 525–526. But those principles have no place in rate regulation. In the first place, the value of a going concern in fact depends on earnings under whatever rates may be anticipated. The present fair value rule creates, but offers no solution to, the dilemma that value depends upon the rates fixed and the rates upon value. See Mr. Justice Brandeis, *Southwestern Bell Telephone Co.* v. *Public Service Commission*, 262 U. S. 276, 292; Hale, The Fair Value Merry-Go-Round, 33 Ill. L. Rev. 517; 2 Bonbright, Valuation of Property, pp. 1094 *et seq.* In the second place, when property is taken under the power of eminent domain the owner is "entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken." *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343. But in rate-making, the owner does not have any such protection. We know, without attempting any valuation, that if earnings are reduced the value will be less. But that does not stay the hand of the legislature or its administrative agency in making rate reductions. As we have said, rate-making is one species of price-fixing. Price-fixing, like other forms of social legislation, may well diminish the value of the property which is regulated. But that is no obstacle to its validity. As stated by Mr. Justice Holmes in *Block* v. *Hirsh*, 256 U. S. 135, 155: "The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less con-

cretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay." Somewhat the same view was expressed in *Nebbia* v. *New York,* 291 U. S. 502, 532, where this Court said: "The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago. *Munn* v. *Illinois,* 94 U. S. 113." Explicit recognition of these principles will place the problems of rate-making in their proper setting under this statute.

(2) The rule of *Smyth* v. *Ames,* as construed and applied, directs the rate-making body in forming its judgment as to "fair value" to take into consideration various elements—capitalization, book cost, actual cost, prudent investment, reproduction cost. See Mr. Justice Brandeis, *Southwestern Bell Telephone Co.* v. *Public Service Commission, supra,* pp. 294–295. But as stated by Mr. Justice Brandeis: "Obviously 'value' cannot be a composite of all these elements. Nor can it be arrived at on all these bases. They are very different; and must, when applied in a particular case, lead to widely different results. The rule of *Smyth* v. *Ames,* as interpreted and applied, means merely that all must be considered. What, if any, weight shall be given to any one, must practically rest in the judicial discretion of the tribunal which makes the deter-

mination. Whether a desired result is reached may depend upon how any one of many elements is treated." *Id.*, pp. 295–296. The risks of not giving weight to reproduction cost have been great. *Southwestern Bell Telephone Co.* v. *Public Service Commission, supra; St. Louis & O'Fallon Ry. Co.* v. *United States,* 279 U. S. 461. The havoc raised by insistence on reproduction cost is now a matter of historical record. Mr. Justice Brandeis in the *Southwestern Bell Telephone* case demonstrated how the rule of *Smyth* v. *Ames* has seriously impaired the power of rate-regulation and how the "fair value" rule has proved to be unworkable by reason of the time required to make the valuations, the heavy expense involved, and the unreliability of the results obtained.[6] And see Mr. Justice Brandeis concurring, *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 73; dissenting opinion, *McCart* v. *Indianapolis Water Co.,* 302 U. S. 419, 423 *et seq.;* Mr. Justice Stone dissenting, *West* v. *Chesapeake & Potomac Telephone Co., supra.* The result of this Court's rulings in rate cases since *Smyth* v. *Ames* has recently been summarized as follows: "Under the influence of these precedents, commission regulation has become so cumbersome and so ineffective that it may be said, with only slight exaggeration, to have broken down. Even the investor,[7] on whose behalf the constitutional safeguards have

[6] "The relation between the public utility and the community cannot be expressed in terms of a simple, quantitatively ascertainable fact, for the relation involves numerous and complex factors which depend on compromise and practical adjustment rather than on deductive logic. The whole doctrine of *Smyth* v. *Ames* rests upon a gigantic illusion. The fact which for twenty years the court has been vainly trying to find does not exist. 'Fair value' must be shelved among the great juristic myths of history, with the Law of Nature and the Social Contract. As a practical concept, from which practical conclusions can be drawn, it is valueless." Henderson, Railway Valuation and the Courts, 33 Harv. L. Rev. 1031, 1051.

[7] "Such valuation proceedings, as heretofore conducted, are excessively costly, require a long period of time, affect adversely the

been developed, has received no protection against the rebounds from the inflated stock-market prices that are stimulated by the 'fair-value' doctrine." Bonbright, *op. cit.*, p. 1154.

As we read the opinion of the Court, the Commission is now freed from the compulsion of admitting evidence on reproduction cost or of giving any weight to that element of "fair value." The Commission may now adopt, if it chooses, prudent investment as a rate base—the base long advocated by Mr. Justice Brandeis. And for the reasons stated by Mr. Justice Brandeis in the *Southwestern Bell Telephone* case, there could be no constitutional objection if the Commission adhered to that formula and rejected all others.

Yet it is important to note, as we have indicated, that Congress has merely provided in § 5 of the Natural Gas Act that the rates fixed by the Commission shall be "just and reasonable." It has provided no standard beyond that. Congress, to be sure, has provided for judicial review. But § 19(b) states that the "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." In view of these provisions, we do not think it is permissible for the courts to concern themselves with any issues as to the economic merits of a rate base. The Commission has a broad area of discretion for selection of an appropriate rate base. The requirements of "just and reasonable" embrace, among other factors, two phases of the public interest: (1) the

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corporation's credit, interfere with its financing upon favorable terms, and frequently cause the postponement of extensions and improvements to the great detriment of the public. Unless and until there is some change in the legal principles which must be applied in determining fair value, however, the industry cannot escape from this situation." Report of the Committee on Valuation, American Electric Railway Assoc., 1924, p. 20.

investor interest; (2) the consumer interest. The investor interest is adequately served if the utility is allowed the opportunity to earn the cost of the service. That cost has been defined by Mr. Justice Brandeis as follows: "Cost includes not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest, for the use of the capital, whatever the nature of the security issued therefor; the allowance for risk incurred; and enough more to attract capital." *Southwestern Bell Telephone Co.* v. *Public Service Commission, supra,* 262 U. S. at p. 291. Irrespective of what the return may be on "fair value," if the rate permits the company to operate successfully and to attract capital all questions as to "just and reasonable" are at an end so far as the investor interest is concerned. Various routes to that end may be worked out by the expert administrators charged with the duty of regulation. It is not the function of the courts to prescribe what formula should be used. The fact that one may be fair to investors does not mean that another would be unfair. The decision in each case must turn on considerations of justness and fairness which cannot be cast into a legalistic formula. The rate of return to be allowed in any given case calls for a highly expert judgment. That judgment has been entrusted to the Commission. There it should rest.

One *caveat,* however, should be entered. The consumer interest cannot be disregarded in determining what is a "just and reasonable" rate. Conceivably, a return to the company of the cost of the service might not be "just and reasonable" to the public. The correct principle was announced by this Court in *Covington & Lexington Turnpike Co.* v. *Sandford,* 164 U. S. 578, 596: "It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the pub-

lic, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use its property. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends." Cf. *Chicago & Grand Trunk Ry. Co.* v. *Wellman,* 143 U. S. 339, 345–346; *United Gas Co.* v. *Texas,* 303 U. S. 123, 150–151.

This problem carries into a field not necessary to develop here. It reëmphasizes, however, that the investor interest is not the sole interest for protection. The investor and consumer interests may so collide as to warrant the rate-making body in concluding that a return on historical cost or prudent investment, though fair to investors, would be grossly unfair to the consumers. The possibility of that collision reinforces the view that the problem of rate-making is for the administrative experts, not the courts, and that the *ex post facto* function previously performed by the courts should be reduced to the barest minimum which is consistent with the statutory mandate for judicial review. That review should be as confined and restricted as the review, under similar statutes, of orders of other administrative agencies.

MR. JUSTICE FRANKFURTER, concurring:

I wholly agree with the opinion of the CHIEF JUSTICE.

Congress has in the Natural Gas Act specifically cast upon courts the duty to review orders of the Federal Power Commission fixing "just and reasonable" rates. The constitutional scope of judicial review of rate orders where Congress has denied judicial review is therefore not in issue in this case. Discussion of the problem is academic, especially since we all concur in the CHIEF JUSTICE's conclusions on the rate order here made by the Commission. But since the issue has been stirred, I add a few words because legal history still has its claims.

While the doctrine of "confiscation," as a limitation to be enforced by the judiciary upon the legislative power to fix utility rates, was first applied in *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,* 134 U. S. 418, that decision followed principles expounded in *Stone* v. *Farmers' Loan & Trust Co.,* 116 U. S. 307, especially at 331. See 134 U. S. at 455–56. Mr. Chief Justice Waite, who delivered the opinion in the *Stone* case as well as in the earlier decision in *Munn* v. *Illinois,* 94 U. S. 113, was therefore the author of the doctrine of "confiscation" and its corollary, "judicial review." His view was shared by such stout respecters of legislative power over utilities as Mr. Justice Miller (see Fairman, Mr. Justice Miller and the Supreme Court, *passim*), Mr. Justice Bradley (see his dissent in *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,* 134 U. S. 418, 461), and Mr. Justice Harlan. The latter, indeed, agreed with Mr. Justice Field that the regulatory power exercised in the *Railroad Commission Cases,* 116 U. S. 307, constituted an impairment of the obligation of contract. By no one was the doctrine of judicial review more emphatically accepted, and applied in favor of a public utility, than by Mr. Justice Harlan in the decision and opinion in *Covington & Lexington Turnpike Co.* v. *Sandford,* 164 U. S. 578, especially at 591–95.

But while this historic controversy over the constitutional limitations upon the power of courts in rate cases is not presented here, if it be deemed that courts have nothing to do with rate-making because that task was committed exclusively to the Commission, surely it is a usurpation of the Commission's function to tell it how it should discharge this task and how it should protect the various interests that are deemed to be in its, and not in our, keeping.

PUERTO RICO *v.* RUSSELL & CO., S. EN C.

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

No. 95. Argued February 3, 4, 1942.—Decided March 16, 1942.

In aid of the operation of an irrigation district on a stream in Puerto Rico, the insular Commissioner of the Interior made contracts with a company owning rights to divert water from the stream for the irrigation of lands not embraced in the district, whereby, in consideration of a suspension of the company's water rights in certain particulars, the insular Government undertook to deliver to it at its intakes specified quantities of water regularly, as the fair equivalent of the rights suspended. *Held*, that the Commissioner had statutory authority to make the contracts and that a later statute which sought to recoup part of the cost of maintaining and operating the district system by imposing annual assessments, erroneously called "taxes," on the company's lands, impaired the obligation of the contracts in violation of the insular Organic Act. P. 616.

118 F. 2d 225, affirmed.

CERTIORARI, 314 U. S. 589, to review a judgment which, reversing a judgment of the Supreme Court of Puerto Rico, 56 P. R. Dec. 343, reinstated a judgment of the insular District Court dismissing the complaint in an action brought by Puerto Rico to recover sums claimed as taxes. For earlier phases see, 21 F. 2d 1012; 60 F. 2d 10; 288 U. S. 476.

Mr. William Cattron Rigby, with whom *Messrs. George A. Malcolm,* Attorney General of Puerto Rico, and *Nathan R. Margold* were on the brief, for petitioner.

Mr. George M. Wolfson for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The question for decision is whether a statute of Puerto Rico impairs the obligation of certain contracts in violation of the Island's organic law.[1]

The respondent's predecessor in title, Fortuna Estates, as owner or lessee of lands adjacent to the Jacaguas River, enjoyed under Spanish law, and respondent, as successor, still enjoys, rights appurtenant to the lands to draw from the river 12,612.1 acre-feet of water per year for irrigation.

Puerto Rico adopted a law in 1908 [2] which authorized an irrigation system, as part of which a dam was to be erected in Jacaguas River above Fortuna's intakes. Fortuna's lands were not within or a part of the irrigation district. Although the operation of the system would interfere with Fortuna's water rights, they were not condemned, as the statute permitted, nor were they voluntarily surrendered.

By an amendatory law adopted in 1913,[3] it was provided: "In the case of any land carrying a water right or concession of which the source of supply is destroyed or impaired by the construction or operation of the irrigation system, which shall not have been relinquished or surrendered to the People of Porto Rico, such land shall be entitled to receive from the irrigation system an amount of water which is the reasonable equivalent in value of the said water right

[1] "No law impairing the obligation of contracts shall be enacted." 48 U. S. C. § 737.

[2] Act of September 18, 1908, Laws of Porto Rico, 1909, p. 152.

[3] Act of August 8, 1913, Laws of Porto Rico, 1914, p. 54, § 13.

or concession." This Act empowered the Commissioner of the Interior to make agreements with holders of such rights, fixing the amount, and the time, place, and conditions of delivery, of water to be received as the equivalent of the rights suspended.

In the exercise of this authority the Commissioner executed contracts with Fortuna which called for the suspension of its rights appurtenant to two large tracts during the life of the contracts and assured delivery of a specified amount of water at Fortuna's intakes as the fair equivalent of the rights suspended.

Each contract enumerated the rights to take water appurtenant to a described tract of land which would be impaired or interrupted by the operation of the irrigation system; recited that the amount of water taken by Fortuna under its rights varied throughout the year, due to differences in rainfall, so that it was impossible to determine in advance the amount of water to which it would be entitled in any given period; and that Porto Rico was willing to deliver from the Jacaguas River the water to which Fortuna was entitled, but, in order to make the operation of the system more certain, desired to agree upon a fixed and regular amount which should be received by Fortuna as the fair equivalent in value for irrigation purposes of the water it would ordinarily take and use under its existing rights.

The contract then stated the agreement of the parties as to the quantities of water which, delivered in equal daily instalments, were to be considered such fair equivalents and the petitioner covenanted to deliver these quantities to Fortuna. It was also agreed that Fortuna might exercise its preëxisting rights for ten days in each year to prevent their loss by non-user.

Under the Irrigation Law, lands in a district were subjected to a uniform annual assessment per acre to discharge the cost of construction, maintenance, and operation of

the system. Sales were also made of surplus waters and the proceeds used for maintenance.

Shortly after the contracts were made, a controversy arose between petitioner and respondent with respect to Puerto Rico's right to sell surplus waters. Litigation ensued which terminated in a decree restraining the insular government from diverting certain surplus waters to which the respondent was held to be entitled under the contracts. The decision also upheld the validity of the contracts.[4]

Thereupon the legislature adopted, July 8, 1921, "An Act Fixing a Tax on Certain Lands using water from the Southern Coast Public Irrigation System, on which lands no Tax Whatever was Levied under the Public Irrigation Law, and for Other Purposes."[5] This is the statute enforcement of which is asserted to impair the obligation of the contracts. By this act a special tax is imposed on all lands supplied which, under existing law, contribute nothing to the expense of the maintenance of the system. The Treasurer of Puerto Rico is directed to compute the tax by finding the aggregate acreage receiving water from the system including lands, like those of respondent, outside the district but receiving the equivalents of their preëxisting rights under contracts. He is to assess a prorata share of the total expense against the lands of respondent and others similarly circumstanced. The Act, as is admitted, was aimed only at those who, like respondent, had contracted for the receipt of water in lieu of that to which they were of right entitled and whose lands were not a part of the irrigation district.

Action was instituted by petitioner in an insular court for the recovery of several years taxes so imposed.[6] The

[4] *Porto Rico* v. *Russell & Co.*, 268 F. 723.

[5] Act 49 of 1921, Laws of Porto Rico, 1921, p. 366.

[6] The preceding litigation and the necessity for bringing action for the tax rather than proceeding summarily will be found in *Gallardo* v. *Havemeyer*, 21 F. 2d 1012, and the Act of Congress of April 23, 1928, 45 Stat. 447.

cause was removed to the United States District Court, where a motion to remand was denied and a judgment entered for the respondent on the merits. The judgment was affirmed by the Circuit Court of Appeals for the First Circuit,[7] but was reversed by this court for want of diversity of citizenship on which jurisdiction of the federal courts depended.[8]

After remand, the case was tried in the insular district court and the complaint was dismissed on the merits, on the ground that Act No. 49, of 1921, was an invalid impairment of the obligation of the 1914 contracts. The Supreme Court of Puerto Rico reversed and rendered judgment for the petitioner.[9] The Circuit Court of Appeals in turn reversed and reinstated the judgment of the insular district court.[10] We granted certiorari, as the case presents an important question arising under the Insular Organic Act. We hold that the judgment of the Circuit Court of Appeals was right.

By the Act of 1908, [11] the people of Puerto Rico undertook the construction of a public irrigation system. This necessitated the erection of a dam for impounding and storage of part of the waters of the Jacaguas River above the respondent's intakes, and the creation of an irrigation district. The statute recognized the necessity of providing a method for the acquisition of the rights of riparian owners whose land lay below the dam. Section 12 authorized the condemnation of existing water rights and the payment of their fair value to the owners. By the amendatory Act of 1913, the owners of lands which fell within the irrigation district could release their preëxisting rights, have them valued, and be paid the value by credits against

[7] 60 F. 2d 10.

[8] *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476.

[9] 56 P. R. Dec. 343.

[10] 118 F. 2d 225.

[11] *Supra,* Note 2.

their proportionate share of the expense of the construction and operation of the system.[12] By § 13, owners of lands having water rights, whose source of supply would be destroyed or impaired by the construction or operation of the system, who had not surrendered or relinquished their rights, were declared entitled to receive from the irrigation system an amount of water which would be the reasonable equivalent in value of the right or concession so destroyed or impaired. The Commissioner was authorized to negotiate contracts to this end with such owners.

It is evident that it was thought that lands such as those of the respondent could not be included within the proposed district. It is idle to speculate concerning the reasons for this decision, though it is clear that in order to realize the Government's purpose it was deemed necessary to reach an accommodation concerning preëxisting valid water rights of land owners whose lands could not or should not be included in the irrigation district. In the case of such persons the purpose was to substitute a fair equivalent for the rights theretofore exercised. Such an arrangement offered mutual advantages to Puerto Rico and to the owners. Whereas Fortuna had, prior to the erection of the dam, the right to take over 12,000 acre-feet of water per year for irrigation, a proportion of surplus waters, and certain torrential waters, the supply was uneven and uncertain due to the irregularity of rainfall. It was, therefore, an advantage to the respondent's predecessor to surrender its maximum rights in consideration of an agreement that there should be delivered to it, equally and evenly throughout the year, something less than the maximum it was entitled to take under preëxisting conditions. On the other hand, it was an advantage to the irrigation system that it should not be obliged at any time to deplete its storage waters by furnishing the respondent

[12] *Supra*, Note 3.

the maximum amount which, if the water were available, it was entitled to receive.

The Insular Supreme Court held that the exaction is not precluded by the contracts, and works no impairment of their obligation. It held the exaction is a tax; that the rights which the respondent owned prior to the construction of the irrigation system were taxable, and that the privileges it enjoys under the contract are equally so; that the contract contains no covenant not to tax these rights or privileges and, if it did, it would be beyond the power of the Commissioner. We cannot agree.

The assessment contemplated by Act No. 49 of 1921 is not a general tax laid for the support of government upon a property right or a franchise. This is expressly admitted by the petitioner in brief and in oral argument. In the brief it is said: "The special taxes or assessments here in question, if and when collected, will simply accrue to the special fund for the current operation and maintenance of the irrigation district, and thus serve only to lower the assessments upon other lands now taxed for such operation and maintenance. The insular Treasury can derive no direct benefit." And, in oral argument, counsel for petitioner frankly conceded that the money to be raised is not taxes in any way but merely an assessment against the respondent's land for the cost of delivering the water. If Puerto Rico had essayed to tax respondent's lands or its water rights by a general law, quite distinct questions would arise which we need not discuss.

Treated as an assessment of part of the cost of maintenance of the irrigation system, the petitioner insists that the exaction does not violate the obligation of the 1914 contracts. It asserts that the agreements were only that a given amount of water would be released, or made available, or allotted to respondent and therefore The

People of Puerto Rico are free to charge to respondent the cost of delivering the water; and, further, that if the contracts, by their terms, precluded the imposition upon the respondent of this cost they are beyond the power of the Commissioner.

Section 13 of the Act of 1913 authorizes the Commissioner "to enter into agreements with such owner or owners as to the amount of water and the time, place and conditions of *delivery* thereof, which *shall be delivered to the lands* to which the said water rights or concessions are appurtenant as the fair equivalent in value thereof, . . ." We think it evident from this language that the Commissioner was not limited to agreeing to allot to the land-owner a certain amount of water, but was empowered to stipulate that at certain times he would cause to be delivered, at specified places, the water which respondent was to receive as the equivalent of that which it had formerly been entitled to take at its intakes along the river. That the Commissioner so construed his authority is plain from the terms of the contracts.

Each contract describes the rights appurtenant to the lands in question, acknowledges their validity, states the amounts of water the respondent's predecessor is entitled to take, and, in consideration of the mutual covenants of the parties, stipulates "that the quantities of water specified" in the agreement, "delivered uniformly through the year, subject to the terms and conditions specified in this agreement, . . . are the fair equivalent in value of the water which the said Fortuna Estates takes under and pursuant to the concessions and water rights claimed by it, and The People of Porto Rico will, subject to the conditions and limitations hereinafter specified and at the times, places and subject to the conditions of delivery hereinafter provided for, *make delivery*" of the amounts of water specified in the agreement. Each contract further provides that "The People of

Porto Rico will deliver the said water as follows." One agreement covenants that the water deliverable for some of the tracts shall be at the intakes provided by the owner, and that water deliverable to another tract shall in part be deliverable at such an intake and in part at a pumping station on the bank of the river. The right is reserved, upon notice by The People of Porto Rico, to change the place of delivery of certain of the water. It is further provided that if delivery at the points designated is temporarily interrupted, Porto Rico will deliver an equivalent amount of water at some other point. It is agreed that the presence of water in the river bed at the opening of the described intakes, sufficient to permit the owner to take the quantities specified in the agreement, shall be deemed a delivery within the meaning of the contract. A clause provides that should the owner desire to take water for certain of the tracts at places other than the present intakes, Porto Rico will deliver the water at such other places but that "all extra expenses occasioned by such delivery shall be borne by" the owner.

The obligation of Porto Rico to deliver the named quantities is recognized in many clauses of the contracts. As applied to the petitioner, the word "deliver" appears ten times in each contract, the word "delivery" nine times, and the word "deliverable" four times, in one of the documents. From the four corners of the agreements it is clear that, in consideration of the suspension of the rights of Fortuna, and its successor, the respondent, the insular government agreed not merely to allot, but to deliver, at specified places, certain quantities of water. Prior to the execution of the contracts, Fortuna was under no obligation to the government to pay it any cost or expense for the bringing of the water to its intakes. The contract clearly contemplates that it is to be under none with respect to the water agreed to be

delivered to it in lieu of that which it formerly had the right to take. This fact is emphasized by the provision that, if it desires delivery at other places than those specified in the contracts, it shall bear the expense entailed by the change.

The deficit in the maintenance cost of the system was met, for some time, by the sale of surplus water. The contract gives the respondent the right to a portion of such surplus water over and above the specified amounts to be delivered by the petitioner. The respondent sued to enjoin the petitioner from selling the surplus water to which it claimed to be entitled. The suit resulted in an injunction. The Government being thus deprived of the revenue theretofore used towards the maintenance of the system, adopted the Act of 1921 with the evident purpose of recouping a portion of that expense from the respondent and others with whom it had made contracts in 1914 for the delivery of the stipulated amount of water to them without charge therefor. The history of the legislation shows that the proposed exaction was not a general tax but was an effort to collect from persons whose land was not in the irrigation system a portion of the expense of maintaining that system, whereas the contracts exempted them from contributing to such cost as a condition of receiving the stipulated amount of water from the system. This was a clear violation of the obligation of the contracts.

The judgment is

Affirmed.

MR. JUSTICE DOUGLAS, dissenting:

There was no provision whatsoever in the grant of these water rights exempting them from any form of taxation. Hence if no contract had been made and the irrigation system had been constructed and respondent's lands had been serviced in precisely the same way as

was done here, I should think that there would be no doubt but that the assessment would be valid. The Supreme Court of Puerto Rico relied for the validity of the assessment on such cases as *Knowles* v. *New Sweden Irrigation District*, 16 Ida. 217, 235, 101 P. 81, 87, and *Bleakley* v. *Priest Rapids Irrigation Dist.*, 168 Wash. 267, 11 P. 2d 597. Those cases hold that, under certain circumstances, the owner of a water right may be brought into an irrigation district and forced to pay an assessment. As stated in the *Knowles* case (p. 241):

"Under our irrigation law as it existed at the time of the organization of this district and the assessments referred to were made, if the land of the plaintiff was properly included in said irrigation district, it was subject to assessment for benefits, provided it received any, whether the owner of said land owned a water right in connection therewith or not; for a person in an irrigation district may receive certain benefits regardless of whether the owner has a water right in connection therewith or not."

The reasons which permit the owner of a water right to be brought into an irrigation district are equally cogent here. For, the impact of this assessment is not more rigorous than the assessment attendant on membership in an irrigation district. In fact, it is less, since respondent is being assessed only for a prorata share of the cost of maintenance and operation of the system, not its construction.

It was clear and undisputed that respondent obtained substantial benefits from the irrigation system. (1) The quantity of water received by respondent from the system is 19% larger than what previously had been available from the earlier limited flow of the river. (2) The storage reservoir impounds flood waters which would be largely lost to respondent. The dam not only increases the amount of water available but makes possible regu-

lar and more continuous deliveries of the water. (3) The irrigation system has tapped new sources of water which feed the reservoir. No separation of that additional supply of water from the old supply is possible. As a result, respondent obtains additional advantages, especially in dry years. (4) By reason of the construction and operation of the irrigation system, the water is available at several different distribution points through canals rather than at the river bed alone.

In that posture of the case, we would be faced with a determination by the legislature of Puerto Rico that respondent's lands were benefited and that respondent should pay an assessment. It has long been held that such a "determination is conclusive upon the owners and the courts." *Spencer* v. *Merchant,* 125 U. S. 345, 356. And see *Davidson* v. *New Orleans,* 96 U. S. 97; *Walston* v. *Nevin,* 128 U. S. 578. As stated in *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112, 176, 177, "the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry"; the choice of methods employed "is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discretion of the state legislature, and with which this court ought to have nothing to do." And see *French* v. *Barber Asphalt Paving Co.,* 181 U. S. 324; *Milheim* v. *Moffat Tunnel Improvement Dist.,* 262 U. S. 710, 721; *Roberts* v. *Richland Irrigation Dist.,* 289 U. S. 71; *Chesebro* v. *Los Angeles County Flood Control Dist.,* 306 U. S. 459.

The existence of the contracts does not call for a different result. The statute in question provided that owners of water rights, such as respondent, "shall be entitled to receive from the irrigation system an amount of

water which is the reasonable equivalent in value of the said water right or concession." The Commissioner of the Interior was authorized "to enter into agreements with such owner or owners as to the amount of water and the time, place and conditions of delivery thereof, which shall be delivered to the lands to which the said water rights or concessions are appurtenant as the fair equivalent in value thereof." Act No. 128, § 13, August 8, 1913, L. 1914, pp. 54–84. The contracts, as well as the statute, speak of "delivery" of the water. But the Supreme Court of Puerto Rico interpreted the contracts as meaning that respondent "agreed to *receive* [italics supplied] from the irrigation system a certain quantity of water in exchange" for its water rights. I do not think that that construction is unwarranted.

(1) The contracts themselves make plain that, as respects certain intakes on the river, "the presence of water in the river bed . . . in quantities sufficient to permit the taking at the said intakes of the amounts of water specified shall be deemed to be deliveries." That provision alone demonstrates that the Supreme Court of Puerto Rico was justified in interpreting "delivery" in these contracts differently than might be warranted in case of contracts for the cartage of goods. "The word 'deliver' has perhaps as many different shades of meaning ascertained by judicial interpretation as any other term known to the law." *United States* v. *McCready*, 11 F. 225, 234. The problems of operation of an irrigation system are unique in many respects. Manipulation of the gates at the dam determines the flow of water through the various channels. Puerto Rico's undertaking in each instance was to "deliver" water at specified intakes provided by respondent. Those intakes were in the river or in designated reservoirs provided by respondent. It seems reasonable to conclude that Puerto Rico's

undertaking was to make the specified quantities of water available so that they would be received at those intakes. To enforce the present tax is not to renig on that undertaking. The fact that respondent was to bear "all extra expenses" in case water was delivered at intakes other than the designated ones seems to me hardly more than a provision that respondent was to bear the cost in case the irrigation system had to be partially relocated to meet its requirements. In any event, it does no more than raise a doubt as to the correct interpretation of the contract—a doubt which, as subsequently pointed out, should not be resolved against the power of Puerto Rico to impose this tax.

(2) It seems to me tolerably clear that such a construction of the contracts comports with the purpose of the arrangement. The contracts state that Puerto Rico, "in order to facilitate and make more certain the operation of the said dam and the irrigation system of which it is a part, desires to determine and agree upon an amount of water which, delivered regularly, may, under all attending circumstances, be considered to be fair equivalent in value for irrigation purposes of the amount of water which the Fortuna Estates would under ordinary circumstances take and use under the said water rights and concessions." The amount of water actually obtained by respondent before the dam was erected apparently fell far below the amount to which it was entitled under their water rights. The contracts were designed to substitute for that latter theoretical figure one which would represent a "fair equivalent in value for irrigation purposes" of the amount of water which respondent would "under ordinary circumstances take and use" under its water rights. From Puerto Rico's point of view, such a determination was important so that the demands on the dam could be reduced to known requirements and so that the erection of the dam would not

result in a windfall to respondent. The latter certainly would transpire if the dam gave respondent an amount of water which it had not been able to obtain on its own without the irrigation system. Thus the specification in the contracts of the "fair equivalent" of the amount of water which respondent ordinarily would obtain under its water rights was nothing more than a determination of the then worth of the water rights in terms of acre feet of water. Under that view, the contracts did not raise the water rights to a higher constitutional dignity than they previously enjoyed.

(3) No express exemption from this form of taxation is to be found in the contracts. If that exemption exists, it is implied. But even though it be assumed *arguendo* that Puerto Rico's representative had the authority constitutionally to bargain away its taxing power, the exemption should not be inferred. Chief Justice Marshall stated in *Providence Bank* v. *Billings*, 4 Pet. 514, 561, that a relinquishment of a power to tax "is never to be presumed"; "its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear." If there are doubts, they must be resolved in favor of the government. *Wells* v. *Savannah*, 181 U. S. 531; *Chicago Theological Seminary* v. *Illinois*, 188 U. S. 662; *Metropolitan Street Ry. Co.* v. *New York*, 199 U. S. 1, 35–36. As stated in *Wells* v. *Savannah*, *supra*, pp. 539–540, a contract of exemption from taxation must "be clearly proved. It will not be inferred from facts which do not lead irresistibly and necessarily to the existence of the contract. The facts proved must show either a contract expressed in terms, or else it must be implied from facts which leave no room for doubt that such was the intention of the parties and that a valid consideration existed for the contract. If there be any doubt on these matters, the contract has not been proven and the exemption does not exist."

That rule should be applied to this situation. It is clear that respondent is one of the beneficiaries of the irrigation system, even though the additional amount of water which the erection of the dam enabled it to obtain be disregarded. The meaning of the word "delivery" as used in the contracts is at best ambiguous. Hence, we should strictly adhere to the presumption against exemption from taxation. To resolve all ambiguities in the contracts in respondent's favor and against Puerto Rico is to forsake a canon of construction which has long obtained.

In conclusion, Puerto Rico has not treated respondent the same as landowners who have no water rights. The latter have to pay for the construction of the irrigation system as well as for its maintenance and operation. Respondent, on the other hand, is merely required to contribute towards the cost of maintenance and operation of the system. On these facts, that favored treatment is sufficient respect for the integrity of respondent's property rights. To free it from all burden is to give it a windfall. Only under the compulsion of plain and unambiguous language should we permit a beneficiary of such a project to escape his fair share of the costs. There is no such compulsion here. Hence we should refuse to let the contract clause of Puerto Rico's organic law produce an inequitable, unfair, and harsh result.

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

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SPRECKELS *v.* COMMISSIONER OF INTERNAL REVENUE.

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

Nos. 581 and 582. Argued March 4, 5, 1942.—Decided March 16, 1942.

Sales commissions paid by a taxpayer engaged in the business of buying and selling securities on his own account are not deductible as ordinary and necessary expenses, under § 23 (a) of the Revenue Act of 1934, but are to be treated as offsets against selling price relevant only to the determination of capital losses or gains. P. 627.

In Art. 282 of T. R. 77, under the Revenue Act of 1932, and Art. 24–2 of T. R. 86, under the Revenue Act of 1934, providing that commissions paid in selling securities are an offset against the selling price "when such commissions are not an ordinary and necessary business expense," the qualifying clause is controlling only in the case of dealers in securities.

119 F. 2d 667, affirmed.

CERTIORARI, 314 U. S. 600, to review the reversal of a ruling of the Board of Tax Appeals, 41 B. T. A. 1204.

Messrs. Thomas M. Wilkins and *Walter Slack* for petitioner.

Mr. Arnold Raum, with whom *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Morton K. Rothschild* were on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

During 1934 and 1935, the petitioner bought and sold stocks, bonds, and commodities. In connection with the sales, he paid selling commissions to brokers, and in his books these commissions were deducted from selling price before net profit or loss was determined. In his income tax returns for 1934 and 1935, he treated the commissions

similarly, not making deductions for them as ordinary and necessary business expenses. In 1939, however, in the course of proceedings before the Board of Tax Appeals,[1] the petitioner asserted that he was entitled to tax-refunds, for the reason that his failure to make deductions for the commissions had resulted in overpayment in both years. The Board sustained his contention in part, holding that the selling commissions could properly have been deducted as ordinary and necessary business expenses, that the refund claimed for 1935 should be allowed, but that the refund claimed for 1934 was barred by the applicable statute of limitations. 41 B. T. A. 1204. The Circuit Court of Appeals reversed, holding that the claimed deductions for selling commissions were not permissible, and finding it unnecessary therefore to determine whether the refund claim for 1934 was timely. 119 F. 2d 667. Because of a conflict in decisions of Circuit Courts of Appeal,[2] we granted certiorari to consider the question: Are sales commissions, paid by a taxpayer engaged in the business of buying and selling securities,[3] deductible as ordinary and necessary expenses under § 23 (a) of the Revenue Act of 1934,[4] or are they to be treated as offsets against selling

[1] These proceedings had been initiated in connection with other issues, not relevant here.

[2] With the decision below and *Commissioner* v. *Covington*, 120 F. 2d 768 (C. C. A. 5), compare *Winmill* v. *Commissioner*, 93 F. 2d 494 (C. C. A. 2), and *Neuberger* v. *Commissioner*, 104 F. 2d 649 (C. C. A. 2).

[3] Although the petitioner alleges that some of the commissions were paid on sales of commodities, it does not appear from the record that the petitioner asked for separate treatment of these commissions before either the Board of Tax Appeals or the Circuit Court of Appeals. Nor was such separate treatment requested before this Court.

[4] 48 Stat. 680, 688. The statute provides:

"In computing net income there shall be allowed as deductions:

"(a) *Expenses.*—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. . . ."

price, relevant only to the determination of capital losses or gains?

In *Helvering* v. *Winmill*, 305 U. S. 79, we held that a taxpayer who bought and sold securities could not deduct the commissions paid on his *purchases* as a business expense. Although the *Winmill* case arose under the Revenue Act of 1932, the statutory provisions and regulations there relevant are identical with those again in controversy here. And the conclusion we reached there—that a general regulation [5] designating "commissions" as one of a long list of deductible business expenses is not controlling in the face of a specific regulation pertaining to commissions on securities transactions—is equally applicable here.

The specific regulation pertaining to securities transactions provides:

"Commissions paid in purchasing securities are a part of the cost price of such securities. Commissions paid in selling securities, when such commissions are not an ordinary and necessary business expense, are an offset against the selling price. . . ." [6]

If there is any justification for treating sales commissions differently from purchase commissions, it must depend upon the significance of the clause "when such commissions are not an ordinary and necessary business expense." This clause first appeared in Treasury Regulations 77, accompanying the Revenue Act of 1932. In the income tax regulations prior to that time, it was consistently prescribed that commissions paid on purchases and sales of

[5] "Among the items included in business expenses are . . . commissions . . . advertising and other selling expenses . . ." Article 121 of Treasury Regulations 77, under the Revenue Act of 1932; Article 23(a)-1 of Treasury Regulations 86, under the Revenue Act of 1934.

[6] Article 282 of Treasury Regulations 77, under the Revenue Act of 1932; Article 24–2 of Regulations 86, under the Revenue Act of 1934.

securities were to be treated as part of the cost or selling price and were not otherwise to be deductible.[7] And in *Helvering* v. *Union Pacific Co.*, 293 U. S. 282, 286, this Court expressly recognized that such commissions have been "consistently treated . . . not as items of current expense, but as additions to the cost of the property or deductions from the proceeds of sale."

What, then, is the significance of the qualifying clause first appearing in the Regulations of 1932, and what effect is to be given to it? Prior to the formal adoption of the Regulations of 1932, the Commissioner of Internal Revenue permitted one exception to what appears to have been an otherwise uniform practise of treating commissions on the sales of securities as mere offsets against selling price. This exception was made in the case of the dealer in securities, one who "as a merchant buys securities and sells them to customers with a view to the gains and profits that may be derived therefrom." [8] It reflects the view that there are practical considerations of accounting convenience which make it as difficult for such dealers, in many instances, to set commissions off against the proceeds of individual sales as it would be for the merchant of other wares to treat his selling expenses only as a series of subtractions from the selling price realized on particular items of his stock.[9] Incorporation of the clause "when such commissions are not an ordinary and necessary business expense" was intended to provide formal recognition for an established business usage, based on the peculiar

[7] See, *e. g.*, Article 8, par. 10 of Treasury Regulations 33, Revised, under the Revenue Act of 1916; Article 293 of Treasury Regulations 45, under the Revenue Act of 1918.

[8] See Article 22(c)-5 of Treasury Regulations 86, under the Revenue Act of 1934.

[9] See Bureau of Internal Revenue, G. C. M. 15430, XIV-2 Cum. Bull. 59 (1935).

necessities of securities dealers, a usage to which the Commissioner had already given informal acquiescence.[10] For the casual buyer and seller of securities, or even for the large scale trader on his own account, as here, the practical obstacles to treating sales commissions as offsets against selling price do not exist. In this very case, for example, the taxpayer apparently found it more convenient to follow this method in keeping his own business records.

We therefore conclude that the clause "when such commissions are not an ordinary and necessary business expense" was intended to be and is controlling only in the case of securities dealers.[11] In the case of a trader on his own account where there are no compelling practical grounds for treating sales commissions as such an expense, we find no persuasive reason for distinguishing, under the statute and regulations, between sales commissions like those before us and purchase commissions like those of the *Winmill* case. The judgment of the court below is accordingly

Affirmed.

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

[10] *Ibid.*

[11] As the Government points out in its brief, a dealer's tax liability under the Revenue Acts of 1932 and 1934 would ordinarily have been the same whether the commissions he paid on sales were treated as deductible business expenses or offsets against selling price. For in general, his gains or losses would not have been capital gains or losses as defined in those acts. See § 101 (c) (8) of the Revenue Act of 1932, 47 Stat. 169, 192; § 117 (b) of the Revenue Act of 1934, 48 Stat. 680, 714.

Counsel for Parties.

CRANCER ET AL., DOING BUSINESS AS VALLEY STEEL PRODUCTS CO. ET AL., *v.* LOWDEN ET AL., TRUSTEES.

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

No. 505. Argued March 3, 4, 1942.—Decided March 16, 1942.

1. In an action by a carrier to recover the difference between the charges collected on a shipment and the charges which should have been collected under the tariff, where the question is merely whether the goods were of such character as to come within one tariff category, allowing the rate paid by the shipper, or another category exacting a higher rate, an opinion of the Interstate Commerce Commission on the same question of classification in another case may properly be admitted by the District Court as evidence of the meaning and application of the tariff. P. 634.
2. In such an action it is not incumbent upon the court to await the outcome of a proceeding before the Commission between the same parties putting in question the reasonableness of the rates charged but not the classification of the goods. P. 635.
3. A shipper who is obliged in an action by the carrier to pay charges which conform to the tariff but are unreasonable has the remedy of reparation if the Interstate Commerce Commission finds the rate unreasonable and requires that the tariff be modified accordingly. P. 636.

121 F. 2d 645, affirmed.

CERTIORARI, 314 U. S. 595, to review the affirmance of a judgment recovered by the respondents against the petitioners in an action based on undercharges for transportation of freight by a railway.

Mr. Irl B. Rosenblum, with whom *Mr. Abraham B. Frey* was on the brief, for petitioners.

Mr. Hale Houts, with whom *Mr. William S. Hogsett* was on the brief, for respondents.

MR. JUSTICE BYRNES delivered the opinion of the Court.

In the District Court for the Eastern District of Missouri respondents brought this suit to recover certain freight charges from petitioners. The case was tried without a jury and judgment rendered in favor of respondents in the sum of $2,263.47. On appeal, the judgment was affirmed by the Circuit Court of Appeals for the Eighth Circuit. 121 F. 2d 645.

We brought the case here because of the claim that the courts below sustained the jurisdiction of the District Court although the matter concerned called for the exercise of the administrative discretion of the Interstate Commerce Commission, under the established rule first announced in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, as explained in *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285.

The shipments, amounting to seven carloads, moved from points in several states, the cars being billed by petitioners to themselves at St. Louis, Missouri. The petitioners billed the contents of the cars as scrap iron and paid the tariff charge applicable to that classification. When the cars arrived at St. Louis, the respondents caused the Western Weighing and Inspection Bureau to inspect their contents. As a result of that inspection, respondents claimed that the articles were actually "pipe thread protecting rings" and that they belonged in the classification of "pipe fittings." The tariff rates on pipe fittings being higher than the rate on scrap iron, demand was made upon petitioners for the difference in freight charges. The demand was refused and this suit followed.

The trial court found that the articles in question were governed by the tariff for "pipe fittings" and not by that for "scrap iron." The Circuit Court of Appeals sustained this finding. In the light of certain proceedings

before the Interstate Commerce Commission, affecting the articles in question and their relation to the tariffs in controversy, we hold that the lower courts were right.

The only questions of any moment presented by this case arise in connection with these proceedings before the Interstate Commerce Commission. In 1937, petitioners filed with the Commission a complaint against a number of railroads, in which they asserted that certain shipments of iron or steel pipe thread protecting rings should have been classified under the freight tariffs as scrap iron or steel and not as pipe fittings. They also urged, as an alternative contention, that even though the shipments were classed as pipe fittings rather than scrap, the rate was unreasonably high. On August 6, 1937, the Commission dismissed the complaint, holding both that the pipe thread protecting rings fell within the classification of pipe fittings and that the rates so imposed were not unreasonable. Crancer & Fleischman *v.* Abilene and Southern Ry. Co., 223 I. C. C. 375.

In their answer and in a motion to stay proceedings filed in the District Court in the present case, petitioners asserted that, on or about March 16, 1939 (the date on which respondents brought this suit), they had instituted a second action before the Commission. In their complaint in this 1939 action, petitioners alleged that the freight charges demanded by the respondents on the shipments involved in the suit now before us were "unjust and unreasonable . . . to the extent that they exceeded or exceed rates applicable on scrap iron and scrap steel." It is not clear from this language whether petitioners intended to raise anew the question of classification, or whether they were simply requesting the Commission to pass again on the reasonableness of the rate. But in its opinion dated February 18, 1941, the Commission stated: "While com-

plainants admit for the purpose of this proceeding that the rates on scrap iron are not applicable, they contend that reasonable rates on thread protectors should bear some definite relation to the scrap-iron rates." Valley Steel Products Co. *v.* Atchison, T. & S. F. Ry. Co., 243 I. C. C. 509, 512. We conclude that the classification question is not involved in the 1939 I. C. C. proceeding. This proceeding is still pending. The effective date of the February 18, 1941 opinion and order has been indefinitely postponed, a further hearing has been held, but no subsequent opinion or order has been issued.[1]

Petitioners raise two contentions with respect to these I. C. C. proceedings and their bearing upon the present suit. First, they contend that it was reversible error for the District Court to admit in evidence a copy of the 1937 opinion of the Commission. At the trial, petitioners objected to its admission on the ground that the opinion has "absolutely no probative value in this case at all," that it is not "determinative" or "conclusive" and "not even persuasive" in this case, and that there was no pleading that "this opinion . . . is *res adjudicata* of the issues before your Honor." With respect to this point, we can only say that petitioners have made a bold attempt to transform their weakness into strength. The present case turns upon whether these iron pipe thread protecting rings are to be classified under the freight tariffs as pipe fittings or scrap. That was the very question decided by the Commission in its 1937 opinion, and it was decided adversely to petitioners. It is true that the shipments in the two cases are not the same and that no evidence was introduced to prove that their contents were identical.

[1] Order of the Commission in No. 28215, dated April 19, 1941; Order in No. 28215, dated May 23, 1941; Order in No. 28215, dated June 2, 1941; Order in No. 28215, dated June 20, 1941; Order in No. 28215, dated July 22, 1941.

Consequently, the issues in the present suit are not *res adjudicata*. But the Commission's 1937 opinion could hardly have been more relevant to the question before the District Court. As the Circuit Court observed: "Since the case was tried without a jury, we can see no possible prejudice to appellants by the consideration of the opinion of the Commission by the Court as evidence, rather than by an examination of the same opinion in his library. There is no suggestion that the latter course would have been improper. The trial court did not treat the opinion as being *res adjudicata*." 121 F. 2d 645, 650. We think this is the least that could be said, and that the District Court properly admitted and considered the administrative determination of virtually the same question as that before it.

Second, petitioners contend that the District Court erred in denying their motion to stay proceedings in this case pending action by the I. C. C. in the second proceeding before the Commission. As we have said, the classification question alone was involved in the case before the District Court. The Commission had passed upon that question almost two years earlier. In their newly instituted proceeding, petitioners did not resurrect that dispute but confined themselves to the contention that the rates on pipe fittings were unreasonable as applied to their pipe thread protecting rings. The issue of the reasonableness of the rates was not open to the District Court. The meaning of the tariff had been determined by the Commission. It remained to the railroad only to collect the rates for which the tariff called and for the District Court only to see that the railroad did collect them. "Until changed, tariffs bind both carriers and shippers with the force of law. Under § 6 of the Interstate Commerce Act the carrier cannot deviate from the rate specified in the tariff for any service in connection

with the transportation of property. That section forbids the carrier from giving a voluntary rebate in any shape or form. This Court has had occasion recently to sustain action of the Commission aimed at carriers' practices resulting in collection of less than the tariff rate. It is equally important to aid the efforts of a carrier in collecting published charges in full. Involuntary rebates from tariff rates should be viewed with the same disapproval as voluntary rebates." *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 520, 521. Nothing involved in the pending administrative proceedings before the Interstate Commerce Commission was essential to the determination of the issue in this suit. If the trial judge had, in the exercise of his discretion, continued the trial of the cause until such time as the Commission had passed upon the reasonableness of the rate, the delay might have made it impossible for the carrier to produce the witnesses who had made the inspection of the shipments. On the other hand, the petitioners suffered no hardship as a result of the trial court's insistence on proceeding with the trial. If petitioners pay the judgment in this case, and the Commission should, in the still pending proceeding, decide to modify the tariffs, petitioners can obtain a complete remedy by way of reparation. *Pennsylvania R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, 197. The form of the Circuit Court's judgment specifically preserved petitioners' right to such reparation. We hold that under the circumstances there was no abuse of discretion by the trial judge.

Judgment affirmed.

PUERTO RICO *v.* RUBERT HERMANOS, INC. ET AL.

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

No. 96. Argued February 6, 9, 1942.—Decided March 16, 1942.

1. The principle which accords great weight to the decisions of the Supreme Court of Puerto Rico in matters of local law applies where the question respects the power of that court to appoint a receiver and is dependent upon a construction of local statutes; and *a fortiori* where the question concerns merely the propriety of an exercise of that power. P. 646.
2. A decision of the Supreme Court of Puerto Rico affirming its power to place a receiver in control of the property of a corporation the dissolution of which it had decreed for violations of a law forbidding corporations to hold more than 500 acres of land, is entitled to great weight as an exposition of the local law and, not being plainly incorrect, should not have been reversed by the Circuit Court of Appeals, although § 182 of the local Code of Civil Procedure upon which the insular court relied appears to conflict with §§ 27–30 of the Private Corporation Law. P. 646.
3. The Supreme Court of Puerto Rico, having decreed the forfeiture of the charter, and the dissolution and winding up of a corporation, which in violation of the law and its charter restrictions had acquired more than 500 acres of land, appointed a receiver of all its property, which was operated as a unit in the production of sugar, and directed him to manage the property as a going concern until Puerto Rico should exercise its statutory option either to confiscate the real estate unlawfully held or to have it sold at public auction. *Held:*

   (1) That the appointment was discretionary, for the purpose of preventing confusion and needless litigation which might result if the directors of the corporation should attempt to convey interests in the property pending the exercise of the option. P. 646.

   (2) That as the receivership was to be terminated upon the exercise of the option, it was sufficiently definite in time; nor was it too broad in not being restricted to the land in excess of the 500 acre maximum, since to separate the land from the machinery and other personalty pending the exercise of the option would have resulted in economic waste. P. 647.

118 F. 2d 752, reversed.

CERTIORARI, 314 U. S. 589, to review the reversal of a decree of the Supreme Court of Puerto Rico appointing a receiver. For earlier phases of the litigation see 106 F. 2d 754; 309 U. S. 543.

Mr. William Cattron Rigby, with whom *Messrs. George A. Malcolm,* Attorney General of Puerto Rico, and *Nathan R. Margold* were on the brief, for petitioner.

Mr. Henri Brown for respondents.

MR. JUSTICE BYRNES delivered the opinion of the Court.

By Joint Resolution of May 1, 1900, the Congress provided that "every corporation hereafter authorized to engage in agriculture [in Puerto Rico] shall by its charter be restricted to the ownership and control of not to exceed five hundred acres of land." [1] This limitation was carried over into the present Organic Act of Puerto Rico, enacted on March 2, 1917.[2] In 1935, the Legislative Assembly of Puerto Rico enacted two laws to provide the means of enforcing the Congressional prohibition. Act No. 33 conferred upon the Supreme Court of Puerto Rico exclusive original jurisdiction over quo warranto proceedings instituted for violations of the 500-acre law.[3] Act No. 47 authorized the Attorney General of Puerto Rico, or any district attorney, to bring such quo warranto proceedings in the Supreme Court of Puerto Rico against any corporation violating the Organic Act, and provided further that when any corporation is "unlawfully holding . . . real estate in Puerto Rico, the People of Puerto Rico may, at its option, through the same proceedings, institute in its behalf the confiscation of such property,

[1] § 3, 31 Stat. 715.

[2] § 39, 39 Stat. 951, 964, U. S. C., Title 48, § 752.

[3] Act of July 22, 1935, Laws of Puerto Rico, Special Session, 1935, p. 418.

or the alienation thereof at public auction, within a term of not more than six months counting from the date on which final sentence is rendered." [4]

This is a quo warranto proceeding brought in 1937 against respondent corporation by the Attorney General of Puerto Rico under these statutes. The complaint alleged that respondent corporation was organized in 1927 under the laws of Puerto Rico for the purpose of acquiring and working sugar cane farms and plantations, that its articles of incorporation restricted it to the acquisition of 500 acres, that it nevertheless had acquired, and that it owned and was working at the time of the filing of the complaint, some 12,188 acres of land. The answer conceded that the 500-acre restriction was contained in the articles and that the respondent had nevertheless acquired the 12,188 acres, but interposed several defenses. On July 30, 1938, the Supreme Court of Puerto Rico entered judgment for the petitioner. It ordered "the forfeiture and cancellation" of the license and articles of incorporation of respondent, "the immediate dissolution and winding up of the affairs" of the corporation, and the payment of a $3000 fine and costs. On the same day, petitioner moved that a receiver be appointed to handle the dissolution and disposition of the respondent's property, pursuant to subsections 4 and 5 of § 182 of the Puerto Rico Code of Civil Procedure.[5]

[4] Act of August 7, 1935, Laws of Puerto Rico, Special Session, 1935, pp. 530–532.

[5] "Section 182.—(564 Cal.) A receiver may be appointed by the court in which an action is pending or has passed to judgment, or by the judge thereof:

"1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or jointly interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds

The motion for the appointment of a receiver was held in abeyance pending an appeal to the Circuit Court of Appeals for the First Circuit. That court reversed the judgment of the Supreme Court of Puerto Rico, on the ground that Acts Nos. 33 and 47 exceeded the authority of the Legislative Assembly under the Organic Act. 106 F. 2d 754. We granted certiorari, and on March 25, 1940 reversed the judgment of the Circuit Court of Appeals and reinstated that of the Supreme Court of the Island. 309 U. S. 543.

The mandate of this Court reached the clerk of the Supreme Court of Puerto Rico on May 13. On the same day, the Attorney General entered a request for a hearing on petitioner's pending motion for the appointment of a receiver. The respondent then filed its answer, and briefs were submitted by both parties. In its answer and brief, respondent raised numerous objections to the appointment of a receiver. Chief among these objections were: (a) that on March 28, 1940, respondent corporation had been dissolved by vote of its stockholders, and its property conveyed to a partnership consisting of all the stockholders, so that nothing remained to be done; and (b)

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thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured.

"2. After judgment, to carry the judgment into effect.

"3. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment.

"4. *In the case when a corporation has been dissolved,* or is insolvent, or in imminent danger of insolvency, *or has forfeited its corporate rights.*

"5. *In all other cases where receivers have heretofore been appointed by the usages of courts of equity.*" (1933 ed., italics added.)

that the statutes applicable to this case are certain sections of the Private Corporations Law [6] rather than § 182

[6] "Section 27.—*Corporate existence pending dissolution.* All corporations, whether they expire through the limitation contained in articles of incorporation or are annulled by the Legislature, or otherwise dissolved, shall be continued as bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them to settle and close their affairs, to dispose of and convey their property and to divide their capital; but not for the purpose of continuing the business for which they were established.

"Sec. 28 (as amended by Act No. 24 of 1916, p. 68).—*Directors as trustees pending dissolution.* Upon the dissolution in any manner of a corporation, the directors shall be the trustees thereof pending the liquidation, with full power to settle the affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts, so far as such moneys and property shall suffice. They shall have power to meet and to act under the bylaws of the corporation, and, under regulations to be made by a majority of the said trustees, to prescribe the terms and conditions of the sale of such property, or may sell all or any part for cash, or partly on credit, or take mortgages and bonds for part of the purchase price for all or any part of the said property. In case of a vacancy or vacancies in the board of directors of such corporation existing at the time of dissolution or occurring subsequently thereto, the surviving directors or director shall be the trustees or trustee thereof, as the case may be, with full power to settle the affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts, as far as such moneys and property shall enable them, and to do and perform all such other acts as shall be necessary to carry out the provisions of this Act relative to the winding up of the affairs of such corporation and to the distribution of its assets.

"Sec. 29.—*Powers and liabilities of Trustees in Liquidation.* The directors constituted trustees as aforesaid shall have power to sue for and recover the aforesaid debts and property by the name of the corporation and shall be suable by the same name, or in their own names or individual capacities for the debts owing by such corporation, and shall be jointly and severally responsible for such debts to

of the Code of Civil Procedure,[7] that under the terms of the former "the directors shall be the trustees . . . pending the liquidation" of any dissolved corporation, and that the court was consequently without jurisdiction to appoint a receiver under § 182. The insular court resolved all the issues in petitioner's favor, appointed a receiver of all the property of the respondent, and directed the receiver to handle the property as a going concern until the People of Puerto Rico should exercise the option granted to them by § 2 of Act No. 47 of August 7, 1935 either to confiscate the real estate unlawfully held by respondent or to have it sold at public auction.[8]

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the amount of the money and property of the corporation which shall come to their hands or possession as such trustees.

"Sec. 30.—*Judicial appointment of liquidators.* When any corporation shall be dissolved in any manner whatever, the district court having jurisdiction of the place where its principal office in the Island of Porto Rico is situated, on application of any creditor or stockholder, may at any time either continue the directors as trustees as aforesaid, or appoint one or more persons to be liquidators of such corporation to take charge of the assets and effects thereof, to collect the debts and property due and belonging to the corporation, with power to prosecute and defend in the name of the corporation, or otherwise, all suits necessary or appropriate for the purposes aforesaid, or to appoint an agent or agents under them, or to do other acts that might be done by such corporation if in being that may be necessary for the final settlement of its unfinished business, and the powers of such trustees or receivers may be continued so long as the courts shall think necessary for such purpose." (Appendix to Code of Commerce of Puerto Rico (1932 ed.) 327, at 355.)

[7] See note 5, *supra.*

[8] Section 2 provides, in part:

"When any corporation by itself or through any other subsidiary or affiliated entity or agent is unlawfully holding, under any title, real estate in Puerto Rico, The People of Puerto Rico may, at its option, through the same proceedings, institute in its behalf the confiscation of such property, or the alienation thereof at public auction, within a

From this order, respondent took a second appeal to the Circuit Court of Appeals, making the two contentions which have been noted as well as many others which require no discussion here. The Circuit Court of Appeals disposed of several of these contentions unfavorably to the respondent. However, it reversed the judgment of the Supreme Court of Puerto Rico, on the gound that the order appointing the receiver was "improvidently issued." 118 F. 2d 752. In the opinion of the Circuit Court, §§ 27, 28 and 30 of the Private Corporation Law are unquestionably applicable to the dissolution of a corporation by court order as a result of a violation of its charter and the laws, although the insular court had declared them "applicable only to a voluntary dissolution agreed upon by the shareholders of a corporation or by expiration of the term fixed for its duration." With respect to § 182 of the Code of Civil Procedure, upon which the lower court relied, the Circuit Court of Appeals determined that it permitted the appointment of a receiver only "upon proper showing by an interested party, agreeably to the usages of courts of equity." It concluded that the option granted by Act No. 47 of 1935 did not afford the People of Puerto Rico an interest sufficient for this purpose. It observed that the option relates only to the excess acreage, whereas the order had sought to place the receiver in charge of all the property of the respondent, both real and personal. If the People of Puerto Rico should elect to have the land sold at public auction,[9] the Circuit Court asserted, a master can be appointed for that purpose, and in the meantime a

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term of not more than six months counting from the date on which final sentence is rendered.

"In every case, alienation or confiscation shall be through the corresponding indemnity as established in the law of eminent domain."

[9] According to the Circuit Court's opinion, on August 28, 1940, after the order appointing the receiver had been entered, the Attorney

notice of *lis pendens* which was filed with the Registry of Property will prove adequate to protect the People's interest.

The Circuit Court's opinion leaves it uncertain whether it meant to hold that the insular court wholly lacked power to appoint a receiver for a judicially dissolved corporation, or merely that it abused its discretion in this case. In any event, the questions for our determination seem to be these: (1) does it lie within the power of the Supreme Court of Puerto Rico to appoint a receiver for the assets of a corporation whose dissolution has been judicially ordered because it has violated its articles of incorporation and the laws of Puerto Rico and the United States; (2) did that court abuse its discretion in appointing a receiver under the circumstances of this case; and (3) did the scope of the order exceed the court's authority?

First. Whether or not it is within the power of the Supreme Court of Puerto Rico to place a receiver in control of the property of a corporation which has been dissolved for violation of law, is a question whose answer must be found in the statutes of the Island. As we have said, § 182 of the Code of Civil Procedure provides: "A receiver may be appointed by the court in which an action is pending or has passed to judgment,

General filed with the insular court the following statement: "Therefore, The People of Puerto Rico elects to have all the lands in the possession of the respondent sold at public auction, and prays this Court to order the sale at public auction of the said real property by the receiver already appointed by this Court, after the same is assessed in conformity with the provisions of the Condemnation Proceedings Act now in force." In the Circuit Court, the respondent argued that the option provided by Act No. 47 could not be exercised in this manner but only by an Act of the Legislative Assembly. We share the Circuit Court's view that this and other problems relating to the actual exercise of the option must first be passed upon by the Puerto Rican Supreme Court.

or by the judge thereof: . . . (4) In the case when a corporation has been dissolved, or is insolvent, or in immediate danger of insolvency, or has forfeited its corporate rights. (5) In all other cases where receivers have heretofore been appointed by the usages of courts of equity." It seems hardly debatable that, if nothing more were shown, these provisions would strongly support the assertion of power by the insular court to appoint a receiver for respondent's property. But respondent urges that the provisions of §§ 27, 28, 29 and 30 of the Private Corporations Law compel the opposite conclusion. Section 27 provides that "all corporations, whether they expire through the limitation contained in articles of incorporation or are annulled by the Legislature, or otherwise dissolved, shall be continued as bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them to settle and close their affairs, to dispose of and convey their property and to divide their capital; but not for the purpose of continuing the business for which they were established." Section 28 declares that "upon the dissolution in any manner of a corporation, the directors shall be the trustees thereof pending the liquidation." And § 30 authorizes the appropriate district court of Puerto Rico, "on application of any creditor or stockholder, . . . at any time either [to] continue the directors as trustees as aforesaid, or [to] appoint one or more persons to be liquidators of such corporation to take charge of the assets and effects thereof . . ." Again, if nothing more than these sections were before us, we think it clear enough that, upon the dissolution of a corporation "in any manner," the directors would remain in charge of the assets as trustees until some "creditor or stockholder" moved a district court—not the Supreme Court of the Island—to remove them.

A frank recognition that the statutes appear on their face to conflict and to overlap permits us to avoid the lengthy and technical arguments which have been advanced by both parties in this Court and in the courts below. The Supreme Court of Puerto Rico resolved this conflict in favor of its power to appoint a receiver, by holding that the pertinent sections of the Private Corporations Law do not apply to judicially ordered dissolutions but that § 182 of the Code of Civil Procedure does apply. In recent years we have had occasion to announce that the decisions of the courts of Puerto Rico with respect to the interpretation of the Island's statutes and to matters of local law are to be accorded the greatest weight. *Bonet* v. *Yabucoa Sugar Co.*, 306 U. S. 505; *Bonet* v. *Texas Company*, 308 U. S. 463. We cannot say that an interpretation placed by the Supreme Court of Puerto Rico upon statutes whose meaning is so open to doubt is plainly incorrect. Accordingly, though the interpretation suggested by the Circuit Court of Appeals may be equally plausible, it erred in reversing the judgment of the insular court.

Second. Assuming that under § 182 the insular Supreme Court has the power to appoint a receiver for a judicially dissolved corporation, the question remains whether it has abused its discretion in appointing a receiver in this case. The Circuit Court of Appeals, after indicating its belief that the power to appoint a receiver is a drastic one and that it should be sparingly employed, concluded that its use was not warranted by the circumstances of this case. Its reasoning was that the sole interest of the petitioner was its option either to confiscate the excess acreage or to have it sold at public auction. "The People do not need a receiver to protect the option. If and when the time comes for the court to decree a sale of the land at public auction a master can be appointed to carry through the sale. The land will still

be there. Meanwhile, the interest of the People is protected by a *lis pendens* notice which was entered in the Registry of Property shortly after the institution of the quo warranto proceedings, which notice the corporation unsuccessfully sought to have cancelled." 118 F. 2d 752, at 759–760.

It may be true that the procedure suggested by the Circuit Court would have been adequate to the needs of the case. It may even be true that an injunction restraining the directors of respondent from disposing of the property pending the People's choice would have been sufficient. But the same considerations that compel restraint on the part of appellate courts where the question is one of power, apply with double force where the question merely concerns the propriety of its exercise. The Supreme Court of Puerto Rico was in the best position to determine what the situation demanded. The attempted transfer of the corporate assets on March 28, 1940 may have been a bona fide effort to comply with the earlier decree of dissolution, as respondent insists. But the fact that the transfer was made to a partnership whose members had been the stockholders of the dissolved corporation might suggest a disposition on the part of the directors to obstruct the effective exercise of the option afforded the People by Act No. 47. Certainly it would not have been unreasonable for the insular court to suspect that this was so. No doubt the *lis pendens* notice would prevent the directors from conveying an interest in any of the property which would be superior to that of a purchaser at a subsequent public auction conducted pursuant to Act No. 47. But the sale and resale of the property, or its encumbrance, could only result in confusion, misunderstanding and needless litigation. It was clearly within the discretion of the Supreme Court of the Island to avert these difficulties.

Third: Respondent insists and the Circuit Court held, finally, that the order was too broad to be sustained. It is

argued that it was not confined to the land which was actually in excess of the 500-acre maximum but included all the properties of the respondent, and that it authorized the continued operation of the business by the receiver for an indefinite period. To treat the latter objection first, an examination of the order appointing the receiver reveals that paragraph 7 specifically contemplates the exercise of its option by the People of Puerto Rico. A fair reading of the order requires us to conclude that the period of the receivership was definite enough, since it was clearly regarded as a preliminary to the exercise of the option. The receiver was expressly directed to surrender the properties whenever the People had indicated its choice. As to the provision of the order consigning the whole of respondent's properties to the receiver, it is enough to say that everyone concedes that the properties constitute a working unit in growing, cutting and grinding sugar. To separate the land from the machinery and other personalty pending the People's election between alternative procedures would have been inexcusable economic waste. It was altogether proper for the Supreme Court to recognize these realities and to permit the receiver to preserve the enterprise as a going concern pending a final settlement. Nothing in § 182, upon which it relied for authority to appoint the receiver, requires that it limit the receivership in the manner suggested by respondent.

The order of the Supreme Court of Puerto Rico should be sustained in full.

Reversed.

The CHIEF JUSTICE and MR. JUSTICE ROBERTS are of the opinion that the court below correctly held, for reasons stated in detail in Judge Magruder's opinion, 118 F. 2d 752, that the appointment of a receiver by the Insular court, in the circumstances of this case, was an abuse of discretion, and that it was the duty of the Circuit Court of Appeals, in the exercise of its appellate authority, to set the appointment aside.

MEMPHIS NATURAL GAS CO. *v.* BEELER, ATTORNEY GENERAL OF TENNESSEE, ET AL.

APPEAL FROM THE SUPREME COURT OF TENNESSEE.

No. 499. Argued March 6, 1942.—Decided March 30, 1942.

1. An attack upon a state tax upon the ground that it infringes a taxpayer's federal rights, privileges and immunities, but without drawing in question the validity of a state statute, will not sustain an appeal under Jud. Code § 237 (a). P. 650.
2. A challenge of the validity of a state statute, first made in a brief filed in the highest state court and certified to this Court as part of the record, will not support an appeal to this Court from a judgment of the state court upholding the statute, if the appellant fails to show that under the state practice such a contention can be availed of when advanced for the first time in the appellate court. P. 651.
3. A corporation is subject to be taxed on its intangible property by a State, not of its origin, in which it has its commercial domicile, if the tax does not infringe the commerce clause. P. 652.
4. A decision of the state supreme court based upon a non-federal ground is re-examinable by this Court only to make certain that the ground is not so colorable or unsubstantial as to be in effect an evasion of a constitutional issue. P. 655.
5. Natural gas was piped into a State by a pipeline corporation, delivered to a local distributing corporation and sold by the latter to local consumers, under an arrangement making the two companies partners or joint enterprises sharing the profits. *Held*, that it was competent for the State to levy a tax on the pipeline company measured by the net profits it so derived. P. 655.
6. A non-discriminatory state tax upon the net income of a foreign corporation engaged solely in interstate commerce is not forbidden by the commerce clause when the corporation is commercially domiciled in the taxing State and the income is derived from within the State and attributable to business done there. P. 656.

Affirmed.

APPEAL from a judgment of the Supreme Court of Tennessee, which sustained a tax and reversed a decree of the Tennessee Chancery Court enjoining its collection. The appeal was dismissed for want of jurisdiction but the writ of certiorari was granted.

Mr. Walter P. Armstrong, with whom *Mr. T. A. McEachern, Jr.* was on the brief, for appellant.

Messrs. Whitworth Stokes and *Lewis S. Pope,* with whom *Messrs. Roy H. Beeler,* Attorney General of Tennessee, and *W. F. Barry,* Assistant Attorney General, were on the brief, for appellees.

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

The question for decision is whether a tax laid pursuant to §§ 1316–1318 of the Tennessee Code of 1932 upon the Memphis Natural Gas Company's net income derived from sales of natural gas in Tennessee, during the years 1932 to 1935, violates the commerce clause.

The case comes here by appeal from a judgment of the Supreme Court of Tennessee, which sustained the tax and reversed a decree of the Tennessee chancery court enjoining its collection. Appellant contends that the case is properly an appeal, under § 237 (a) of the Judicial Code as amended, 28 U. S. C. § 344 (a), because the validity of the Tennessee statute as applied to the facts of this case has been drawn in question. Cf. *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282. But appellant's bill of complaint, filed in the chancery court, alleged only that the assessment of the tax and the threatened levy violated its rights under the commerce clause. Our decisions have long since established that an attack upon a tax assessment or levy, on the ground that it infringes a taxpayer's federal rights, privileges or immunities, will not sustain an appeal under § 237 (a). *Jett Bros. Distilling Co.* v. *City of Carrollton,* 252 U. S. 1; *Miller* v. *City of Denver,* 290 U. S. 586; *Baltimore National Bank* v. *State Tax Comm'n,* 296 U. S. 538; *Irvine* v. *Spaeth,* 314 U. S. 575. It is not enough that an appellant could have launched his attack upon the validity of the statute itself as applied; if he has

failed to do so we are without jurisdiction over the appeal. The Judicial Code was intended to restrict our obligatory appellate jurisdiction to a narrow class of cases, and to foreclose an appeal as of right whenever the prescribed conditions have not been rigorously fulfilled.

It is true that when this case reached the Supreme Court of Tennessee the appellant included in its brief, which has been certified as part of the record here, a statement of its legal position which might serve as a challenge to the validity of the statute. But appellant has failed to establish that under Tennessee practice such a contention can be availed of if advanced for the first time in the appellate court, cf. *Pennsylvania R. Co.* v. *Illinois Brick Co.,* 297 U. S. 447, 462–63; *Jacobi* v. *Alabama,* 187 U. S. 133, 135–36; *Mutual Life Ins. Co.* v. *McGrew,* 188 U. S. 291, and appellant's burden is to show affirmatively that we have jurisdiction. *Chicago, I. & L. Ry. Co.* v. *McGuire,* 196 U. S. 128, 132; cf. *Lynch* v. *New York,* 293 U. S. 52, 54–55; *Enriquez* v. *Enriquez (No. 2),* 222 U. S. 127, 130; *Brady* v. *Terminal Railroad Assn.,* 302 U. S. 678.

The first opinion rendered by the Supreme Court of Tennessee made no mention of any federal question, and in a supplemental opinion the court stated only that "the claim of federally protected right was decided adversely to complainant." Since it does not appear that the validity of the statute was either drawn in question or passed upon in the trial court or deemed by the state supreme court to be in issue, we must dismiss the appeal for want of jurisdiction. Treating the papers on which the appeal was allowed as a petition for writ of certiorari, as required by § 237(c) of the Judicial Code as amended, 28 U. S. C. § 344(c), certiorari is granted, and we proceed to consider the merits of the case.

Taxpayer, a Delaware corporation, was engaged during the period in question in the business of purchasing natural gas in Louisiana and transporting it through its

pipeline to points in Tennessee where it delivered the gas into the pipelines of two distributing companies—Memphis Power & Light Co. and West Tennessee Power & Light Co.—which sold the gas to local consumers. Taxpayer sells some of its gas in other states, but in Tennessee it sells from 1 to 2% of its output to the West Tennessee Power & Light Co. and delivers 80% or more to the Memphis company. That company distributes it to consumers under a contract with taxpayer which the Supreme Court of Tennessee has found to be a joint undertaking of the two companies whereby taxpayer furnishes gas from its pipeline, the Memphis company furnishes facilities and service for distribution and sale to consumers, and the proceeds of the sale, after deduction of specified costs and expenses, are divided between the two companies.

Taxpayer is licensed by the State of Tennessee to do business there. It maintains a statutory office in Delaware and a stock transfer office in New York City, but conducts no business at either. It manages its business from its office in Memphis, Tennessee, where it keeps its accounts, provides for the payroll of employees on its line in Tennessee and other states, and prepares and sends out bills for gas delivered in Tennessee and other states. It has thus established a commercial domicile in Tennessee by virtue of which it is subject to taxation there upon its intangibles, unless such taxation infringes the commerce clause. *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193.

Section 1316 of the Tennessee Code of 1932 imposes on all foreign and domestic corporations doing business for profit in the state an annual excise tax of "three per cent. of the net earnings for their preceding fiscal year . . . arising from business done wholly within the state, excluding earnings arising from interstate commerce." The Supreme Court of Tennessee sustained the tax on the ground

that it was laid on appellant's net earnings from the distribution of gas under its contract with the Memphis company, which distribution it held not to be interstate commerce within the meaning of the statute. It decided that, by virtue of their contract, the companies became in effect partners or joint enterprisers in the distribution and sale of the gas to Tennessee consumers, the net earnings from which are taxable under the statute.

On petition for rehearing, taxpayer asked a modification of the decree on the ground that, included in the measure of the tax were profits derived from sales of gas to the West Tennessee Power & Light Co., and from certain other sales to the Memphis company, not under the joint adventure agreement, which it was insisted were concededly sales in interstate commerce. The court rejected this contention upon the adequate state ground, not challenged here, that taxpayer had failed to show what portion, if any, of the taxed profits was derived from such sales and consequently had laid no basis for an injunction restraining collection of that part of the tax.

This Court has often had occasion to rule that the retail sale of gas at the burner tips by one who pipes the gas into the state, or by a local distributor acquiring the gas from another who has similarly brought it into the state, is subject to state taxation and regulation. *Public Utilities Comm'n* v. *Landon,* 249 U. S. 236; *East Ohio Gas Co.* v. *Tax Comm'n,* 283 U. S. 465; *Southern Gas Corp.* v. *Alabama,* 301 U. S. 148, 154; cf. *Missouri* v. *Kansas Gas Co.,* 265 U. S. 298, 309; *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.,* 314 U. S. 498. It follows that if the Supreme Court of Tennessee correctly construed taxpayer's contract with the Memphis company as establishing a profit-sharing joint adventure in the distribution of gas to Tennessee consumers, the

taxpayer's net earnings under the contract were subject to local taxation.

The meaning and effect of the contract, so far as they establish taxpayer's participation in and ownership of profits derived from the retail sale of the gas, are local questions conclusively settled by the decision of the state court save only as this Court, in the performance of its duty to safeguard an asserted constitutional right, may inquire whether the decision of the state question rests upon a fair or substantial basis. See *Broad River Co.* v. *South Carolina,* 281 U. S. 537, and cases cited. We examine the contract only to make certain that the non-federal ground of decision is not so colorable or unsubstantial as to be in effect an evasion of the constitutional issue.

The contract was entered into as a preliminary to the award by the City of Memphis to the Memphis company of its franchise to distribute gas to consumers, and execution of the contract was a condition of the grant of the franchise. By the contract, the Memphis company undertook to establish its distribution system. Taxpayer undertook to construct its pipeline with facilities, including measuring stations at a delivery point, for supplying the Memphis company with a varying flow of gas into the service pipes as and when required by the Memphis company for consumer needs. The amount so furnished, less certain deductions covered by a separate contract not now material, was to be divided into five classes, according to the use made of the gas by consumers, and was to be billed by taxpayer to the Memphis company at five different specified rates. The amount of gas allocated to each class was to be in proportion to the amount of that class of gas sold by the Memphis company for like use during the preceding month.

At the end of each year the combined net surplus or deficit of the two companies was to be divided between

them by a cash settlement. The surplus or deficit of each was to be arrived at by deducting from its gross revenues the operating costs, costs of property restorations and replacements, taxes, amortization of investment, and 6% upon investment. After all net deficits of both parties had been made up and the Memphis company had received from the combined net surpluses 1½% of its total investment annually, any additional combined net income was to be paid to or retained by taxpayer.

The contract provided for readjustment from time to time of the billing price of the gas supplied by taxpayer, so as to admit of reduction in the rates to consumers, after first allowing "a reasonable return" on taxpayer's investment. The contract contains the usual provisions for inspection of books by the parties and the city, and a clause requiring all notices to be given to taxpayer at its Memphis office.

The Supreme Court of Tennessee held that the city was a party to the contract entitled to the benefits of its provisions for rate reductions. It held that the circumstance that taxpayer and the Memphis company were designated by the contract as "seller" and "buyer" did not alter or obscure the fact that taxpayer was a participant in the profits derived from the joint undertaking, and that the precise time when the title to the gas passed, if it passed before distribution to consumers, was immaterial. In any case, it thought that the tentative amounts to be paid by the Memphis company for the gas in the first instance were to be determined after delivery by the use made of it by consumers.

We cannot say that there is not a substantial basis for the state court's conclusion that in substance the contract called for the contribution of the services and facilities of the companies to a joint enterprise, the taxpayer's delivery of gas into the mains of the Memphis company for distribution to consumers, and a division between the

two companies of the operating profits after providing for certain agreed initial costs and expenses. Nor can we say that by this participation the taxpayer did not do such a business in the state as to be taxable there, or that the profits derived from it are not an appropriate measure of the tax.

Taxpayer's contribution to the joint undertaking with the Memphis company for the distribution of gas to local consumers, and its activities at its Memphis general office in supplying gas to be distributed for the joint account as required by the Memphis company and in safeguarding and securing payment of its share of the profits, went beyond the mere sale, to a distributor, of gas in interstate commerce. It also constituted participation in the business of distributing the gas to consumers after its delivery into the service pipes of the Memphis company. *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147, 155–56; *Atlantic Lumber Co.* v. *Commissioner,* 298 U. S. 553; *Southern Gas Corp.* v. *Alabama, supra.* Since it was competent for the state to tax such business done within it, it was competent to measure the tax by the net earnings of the business as well as by the capital employed. See *Southern Gas Corp.* v. *Alabama, supra,* 156–57.

In any case, even if taxpayer's business were wholly interstate commerce, a nondiscriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there, cf. *Wheeling Steel Corp.* v. *Fox, supra,* or upon net income derived from within the state, *Shaffer* v. *Carter,* 252 U. S. 37, 57; *Wisconsin* v. *Minnesota Mining Co.,* 311 U. S. 452; cf. *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308, is not prohibited by the commerce clause on which alone taxpayer relies. *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321; *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 119–20; cf. *Bass, Ratcliff & Gretton, Ltd.* v. *Tax Comm'n,* 266 U. S. 271;

Western Live Stock v. *Bureau,* 303 U. S. 250, 255. There is no contention or showing here that the tax assessed is not upon net earnings justly attributable to Tennessee. *Underwood Typewriter Co.* v. *Chamberlain, supra;* cf. *Bass, Ratcliff & Gretton, Ltd.* v. *Tax Comm'n, supra; Butler Bros.* v. *McColgan, ante,* p. 501. It does not appear that upon any theory the tax can be deemed to infringe the commerce clause.

Appeal dismissed for want of jurisdiction. Certiorari granted and judgment affirmed.

Affirmed.

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

GRAVES ET AL., CONSTITUTING THE STATE TAX COMMISSION OF NEW YORK, *v.* SCHMIDLAPP ET AL., EXECUTORS.

CERTIORARI TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK.

No. 604. Argued March 12, 1942.—Decided March 30, 1942.

1. The due process clause of the Fourteenth Amendment did not preclude the State of New York from taxing the effective exercise, by the will of a domiciled resident, of a general power of appointment of which he was the donee under the will of a resident of Massachusetts, the property appointed being intangibles held by trustees under the donor's will. *Wachovia Bank & Trust Co.* v. *Doughton,* 272 U. S. 567, overruled. Pp. 660, 665.
2. Control by the State of the donee's domicile over his person and estate and his duty to contribute to the support of government there, afford adequate constitutional basis for the imposition of a tax. P. 660.

The donee of the power the exercise of which was taxed was also one of the trustees named by the Massachusetts will; and the paper evidences of the intangibles, which consisted wholly of receivables

and corporate stocks and bonds, were kept by him at the time of his death and for some years before, in New York, the State of his residence. He and other trustees accounted to a Massachusetts probate court for the administration of the fund.

286 N. Y. 596, 35 N. E. 2d 937, reversed.

CERTIORARI, 314 U. S. 601, to review a judgment of the Court of Appeals of New York affirming without opinion an order of the Surrogate's Court of the County of New York reducing an estate tax assessment. 172 Misc. 426, 15 N. Y. S. 2d 208.

Mr. Mortimer M. Kassell for petitioners.

Mr. Thomas A. Ryan, with whom *Mr. Harrison Tweed* was on the brief, for respondents.

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

We are asked to say whether the due process clause of the Fourteenth Amendment precludes New York from taxing the exercise, by a domiciled resident, of a general testamentary power of appointment of which he was the donee under the will of a resident of Massachusetts, the property appointed being intangibles held by trustees under the donor's will.

Respondents' decedent died a resident of New York, where his will was probated and letters testamentary were issued. Decedent's father had previously died a resident of Massachusetts, where his will had been probated. By his will the father bequeathed his residuary estate in trust to divide the trust fund into as many shares as he should leave children surviving. To his son, the New York decedent, he gave a life estate in one share and a general power to dispose of that share "by will."

The son was also one of the three testamentary trustees. For some years they managed the trust property as a single trust fund, but in 1911 his one-third share was seg-

regated and he was permitted by the other trustees to manage it as a separate trust, although all continued as trustees and as such accounted to the Massachusetts Probate Court for the administration of his share of the fund. From 1918 to 1929 the New York decedent resided in New York; from then until 1934 he resided in Illinois, when he returned to New York where he resided until his death in 1937. Throughout he kept in the state of his residence the paper evidences of the intangibles comprising his share of the trust. At the time of his death it consisted wholly of receivables and corporate stocks and bonds. By his will decedent appointed his share of the trust fund to his widow, and the New York tax authorities, in computing the tax, included in the decedent's gross estate the intangibles bequeathed to her under the power.

Article 10-C of the New York tax law, by § 249-n, imposes an estate tax "upon the transfer of the net estate" of resident decedents. Under this statute the net taxable estate is arrived at by deducting from the gross estate, as defined by § 249-r, the specified deductions allowed by § 249-s. Section 249-r, so far as relevant, provides:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated . . .

"7. To the extent of any property passing under a general power of appointment exercised by the decedent (a) by will . . ."

An order of the New York Surrogate's Court, 172 Misc. 426, 15 N. Y. S. 2d 208, reduced the estate tax assessed against the decedent's estate by excluding from his gross estate the share of the trust fund passing to the widow by the exercise of the power, on the ground that the state was without constitutional authority to tax the exercise by a resident donee of a power of appointment created by a

nonresident donor, citing *Wachovia Bank & Trust Co.* v. *Doughton*, 272 U. S. 567. The New York Court of Appeals affirmed the order without opinion, 286 N. Y. 596, 35 N. E. 2d 937, but certified by its remittitur that it held that the taxing statute, as sought to be applied in this proceeding, violates the Fourteenth Amendment. We granted certiorari, 314 U. S. 601, because of the importance of the question presented.

For purposes of estate and inheritance taxation, the power to dispose of property at death is the equivalent of ownership. *Bullen* v. *Wisconsin*, 240 U. S. 625; *Whitney* v. *Tax Comm'n*, 309 U. S. 530, 538; see Gray, Rule Against Perpetuities, 3d ed. 1916, § 524. It is a potential source of wealth to the appointee. The disposition of wealth effected by its exercise or relinquishment at death is one form of the enjoyment of wealth and is an appropriate subject of taxation. The power to tax "is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a State extends are objects of taxation." *McCulloch* v. *Maryland*, 4 Wheat. 316, 429. Intangibles, which are legal relationships between persons and which in fact have no geographical location, are so associated with the owner that they and their transfer at death are taxable at the place of his domicile, where his person and the exercise of his property rights are subject to the control of the sovereign power. His transfer of interests in intangibles, by virtue of the exercise of a donated power instead of that derived from ownership, stands on the same footing. In both cases the sovereign's control over his person and estate at the place of his domicile, and his duty to contribute to the financial support of government there, afford adequate constitutional basis for the imposition of a tax. *Curry* v. *McCanless*, 307 U. S. 357; cf. *Graves* v. *Elliott*, 307 U. S. 383.

These were not novel propositions, when they were restated in the *McCanless* and *Elliott* cases,[1] and they were challenged then, though unsuccessfully, only on the ground that the transfer of the intangibles was subject to taxation in another state where they were held in trust. But the contention that the due process clause forecloses taxation of an interest in intangibles by the state of its owner when they are held in trust in another state was rejected in *Bullen* v. *Wisconsin,* 240 U. S. 625. In that case, a fund had been given in trust reserving to the donor a general power of revocation and the disposition of the trust income during life. This Court held that upon his death an inheritance tax could be levied by the state of his domicile although the trustee and the trust fund were outside the state.

In numerous other cases the jurisdiction to tax the use and enjoyment of interests in intangibles, regardless of the location of the paper evidences of them, has been thought to depend on no factor other than the domicile of the owner within the taxing state. And it has been held that they may be constitutionally taxed there even though in some instances they may be subject to taxation in other jurisdictions, to whose control they are subject and whose legal protection they enjoy.[2] And such interests taxable

[1] See *Orr* v. *Gilman,* 183 U. S. 278; *Chanler* v. *Kelsey,* 205 U. S. 466; *Bullen* v. *Wisconsin,* 240 U. S. 625; *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 271; cf. *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 345; *Chase National Bank* v. *United States,* 278 U. S. 327, 337; *Tyler* v. *United States,* 281 U. S. 497, 503; *Porter* v. *Commissioner,* 288 U. S. 436, 444.

[2] See *Kirtland* v. *Hotchkiss,* 100 U. S. 491; *Hawley* v. *Malden,* 232 U. S. 1; *Cream of Wheat Co.* v. *Grand Forks,* 253 U. S. 325; *Blodgett* v. *Silberman,* 277 U. S. 1; *Virginia* v. *Imperial Coal Sales Co.,* 293 U. S. 15; *First Bank Stock Corp.* v. *Minnesota,* 301 U. S. 234, 239–40, and cases cited; *Stewart* v. *Pennsylvania,* 338 Pa. 9, affirmed 312 U. S. 649; cf. *Carpenter* v. *Pennsylvania,* 17 How. 456 (before Fourteenth Amendment); also *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S.

at the domicile of the owner have been deemed to include the exercise or relinquishment of a power to dispose of intangibles. *Chanler* v. *Kelsey,* 205 U. S. 466; *Bullen* v. *Wisconsin, supra;* cf. *Orr* v. *Gilman,* 183 U. S. 278; *Saltonstall* v. *Saltonstall,* 276 U. S. 260.

Decedent's complete and exclusive power to dispose of the intangibles at death was property in his hands in New York, where he was domiciled. *Graves* v. *Elliott, supra.* He there made effective use of the power to bestow his bounty on the widow. Its exercise by his will to make a gift was as much an enjoyment of a property right as would have been a like bequest to his widow from his own securities. See *Helvering* v. *Horst,* 311 U. S. 112, 117. For such enjoyment of property rights, through resort to New York law, decedent was under the highest obligation to contribute to the support of the government whose protection he enjoyed in common with other residents. Taxation of such enjoyment of the power to dispose of property is as much within the constitutional power of the state of his domicile as is the taxation of the transfer at death of intangibles which he owns.

Since it is the exercise of the power to dispose of the intangibles which is the taxable event, the mere fact that the power was acquired as a donation from another is without significance. We can perceive no ground for saying that its exercise by the donee is for that reason any the less the enjoyment of a property right, or any the less subject to taxation at his domicile. The source of the power by gift no more takes its exercise by the donee out of the taxing power than the like disposition of a chose in action

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204; *Baldwin* v. *Missouri,* 281 U. S. 586; *Beidler* v. *South Carolina,* 282 U. S. 1 (all recognizing the power of the state of domicile to tax). In the case of income taxation, see *Lawrence* v. *State Tax Comm'n,* 286 U. S. 276; *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308; *Guaranty Trust Co.* v. *Virginia,* 305 U. S. 19.

or a share of stock, ownership of which is acquired by gift.

But respondents argue that because here the power was bequeathed by a Massachusetts will, which placed the intangibles subject to the power in a Massachusetts trust, there was nothing within the jurisdiction or control of New York which could be deemed subject to its taxing power. If by this is meant that the power was ineffective because its exercise by the New York will did not conform to the requirements of the will creating the power and defining the manner of its exercise, or to the laws of Massachusetts governing the disposition of intangibles, no such question is before us. We must take it that the New York courts assumed, as we do, that the power had been so exercised by the New York will as to confer on the widow the right to demand the property of the trustees in Massachusetts, and that even upon that assumption they held that the exercise of the power in New York could not constitutionally be taxed.

Whether the New York tax statute would apply if the New York will were ineffective to transfer the intangibles because it failed to comply with the requirements of the Massachusetts will or statutes, is for the New York courts to decide. Whether in such a case the statute could be constitutionally so applied is a question not presented by the record. But if, as is assumed, the power has been effectively exercised, the New York will is the implement of its exercise, made effective as a will by New York law whose aid the decedent invoked for the exercise and enjoyment of the property right conferred on him by the Massachusetts will. Its exercise is a subject over which the sovereign power of taxation extends.

Admittedly, under prevailing notions of choice of law in the courts of these two states, the law of the donor's domicile, here Massachusetts, may be looked to in New

York in determining whether, in some respects at least, there has been a valid and effective execution of the power of appointment. *Sewall* v. *Wilmer,* 132 Mass. 131; *Hogarth-Swann* v. *Weed,* 274 Mass. 125, 130, 174 N. E. 314; *Hillen* v. *Iselin,* 144 N. Y. 365, 378, 39 N. E. 368; *In re New York Life Ins. & Trust Co.,* 209 N. Y. 585, 103 N. E. 315. But a transfer which has in fact been effected by recourse in part to the law of New York is not free of taxation there because the power might have been exercised elsewhere or by some other mode, or because it may be necessary for the transferee to invoke the laws of Massachusetts in order to acquire control of the property. A transfer in one state of a chose in action or a share of stock may be taxed there even though the transferee in order to enjoy its benefits must depend in part upon the law of the state of the debtor or of the corporation. *Blodgett* v. *Silberman,* 277 U. S. 1, 10–17. Here the relationship of the power to Massachusetts does not leave New York without sufficient control over the donee and his exercise of the power to support its constitutional authority to tax. For the fact remains that he, as a resident enjoying the protection of New York's laws and owing to it the duty of financial support, has disposed of wealth by a will executed and probated in New York with the same result as if he had owned the property. This transmission of wealth at death by a resident is not a forbidden source of revenue to the state.

Wachovia Trust Co. v. *Doughton, supra,* on which respondents rely, denied the constitutional power of a state to tax the effective exercise of a testamentary power in circumstances like the present. The only grounds for the decision were that the intangibles held in trust in another state, which were the subject of the power, had no situs in the state where the domiciled testator had exercised the power by his will; that its exercise was subject to the laws

of Massachusetts where the will donating the power and establishing the trust had been probated, and that no "right" exercised by the donee was conferred by the state of his domicile where it was exercised.

The conclusion there reached and the reasons advanced in its support cannot be reconciled with the decision and the reasoning of the *Bullen,* the *McCanless* and the *Elliott* cases. It is plain that if appropriate emphasis be placed on the orderly administration of justice rather than blind adherence to conflicting precedents, the *Wachovia* case must be overruled. There is no reason why the state should continue to be deprived of revenue from a subject which from the beginning has been within the reach of its taxing power; a subject over which we cannot say the state's control has been curtailed by the due process clause of the Fourteenth Amendment. No interest which could be served by so rigid an adherence to *stare decisis* is superior to the demands of a system of justice based on a considered and a consistent application of the Constitution. See *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 406, footnote 1; and cf. *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376, 387. The *Wachovia* case should be and now is overruled and the constitutional power of New York to levy the present tax is sustained.

Reversed.

MR. JUSTICE ROBERTS concurs in the result only because he considers himself bound by the decisions in *Curry* v. *McCanless,* 307 U. S. 357, and *Graves* v. *Elliott,* 307 U. S. 383. Otherwise he would vote to affirm.

PECHEUR LOZENGE CO., INC. *v.* NATIONAL CANDY CO., INC.

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

No. 648. Argued March 10, 1942.—Decided March 30, 1942.

A suit in the District Court to enjoin infringement of a trademark and for resulting damages can not be maintained as a suit arising under the Trademark Law where the registration of plaintiff's labels was not under that law but under the Copyright Law. P. 657.

122 F. 2d 318, vacated.

Mr. Alfred J. L'Heureux, with whom *Mr. Joseph Fairbanks* was on the brief, for petitioner.

Mr. James D. Carpenter, Jr., for respondent.

PER CURIAM.

Petitioner brought this suit in the district court to recover damages and for an injunction restraining trademark infringement and unfair competition. There was diversity of citizenship, and the bill of complaint alleged that "this suit arises under the Trademark Laws of the United States" and that petitioner's wrapper design "was registered in the United States Patent Office by the plaintiff on May 1, 1936, under the No. 47748." It prayed treble damages "in accordance with the provisions of the Trademark Law of 1905," and was amended to allege registration of a second wrapper design in the Patent Office under the No. 46862.

A decree for petitioner, 36 F. Supp. 730, was reversed by the Circuit Court of Appeals for the Third Circuit. 122 F. 2d 318. Both courts below having failed to consider or apply local law, we granted certiorari, 314 U. S. 603, in order to determine whether local law or federal law should

have been applied in a suit for infringement of a trademark registered under the Trademark Act of 1905, 33 Stat. 724, and we requested counsel "to present their views as to whether state law governs and, if so, what the applicable state law is."

The opinions below, the printed record and the petition for certiorari give no indication that the suit was not founded upon a trademark registered under the 1905 Act, as the bill of complaint had made it appear. But an examination of the original exhibits, not printed in the record, and of petitioner's brief on the merits here, discloses that the registration referred to is that of petitioner's labels under the Copyright Law of the United States, and not registration under the Trademark Law. It thus appears that petitioner has alleged no cause of action under the Copyright Law and is not entitled to the benefits of registration under the Trademark Law. The only cause of action that this record could possibly support is for unfair competition and common law "trademark infringement," to which local law applies. See *Fashion Guild* v. *Trade Commission,* 312 U. S. 457, 468.

The decree will be vacated without costs in this Court to either party, and the cause will be remanded to the Circuit Court of Appeals, to afford it opportunity to apply the appropriate local law, and for such further or other proceedings as in the circumstances may be proper.

Decree vacated and cause remanded.

U. S. INDUSTRIAL CHEMICALS, INC. *v.* CARBIDE & CARBON CHEMICALS CORP.

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

No. 680. Argued March 13, 1942.—Decided March 30, 1942.

1. A reissue patent must be for the same invention as the original patent. R. S. § 4916. P. 675.
2. Original Patent No. 1,998,878, to Lefort, for a process for the production of ethylene oxide, called for the introduction into a heated reaction chamber of ethylene and oxygen, in the presence of a catalyzer, and also, as an essential, the voluntary introduction of water. Reissue Patent No. 20,370, in describing the process, treats the voluntary introduction of water as permissive but not mandatory. *Held*, that the reissue is void. P. 677.
3. Although it is the duty of a court to determine for itself, by examination of the original and the reissue, whether they are for the same invention, it is permissible, and often necessary, to receive expert evidence to ascertain the meaning of a technical or scientific term or term of art, so that the court may be aided in understanding not what the instruments mean but what they actually say. P. 678.
4. It is inadmissible to enlarge the scope of the original patent by recourse to expert testimony to the effect that a process described and claimed in the reissue, different from that described and claimed in the original patent, is, because equally efficacious, in substance that claimed originally. P. 678.
5. The omission from a reissue patent of one of the steps or elements prescribed in the original, thus broadening the claims to cover a new and different combination, renders the reissue void, even though the result attained is the same as that brought about by following the process claimed in the original patent. P. 678.

121 F. 2d 665, reversed.

CERTIORARI, 314 U. S. 603, to review the affirmance of a decree of the District Court upholding a reissue patent in a suit for infringement.

Mr. William H. Davis, with whom *Messrs. Thomas D. Thacher* and *Dean S. Edmonds* were on the brief, for petitioner.

Mr. Samuel E. Darby, Jr., with whom *Messrs. Leonard A. Watson, Clair V. Johnson,* and *Clair W. Fairbank* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This is a suit by the respondent to restrain the petitioner from infringing claims 8 and 9 of reissue patent No. 20,370. The application for reissue was filed September 25, 1936, and granted May 18, 1937. The original patent was No. 1,998,878, applied for March 22, 1932, and granted April 23, 1935, to Theodore Emile Lefort, of Paris, France, for a "Process for the Production of Ethylene Oxide." The application was based on earlier French patents. The respondent purchased the United States patent in April 1936 and, as a result of its study thereof, the patentee was persuaded to apply for the reissue.

If the reissue patent is valid, no question is now raised as to petitioner's infringement of the claims in suit. The District Court held the patent valid and infringed.[1] The Circuit Court of Appeals affirmed.[2] We took the case because of an apparent conflict with decisions of this court and several Circuit Courts of Appeals, to the effect that a reissue patent must, under the statute, be for the

[1] 34 F. Supp. 813.

[2] 121 F. 2d 665.

same invention as the original patent.[3] The petitioner also raised a question as to intervening rights which, in the view we take, need not be considered or decided.

Ethylene is a hydrocarbon gas, C_2H_4. For a long time it was thought impossible directly to oxygenize it to form C_2H_4O by bringing oxygen and ethylene into contact, though the formation of ethylene oxide by direct oxidation was commercially desirable. Efforts at direct oxidation, instead of producing the oxide, resulted in less desirable oxygenated compounds such as aldehydes. Lefort conceived the idea of effecting the oxidation by catalytic reaction, that is, the use of a substance, which, in some unexplained way, causes a chemical union or reaction when the two substances to be affected are brought into contact in its presence under given conditions. He recognized one incident of the direct oxidation process as applied to ethylene tending to decrease its efficiency, namely, that, in addition to the principal reaction producing C_2H_4O, there occurs a side reaction by which a portion of the ethylene is converted into carbon dioxide and water, and, to that extent, the ethylene is wasted. He found that, by certain control of the process, this side reaction could be so restricted as not to decrease the production of ethylene oxide below a profitable level.

According to both the original patent and the reissue, ethylene and oxygen are to be introduced into a heated reaction chamber in the presence of a catalyzer. The petitioner insists that the original patent also treats as

[3] R. S. 4916, 35 U. S. C. § 64: "Whenever any patent is wholly or partially inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the Commissioner shall . . . cause a patent for the *same invention*, and in accordance with the corrected specification, to be reissued. . . ." [Italics supplied.]

a mandatory or necessary step the voluntary introduction of water, whereas the reissue in specification and claims 8 and 9 omits this requirement, and therefore describes a different process. The respondent, on the other hand, asserts that as both patents describe the oxygen of air as that which may be used, and as atmospheric air contains moisture, the first, specifying water, and the reissue specifying air, both contemplate the introduction of water in some form and therefore are for the same process.[4] This dispute must be resolved by a comparison of the disclosures of the two instruments. If that comparison leads to the conclusion that the reissue is not for the same invention as the original, the reissue is void as not within the terms of the statute.

We shall postpone discussion of the tests of identity or difference of invention, and the use of expert testimony, to a statement of the criteria of judgment furnished by the language of the specifications and claims of the two documents.

The opening paragraph of the original patent is:

"This invention has for object a process for the production of ethylene oxide which mainly consists in subjecting ethylene to the simultaneous action of the oxygen of air and of water, in presence of a catalyzer and, if need be, of hydrogen."

After referring to the use of hydrogen as optional, the specification deals with the character and composition of metals to be used as catalyzers. It then speaks of the elements to be used to obtain the desired reaction thus:

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[4] No question of unreasonable delay is presented. Compare *Mahn* v. *Harwood*, 112 U. S. 354, 363; *Ives* v. *Sargent*, 119 U. S. 652, 661; *Topliff* v. *Topliff*, 145 U. S. 156, 169. Nor have we occasion to decide what may be the scope of permissible court review of the commissioner's determination that the error of the patentee arose "by inadvertence, accident or mistake, without fraudulent or deceptive intention."

"The ethylene can be obtained from any source of supply: . . .

"Water can be admitted in the reaction vessel, either in the liquid state, or as steam.

"The oxygen can be the oxygen of the air, this latter gas being introduced in the reaction."

Immediately following, it is said:

"The efficiency of the reaction is increased by diminishing the CO_2 which is formed, by introduction, in this reaction, of a suitable quantity of water. A suitable volume of CO_2 can also be previously introduced in the reacting gases."

The CO_2 which it is desired to diminish is that which is formed by the undesirable side reaction above mentioned. This reaction is again mentioned, and the introduction of water again specified thus:

"Moreover, the applicant has found that the reaction giving CO_2 is, contrarily to previous belief, a reaction of oxidation independent from that giving ethylene oxide and from that giving aldehydes. From experiments effected by the applicant, it results that, if water is introduced in suitable quantity, the reaction is not only facilitated, as above stated, but, in addition, the reaction giving CO_2, probably by direct oxidation of ethylene according to the equation:

$$C_2H_4+3O_2=2H_2O+2CO_2$$

is checked, owing, as is probable, to the partial pressure of water."

It is further said that the experiments indicate that the side reaction producing CO_2 and water may be completely checked and the efficiency of the reaction producing ethylene oxide increased if CO_2 is previously introduced in addition to the water and the reacting gases.

Three *modi operandi* are next indicated as examples. In the first, compressed ethylene and compressed air are led, with or without hydrogen, into a heated tube contain-

ing the catalyzer, the tube being connected with a circulating pump to supply water under pressure. In the second, the catalyzer is introduced and the tube heated and then "a mixture of ethylene, air, water vapour and hydrogen" is sent through the tube. In the third, the catalyzer is introduced into a high-pressure tube filled with water. Pure ethylene is added "in order that it can dissolve in the water." The tube is heated and "air and hydrogen are slowly introduced."

The specification concludes:

"The experiments . . . have shown that, in presence of the catalyzers indicated, water, in the form of steam or not, considerably promotes the reaction ensuring the production of ethylene oxide."

All of the seven claims include oxygen and water or steam. Claim 1 is typical. It runs:

"A process for the production of ethylene oxide, consisting in subjecting ethylene to the simultaneous action of oxygen and water, in presence of a catalyst [describing the catalyst] at a temperature between 150 and 400° C."

In some of the claims the word "steam" is substituted for "water"; in two, "hydrogen" is added.

Various options or alternatives are mentioned in the specifications, but nowhere in them, or in the claims, is the introduction of water treated as optional or permissive. The District Court made no finding directed to this fact, but the court below definitely holds, and we agree, that, in the process defined in the original patent, the voluntary introduction of water into the reaction chamber is mandatory.

Experiments conducted by the respondent just before it acquired the patent demonstrated that ethylene oxide could be produced by passing ethylene and air over a catalyst at the temperature described in the patent without the voluntary introduction of water. Its patent attorney was asked to study the patent and he concluded that Le-

fort should have obtained far broader claims. He prepared two oaths for execution by Lefort to support the application for reissue.

In the first, it was averred that the specification and claims failed to emphasize the fact that the reaction takes place "whether or not water is present"; and that the attorney in drawing the application had not been adequately instructed that the "fullest benefit and application" of the invention was the production of the oxide in the presence of the catalyst "with or without the inclusion of water in the reaction."

After rejection, the second affidavit was filed. This stated that a certain amount of water was necessarily present in the reaction chamber due to the side reaction which gives CO_2 and water, and that the introduction of additional water and carbon dioxide was merely permissive in order to augment the quantities already formed by that reaction.

Thereupon reissue was granted with a rewritten specification, the seven original claims and two new ones, 8 and 9, which are those in suit.

The substituted specification opens thus:

"This invention provides a specific and novel process for making ethylene oxide. It essentially consists in causing ethylene to combine directly with molecular oxygen at temperatures of about 150° to about 400° C. in the presence of a surface catalyst which favors the oxidation of ethylene to ethylene oxide under these conditions."

The statement is made that ethylene from any source can be used, and that the oxygen can be that of the air.

The only reference to the introduction of water is:

"The oxidation of ethylene takes place with a giving off of heat, and it is, of course, desirable to maintain the temperature of the zone of reaction within the range specified. This can be facilitated by suitable dilution of the reaction

gases, such as that accomplished by the use of air as the source of oxygen, and some water or carbon dioxide in addition to that formed can be admitted to the mixture in the reaction zone if desired. Hydrogen may be similarly added."

The description of the mode of conducting the process differs from all those given in the original specification in omitting the introduction of water.

The specification concludes:

"In any case, the ethylene and oxygen are thus reacted simultaneously at the temperatures set forth in the presence of a surface catalyst and of water . . ."

The new claims 8 and 9 are broader than those of the original patent.[5] It will suffice to quote 8. It is:

"The process of making ethylene oxide by the direct chemical combination of oxygen with ethylene in the proportions of one atom of oxygen to one molecule of ethylene, which comprises forming a mixture containing ethylene and molecular oxygen and conducting said mixture through a confined reaction zone which is maintained at an elevated temperature; controlling said temperature to maintain said mixture in said zone at a temperature between about 150° and about 400° C.; subjecting said mixture in said zone at said elevated controlled temperature to intimate contact with an active surface catalyst" [describing it, *inter alia,* as one which favors the formation of "oxidation products containing ethylene oxide in the presence of water."] and describing other steps not necessary to be recited.

The question is whether, in the light of the disclosures contained in the two patents, they are for the same invention. This court has said that they are if the reissue

[5] This fact, standing alone, does not vitiate the reissue. *Topliff* v. *Topliff,* 145 U. S. 156.

fully describes and claims the very invention intended to be secured by the original patent; [6] if the reissue describes and claims only those things which were embraced in the invention intended to have been secured by the original patent; [7] if the broader claims in the reissue are not merely suggested or indicated in the original specification but constitute parts or portions of the invention which were intended or sought to be covered or secured by the original patent.[8] The required intention does not appear if the additional matter covered by the claims of the reissue is not disclosed in the original patent.[9] If there be failure of disclosure in the original patent of matter claimed in the reissue, it will not aid the patentee that the new matter covered by the reissue was within his knowledge when he applied for his original patent.[10] And it is not enough that an invention might have been claimed in the original patent because it was suggested or indicated in the specification. It must appear from the face of the instrument that what is covered by the reissue was intended to have been covered and secured by the original.[11]

As the Circuit Court of Appeals held, the original specification and claims treated the voluntary introduction of water into the reaction chamber as a necessary step in the

[6] *Powder Co.* v. *Powder Works*, 98 U. S. 126, 138.

[7] *Parker & Whipple Co.* v. *Yale Clock Co.*, 123 U. S. 87, 99; *Hoskin* v. *Fisher*, 125 U. S. 217, 223; *Flower* v. *Detroit*, 127 U. S. 563, 571.

[8] *Corbin Cabinet Lock Co.* v. *Eagle Lock Co.*, 150 U. S. 38, 42.

[9] *Clements* v. *Odorless Excavating Apparatus Co.*, 109 U. S. 641, 647; *Coon* v. *Wilson*, 113 U. S. 268, 277; *Electric Gas-Lighting Co.* v. *Boston Electric Co.*, 139 U. S. 481, 501; *Freeman* v. *Asmus*, 145 U. S. 226, 239; *Olin* v. *Timken*, 155 U. S. 141, 147.

[10] *Powder Co.* v. *Powder Works*, *supra*, p. 138; *Manufacturing Co.* v. *Ladd*, 102 U. S. 408, 413; *Huber* v. *Nelson Mfg. Co.*, 148 U. S. 270.

[11] *Parker & Whipple Co.* v. *Yale Clock Co.*, *supra*; *Flower* v. *Detroit*, *supra*.

process, whereas such introduction is made permissive by the reissue. We agree with that court's view that there is thus a difference between the procedure described in the two documents. But we cannot agree with its conclusion that the difference is so insubstantial as not to invalidate the new claims 8 and 9. On the face of the papers, the process described in the original patent included a step not designated as optional or desirable but described and claimed as an integral part of the whole operation. In contrast, the reissue treats this step as immaterial and mentions the introduction of water as for the mere purpose of controlling the temperature in the reaction zone,—a thought not even suggested by the specification of the original patent, which, on the contrary, in its very first sentence, speaks of the simultaneous action of the oxygen of air and of water.

We think it plain that the reissue omitted a step in the process which was described and claimed as essential in the original patent. The court below was persuaded by expert testimony that, from a chemist's point of view, the prescribed step (the introduction of water) was immaterial; in other words, chemists testified that, by carrying out the procedure, omitting the introduction of water, they obtained the results described in the patent. Naturally enough, this fact led them to state, as chemists, that the introduction of the water was immaterial. Apparently this testimony induced both of the courts below to conclude that Lefort, when he applied for his original patent, knew that the introduction of water was unnecessary. The inquiry at once arises, if this were so, why did he not say so. If he had discovered a process, which the claims of the reissue are certainly broad enough to cover,—that of mixing dry oxygen and ethylene in the presence of a catalyst at the prescribed temperature to produce ethylene oxide,—it is not understood why, throughout his

specifications and claims, he spoke of exposing ethylene to the simultaneous action of oxygen and water or steam.

We think the court below fell into error in adopting the scientific conclusion of expert witnesses that the result would be the same whether water were introduced into the reaction chamber or not, as proof that Lefort's invention was not what he stated it to be in his original patent but rather the invention of a process of bringing ethylene and oxygen into contact in the presence of a catalyst.

Although it is the duty of a court to determine for itself, by examination of the original and the reissue, whether they are for the same invention, it is permissible, and often necessary, to receive expert evidence to ascertain the meaning of a technical or scientific term or term of art so that the court may be aided in understanding not what the instruments mean but what they actually say.[12] It is inadmissible to enlarge the scope of the original patent by recourse to expert testimony to the effect that a process described and claimed in the reissue, different from that described and claimed in the original patent, is, because equally efficacious, in substance that claimed originally.[13] If such testimony could tip the scales on the issue of the validity of a reissue, it would always be possible to substitute any new combination of steps or elements or devices for the one originally described and claimed by proving that the omission of any one or more steps would not alter the result.

This court has uniformly held that the omission from a reissue patent of one of the steps or elements prescribed in the original, thus broadening the claims to cover a new and different combination, renders the reissue void, even though the result attained is the same as that brought about by following the process claimed in the original patent.

[12] *Seymour* v. *Osborne*, 11 Wall. 516, 546.

[13] *Collar Co.* v. *Van Dusen*, 23 Wall. 530, 557.

In *Russell* v. *Dodge,* 93 U. S. 460, the original patent was for treating skins by the use of a compound in which heated fat liquor was expressly stated as an essential ingredient. There was no disclosure that the fat liquor could be used cold. In a reissue the specification was altered by eliminating the requirement that the liquor be heated. The court said:

"The change made in the old specification, by eliminating the necessity of using the fat liquor in a heated condition, and making in the new specification its use in that condition a mere matter of convenience, and the insertion of an independent claim for the use of fat liquor in the treatment of leather generally, operated to enlarge the character and scope of the invention. The evident object of the patentee in seeking a reissue was not to correct any defects in specification or claim, but to change both, and thus obtain, in fact, a patent for a different invention. This result the law, as we have seen, does not permit."

In *Gill* v. *Wells,* 22 Wall. 1, the original patent disclosed and claimed a machine for making hat bodies. One of the elements of the machine was a tunnel through which a current of air was to be passed. The specifications did not indicate that this part could be omitted. The reissue for a machine without any tunnel, was held invalid. The court said (p. 26):

"Argument to show that an invention consisting of a combination of three ingredients which are old is not the same as that of a combination of four old ingredients is quite unnecessary, as the negative of the proposition is as well settled in the patent law as it is in mathematics."

Many other cases might be cited to the same effect.

The court below was persuaded to construe the reissue patent as not differing from the original by the argument that, in both, the introduction of water was not essential to the technological success of the process. When certiorari was applied for in this court, the respondent in its

brief said: "The introduction of water, as distinguished from its presence, in the reaction zone is not 'an essential feature' in the invention at bar, and was not 'described and claimed in the original patent as an essential feature.'"

This argument goes upon the theory that if the presence of water is necessary to the reaction, its presence is assured by the side reaction we have mentioned which produces CO_2 and water. It does not explain, however, why, if this is the source of the necessary water, Lefort did not say so in his original patent. Nor does it suggest how the reaction can be initiated or caused when dry oxygen is used and the side reaction has not commenced.

In the argument on the merits in this court, the respondent shifted its position. In brief and argument it stated that both the original and reissue cover the same invention, for, if both require the introduction of water, the described introduction of air effects also the introduction of water since atmospheric air contains both oxygen and moisture. It is thus sought to avoid the finding of the Circuit Court of Appeals that the original patent called for the voluntary introduction of water and the reissue does not. This argument fails to square with the specification or claims of either the original patent or the reissue. The claims of the original patent are not limited to the oxygen of air; and the specification merely says the oxygen "can be the oxygen of air." The specification and claims of the reissue are satisfied by the introduction of dry oxygen.

In short, to avoid the difficulties which stare one in the face when the attempt is made to read specifications and claims as calling for the same process, the respondent is driven to take inconsistent positions, neither of which comports with the plain language of the two patents.

We hold that the reissue is not for the same invention described and claimed and intended to be secured by the original patent, and is, therefore, void.

The decree is

Reversed.

TULEE *v.* STATE OF WASHINGTON.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 318. Argued March 3, 1942.—Decided March 30, 1942.

Under the provision of the treaty of May 29, 1855, with the Yakima Indians, reserving to the members of the tribe the right to take fish "at all usual and accustomed places, in common with the citizens" of Washington Territory, the State of Washington has the power to impose on the Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, but it can not require them to pay license fees that are both regulatory and revenue-producing. P. 685.

7 Wash. 2d 124, 109 P. 2d 280, reversed.

APPEAL from a judgment affirming a conviction of a member of the Yakima Tribe of Indians on a charge of catching salmon with a net without first having obtained a license as required by state law.

Mr. Nathan R. Margold, with whom *Solicitor General Fahy* and *Mr. Kenneth R. L. Simmons* were on the brief, for appellant.

Mr. T. H. Little, Assistant Attorney General of the State of Washington, with whom *Messrs. Smith Troy,* Attorney General, and *E. P. Donnelly* were on the brief, for appellee.

Mr. I. H. Van Winkle, Attorney General of Oregon, filed a brief on behalf of the State of Oregon, as *amicus curiae,* urging affirmance.

MR. JUSTICE BLACK delivered the opinion of the Court.

The appellant, Sampson Tulee, a member of the Yakima tribe of Indians, was convicted in the Superior Court for Klickitat County, Washington, on a charge of catching salmon with a net, without first having obtained a license as required by state law.[1] The Supreme Court of Washington affirmed. 7 Wash. 2d 124, 109 P. 2d 280. The case is here on appeal under 237(a) of the Judicial Code, 28 U. S. C. 344(a), the appellant challenging the validity of the Washington statute, as applied to him, on the ground that it was repugnant to a treaty made between the United States and the Yakima Indians.

In 1855, the Yakimas and other Indians owned and occupied certain lands in the Territory of Washington, which the United States wished to open up for settlers. May 29, 1855, representatives of the Government met in council with representatives of the Indians, and after extended discussions lasting until June 11, the Indians agreed to a treaty, under which they were to cede 16,920 square miles of their territory, reserving 1,233 square miles for the confederated tribes represented at the meeting. As consideration for the cession by the Indians, a cession which furthered the national program of transforming wilderness into populous, productive territory,

[1] "It shall be unlawful to catch, take or fish for food fish with any appliance or by any means whatsoever except with hook and line . . . unless license so to do has been first obtained. . . ." Remington's Revised Statutes of Washington, § 5693. "For each dip bag net license for the taking of salmon on the Columbia River, [the license fee shall be] five dollars. . . ." *Id.* (vol. 7, 1940 supp.), § 5703.

the Government agreed to pay $200,000; to build certain schools, shops, and mills and keep them equipped for twenty years; to erect and equip a hospital; and to provide teachers and various helpers for twenty years. This agreement was ratified and proclaimed as a treaty in 1859. 12 Stat. 951.

The appellant claims that the Washington statute compelling him to obtain a license in order to fish for salmon violates the following provision of Article III of the treaty:

"The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."

The state does not claim power to regulate fishing by the Indians in their own reservation. *Pioneer Packing Co.* v. *Winslow,* 159 Wash. 655, 294 P. 557. Nor does it deny that treaty rights of Indians, whatever their scope, were preserved by Congress in the act which created the Washington Territory and the enabling act which admitted Washington as a state. 10 Stat. 172; 25 Stat. 676. Relying upon its broad powers to conserve game and fish within its borders,[2] however, the state asserts that its right to regulate fishing may be exercised at places like the scene of the alleged offense, which, although within the territory originally ceded by the Yakimas, is outside of their reservation. It argues that the treaty should not be con-

[2] *Geer* v. *Connecticut,* 161 U. S. 519; *Ward* v. *Race Horse,* 163 U. S. 504, 507; *Patsone* v. *Pennsylvania,* 232 U. S. 138; *Lacoste* v. *Dept. of Conservation,* 263 U. S. 545, 549.

strued as an impairment of this right, and that, since its license laws do not discriminate against the Indians, they do not conflict with the treaty. The appellant, on the other hand, claims that the treaty gives him an unrestricted right to fish in the "usual and accustomed places," free from state regulation of any kind. We think the state's construction of the treaty is too narrow and the appellant's too broad; that, while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish,[8] it forecloses the state from charging the Indians a fee of the kind in question here.

In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear. In *United States* v. *Winans*, 198 U. S. 371, this Court held that, despite the phrase "in common with citizens of the Territory," Article III conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their "usual and accustomed places" in the ceded area; and in *Seufert Bros. Co.* v. *United States*, 249 U. S. 194, a similar conclusion was reached even with respect to places outside the ceded area. From the report set out in the record before us, of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a

[8] Cf. *Kennedy* v. *Becker*, 241 U. S. 556. See *United States* v. *Winans*, *supra*, 384.

spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. *United States* v. *Kagama,* 118 U. S. 375, 384; *Seufert Bros. Co.* v. *United States, supra,* 198–199.

Viewing the treaty in this light, we are of the opinion that the state is without power to charge the Yakimas a fee for fishing. A stated purpose of the licensing act was to provide for "the support of the state government and its existing public institutions." Laws of Washington (1937) 529, 534. The license fees prescribed are regulatory as well as revenue producing. But it is clear that their regulatory purpose could be accomplished otherwise, that the imposition of license fees is not indispensable to the effectiveness of a state conservation program. Even though this method may be both convenient and, in its general impact, fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve. We believe that such exaction of fees as a prerequisite to the enjoyment of fishing in the "usual and accustomed places" cannot be reconciled with a fair construction of the treaty. We therefore hold the state statute invalid as applied in this case.

The judgment of the Supreme Court of Washington is

Reversed.

NATIONAL LABOR RELATIONS BOARD *v.* ELECTRIC VACUUM CLEANER CO., INC., ET AL.

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

No. 588. Argued March 5, 1942.—Decided March 30, 1942.

1. The finding of the National Labor Relations Board that, by a supplementary oral contract between an employer and a labor union, it was agreed only that new employees would be re-

quired to join the union, was supported by substantial evidence. P. 690.

2. The conclusion of the Board that the closed-shop agreement between the employer and a labor union in this case was not valid under § 8 (3) of the National Labor Relations Act, because prior to such agreement the union—although then the collective bargaining representative of a majority of the employees—had been assisted by coöperation of the employer constituting unfair labor practice, was supported by substantial evidence. P. 694.

   The evidence supports the Board's ruling that the employer, contrary to a collective bargaining agreement, coerced old employees to join certain unions with which the employer had no closed-shop contracts; in violation of the freedom of employees to organize, guaranteed by the Labor Act.

3. An order of the Board requiring the employer in this case to cease and desist from encouraging membership in such union and discouraging membership in another; from giving effect to the closed-shop provision of the contract; from giving effect to the remainder of the contract, when any other labor organization shall be certified as exclusive bargaining representative; from interfering with its employees' rights to self-organization; and requiring reinstatement with back pay of certain employees, posting of notices of compliance, and notification of the Board, was supported by the evidence and the findings, and was valid and enforceable. Pp. 689, 698.

4. A finding by the Board that a clause of a contract between an employer and a labor union, whereby new employees would be required to join the union, was abandoned and not subsequently revived, *held* supported by substantial evidence. P. 696.

5. Shortening the period for which the Board ordered compensation to be paid to employees wrongfully discharged or refused employment is not justified by the delays in disposing of this case. P. 698.

120 F. 2d 611, reversed.

CERTIORARI, 314 U. S. 600, to review a judgment refusing enforcement of and setting aside an order of the National Labor Relations Board.

Mr. Robert B. Watts, with whom *Solicitor General Fahy* and *Messrs. Richard S. Salant, Ernest A. Gross,* and *Morris P. Glushien* were on the brief, for petitioner.

Mr. Lawrence C. Spieth for the Electric Vacuum Cleaner Co., Inc., and *Mr. Herbert S. Thatcher,* with

whom *Mr. Joseph A. Padway* was on the brief, for the International Molders' Union, Local 430, et al., respondents.

MR. JUSTICE REED delivered the opinion of the Court.

The basic question for determination by this review is the right of the respondent employer, the Electric Vacuum Cleaner Company, Inc., to coöperate with unions, representing an uncoerced majority of its employees, to secure new members. The right is challenged because exercised prior to a closed shop agreement.

The other respondents are various unions, all affiliated with the American Federation of Labor, which we shall call the Affiliates. Since June 22, 1935, these unions have been recognized by the employer as the duly chosen agents of the employees for collective bargaining. On that date, the Affiliates and the employer entered into a written contract covering hours and working conditions for the period ending June 23, 1936. A similar contract extended the arrangements to June 23, 1937. In making the latter contract, the Affiliates satisfied the employer of their right to represent the workers, by exhibiting authorization cards totaling 771 out of the 809 employees affected. These cards gave the Affiliates "full power and authority" to conclude for the signer "all agreements as to hours of labor, wages and other employment conditions." They were to "remain in full force and effect for one year from date and thereafter, subject to thirty (30) days written notice of my desire to withdraw such power and authority to act for me in the matters referred to herein." We assume that the cancellation clause is ineffective prior to twelve months from the date of the card and that all cards were dated just prior to the termination of the first, or 1935, contract.

In March 1937, when the contract and the individual powers of attorney still had several months to run, the

United Electrical and Radio Workers of America (hereafter called United), affiliated with the Committee for Industrial Organization, began an effort to organize the plant. The Board, on adequate evidence, found that about sixty employees immediately signed United cards, that on March 19th a meeting of United was held at the Post Office building in East Cleveland, attended by a "large number of employees," and that on March 28th another United meeting was held "by a large number of persons, for the purpose of securing formal resignations from the A. F. of L. Affiliates." It is undisputed that a United charter was issued to the interested employees for a Local 720, and that on April 2nd the Local notified the employer by letter that a majority of its employees had resigned their memberships in the Affiliates and had "affiliated" themselves with United. Local 720 claimed in the letter the right to negotiate grievances "under the existing contract," i. e., that expiring June 23, 1937. This letter was not received by the employer until April 5th.

Prior to the receipt of this letter, and during a shutdown of the plant by the employer, which had begun on Monday, March 22, 1937, pursuant to a request of the Affiliates, dated March 20th, the employer and the Affiliates had entered into an oral arrangement on Saturday, April 3rd, pursuant to which the employer notified its employees it was reopening its plant Monday, April 5th, under the contract expiring the subsequent June 23rd, and added "but only those employees who are members of the crafts under contract with us will be employed." Eventually, a closed shop clause appeared in a bilateral written contract, superseding the one expiring June 23rd, executed as of May 20, 1937, in the following form:

Article III (d) "The Employer agrees to employ only members of the Unions in good standing in their respective Unions, and should the Employer require more employees

than those now employed, the Employer will secure such employees through the Unions, if however, the Unions are unable to furnish such employees, the Employer may secure them elsewhere, it being understood, however, that such employees so secured shall become members of the Union."

On the reopening of the plant, no one was permitted to return to work who did not present a clearance card from the Affiliates. The refusal of the company to reëmploy certain members of United Local 720 gave rise to charges of unfair labor practices, which were sustained by the National Labor Relations Board. 18 N. L. R. B. 591. The employer was ordered to cease and desist from discouraging membership in United and encouraging membership in the Affiliates; from giving any effect at any time to paragraph (d) of Article III of the May 20, 1937, agreement, quoted above, requiring a closed shop; from giving any effect to the remainder of the May 20, 1937, agreement upon certification of any other labor organization than the Affiliates as exclusive collective bargaining representative, and from in any manner interfering with its employees' rights to self-organization. The order required affirmative action by the employer, for certain employees, to the extent of reinstatement and back pay, with the usual provisions for posting notices of compliance and notification of the Board. Some other charges, and a petition for investigation and certification of bargaining representatives, were dismissed without prejudice.[1]

The respondents successfully contested an enforcement petition. The Circuit Court of Appeals set aside the order, 120 F. 2d 611, on the ground that the refusal to permit

[1] Certain clauses of the order relating to reimbursement of federal, state and local work-relief projects are abandoned by the Board and should be eliminated. *Republic Steel Corp.* v. *Labor Board,* 311 U. S. 7.

members of the United to resume their work was justified because, at the time, a valid closed shop contract, in favor of the Affiliates, under § 8 (3) of the statute, set out below, was in effect.[2] Deeming the issues important in the administration of the Act, we granted certiorari. 314 U. S. 600.

In addition to the facts just stated, the Board found there was an oral provision, pertaining to a closed shop, included in the 1935 and 1936 contracts. This was to the effect, the Board concluded, that all employees hired after the date of the first contract (referred to as new employees) should be required, after a work-probation period of two weeks, to become members of the appropriate Affiliate union. Respondents contend the oral addition was somewhat different, and that, under it, not only were new employees compelled to join the Affiliates, but old employees (those employed before the first contract) who were, or who became, members of the Affiliates were required to maintain their membership unimpaired. Respondents' position was upheld by the Circuit Court of Appeals for this and other reasons. The freedom of old employees, under the earlier contracts, to join or not, as they wished, is acknowledged by all.

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[2] 49 Stat. 452, c. 372, § 8: "It shall be an unfair labor practice for an employer— . . . (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or . . . any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made." 29 U. S. C. § 158 (3).

The Court relied heavily upon the authorizations to bargain,[3] furnished the Affiliates by the old employees, as indicating the old employees who were members must maintain that status until the year was up. Assuming that every old employee furnished a power of representation for collective bargaining not revocable during the year, it need not be inferred the employee also was bound thereby not to switch his union allegiance. If the employee were forced to await the expiration of the year before changing membership, the first bargaining representative might have a contract for the ensuing year executed before a new representative could be organized and empowered to act. There is nothing in this record to compel such interpretation of the authorizations. With respect to the contract between the employer and the Affiliates, the Board cites the evidence of several, including a letter from the employer's president, written before any controversy arose, to the effect that the oral provision was that new employees must join the Affiliates. From this evidence, the Board was fully justified in reaching its determination that nothing more was agreed. *Labor Board* v. *Automotive Maintenance Mach. Co.*, 315 U. S. 282; *Labor Board* v. *Falk Corp.*, 308 U. S. 453, 461; *Labor Board* v. *Greyhound Lines*, 303 U. S. 261, 271. There is a difference between being bound to retain the same bargaining representative

[3] "I, the undersigned, . . . hereby authorize my Craft Organization . . . to represent me and, in my behalf, to negotiate and conclude all agreements as to hours of labor, wages and other employment conditions. . . .

"The full power and authority to act for the undersigned as described herein supersedes any power or authority heretofore given to any person or organization to represent me, and shall remain in full force and effect for one year from date and thereafter, subject to thirty (30) days written notice of my desire to withdraw such power and authority to act for me in the matters referred to herein."

for a specified period, and being bound not to become a member of a different union during the term of the contract. The first situation, not the second, arose from the earlier contracts.

The commencement of the United campaign for membership, in March, brought coöperative action between the employer and the Affiliates to strengthen the latter's position. Under the oral contract, as defined by the ruling of the Board, now approved here, new employees could properly be required to become members of the Affiliates, but old employees could neither be required to become members nor to maintain their membership. The Board found that, to forestall defections of old employees from the Affiliates to the United, the employer "summoned old employees to the office and there sought to, and in many instances was able to, coerce them into joining the A. F. of L. Affiliates." In the office were representatives of the Affiliates as well as the employer. A number of old men were called before this group. It is not clear from the record which ones had been members of the Affiliates and lost their standing, or which ones had never been members. There were instances of each type. Vitosky had been a member. Ramsey had not. Both Vitosky and Ramsey were old employees, each in service long prior to the first contract. Vitosky and four others signed affiliate cards on demand, and returned to work. Ramsey refused to sign, and was discharged. Upon the report of Ramsey's discharge reaching the workshops, there was a one day sit-down strike. Respondents urge that Ramsey's discharge was the result of an error. This issue need not be resolved, as there is evidence that some old men, in violation of the collective bargaining agreement, were required to maintain or renew their membership in the Affiliates prior to the closed shop agreement of April 3rd. Such facts are adequate to support the Board's ruling of coercion of em-

ployees by the employer in order to maintain the membership of the Affiliates. Without a closed shop contract covering the employees involved, this company effort to maintain a union violates provisions protecting the freedom of employees to organize as they may wish. 49 Stat. 452, §§ 7, 8 (1), 8 (3); 29 U. S. C. §§ 157, 158 (1), 158 (3).

Furthermore, upon the adjustment of this sit-down strike, which took place Friday, March 19th, after the occurrences just described, the Affiliates requested, and the employer ordered, a shutdown of the entire plant, which lasted from March 22nd to April 5th. The Board found that this shutdown was for the purpose of preventing "further proselyting" among members of the Affiliates by the United. A vice-president of the employer testified to such facts, learned by him in conference with officials of the Affiliates who stated they needed the time to "get their lines in order." Assistance to a union by a shutdown, like any other employer assistance, is forbidden.[4]

Respondents assert that whatever employer assistance was rendered the Affiliates was justified, even under an interpretation of the contract which restricts the oral portion to a requirement that new members join the Affiliates. The assistance, it is urged, was rendered to collective-bargaining representatives, selected freely by a majority of the employees and possessed of unrestricted and unrevoked powers to negotiate generally over labor conditions, including the closed shop clause of April 3rd and the new closed shop contract of May 20, 1937. Under this view, since the discharges took place after a valid closed shop amendment, they were in conformity with § 8 (3) of the Labor Act.

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[4] *Labor Board* v. *Lund*, 103 F. 2d 815; *Labor Board* v. *National Motor Bearing Co.*, 105 F. 2d 652.

An examination of the proviso of § 8 (3) will demonstrate the error of this position. That proviso reads, so far as pertinent, as follows:

"*Provided,* That nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made."

Under the findings already sustained, the Affiliates were assisted and maintained by the coöperation of the employer in dealing with the old employees. Such acts encouraged the labor organization, in violation of the portion of § 8 (3) preceding the proviso, set out in note 2. Consequently, when the closed shop agreement was adopted, April 3rd, it was invalid because entered into with a labor organization assisted by an employer, in the precise words of § 8 (3) quoted above. Cf. *I. A. of M.* v. *Labor Board,* 311 U. S. 72, 81. Being invalid, the discharges violated §§ 7, 8 (1) and (3).

Respondents, however, take the position that the Congressional purpose embodied in the Labor Act is not served by such literalness. As they see the situation, freedom to organize must necessarily be qualified after uncoerced employees obtain validly chosen majority representatives. Previously untrammeled rights, they argue, must be subjected to the modicum of interference here practiced, in order that the Congressional object of industrial peace may be realized. We think, however, that the Board's interpretation of the applicable language is correct. The provision for a closed shop, as permitted by § 8

(3), follows grammatically a prohibition of discrimination in hiring. These words of the exception must have been carefully chosen to express the precise nature and limits of permissible employer activity in union organization. To permit employer interference prior to the execution of a closed shop contract, as soon as a bare majority of employees had properly selected their representatives, would go far to restore the type of company-union coördination in labor matters which the act forbids.[5]

Since we have held that assistance was given the Affiliates by the unfair labor practice of encouraging membership in those unions, it follows that the closed shop agreement of April 3rd, requiring old employees to be members of the Affiliates, was made with an assisted labor organization and could be held invalid. *I. A. of M.* v. *Labor Board,* 311 U. S. 72, 75. How long that invalidity continues is an inference of fact for the fair determination of the Board. Cf. *H. J. Heinz Co.* v. *Labor Board,* 311 U. S. 514, 522. Consequently, the refusal of the employer to permit the employees to work without clearance from the Affiliates could be found a forbidden interference and discrimination. § 8 (1) and (3). *Labor Board* v. *Link-Belt Co.,* 311 U. S. 584, 601. Further, the Board's conclusion that the infirmities of the April 3rd arrangement were destructive of the May 20th contract proceeds naturally from its decision as to the effect of the employer activities prior to April 3rd. The force of the unfair practices was not necessarily dissipated so quickly.

[5] There is an illuminating comment in the Senate Report on the Labor Bill. S. Rep. 573, 74th Cong., 1st Sess., p. 12:

"The assertion that the bill favors the closed shop is particularly misleading in view of the fact that the proviso in two respects actually narrows the now existent law regarding closed-shop agreements. While today an employer may negotiate such an agreement even with a minority union, the bill provides that an employer shall be allowed

The employer calls our attention to provisions of the order reinstating employees, which it feels erroneous. So far as this objection is based on an interpretation of the 1936 oral contract to require old employees to maintain their membership, it is answered by prior portions of this opinion. The employer's refusal to admit these old employees to work on and after April 5th is properly remedied by reinstating them in their position and granting them back pay.

There is a different basis, however, for the objection to the reinstatement of the new employees. This is that, under any interpretation of the oral clause of the 1936 contract, these men must become members of the Affiliates, and therefore the employer's refusal to take them back on their jobs is proper, even though the April 3rd arrangement is invalid. The Board answers that the April 3rd arrangement was an abandonment of the earlier oral clause, and that, consequently, the discharges made pursuant to the later invalid closed shop arrangements are improper. The abandonment, the Board finds, was intentional, and therefore the subsequent invalidation of the later arrangement did not revive the vitality of the earlier oral contract.

This finding of abandonment of the 1936 membership clause was an inference drawn by the Board from the circumstances surrounding the adoption of the April 3rd arrangement. It is an inference the Board is entitled to

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to make a closed-shop contract only with a labor organization that represents the majority of employees in the appropriate collective-bargaining unit covered by such agreement when made.

"Secondly, the bill is extremely careful to forestall the making of closed-shop agreements with organizations that have been 'established, maintained, or assisted' by any action defined in the bill as an unfair labor practice. And of course it is clear that no agreement heretofore made could give validity to the practices herein prohibited by section 8."

make when supported by material evidence. To the Board, the Congress has entrusted the appraisal of the evidence and the drawing of such inferences. 49 Stat. 454, § 10 (e); *Labor Board* v. *Waterman S. S. Co.*, 309 U. S. 206, 209; *Labor Board* v. *Link-Belt Co.*, 311 U. S. 584, 597. The lack of positive evidence of the abandonment is natural. It was found abandoned by the Board because of the actions of the parties, the employer and the Affiliates, looking to the creation of a new, all embracing closed shop contract. While the Board found the 1936 oral clause had covered only new employees, the Affiliates issued a notice to their members, dated March 31st, saying the "solution to the problem [i. e., "the situation that resulted in the closing of the plant"] is proper enforcement of the present agreement, and that no one be allowed to resume work unless affiliated with these organizations." On April 3, 1937, the employer notified its employees that in 1936 "it was agreed that we employ only persons affiliated with said crafts" (the Affiliates). Such interpretation of the old clause, varying so radically from that adopted by the Board, is not conducive to clear-cut evidence of the purpose of the substitute closed shop arrangement of April 3rd. Considered against the background of coercion of old employees, the strike difficulties and the closing of the plant, all affected at least by the United's membership campaign, we are not willing to say that the Board's finding that "In substance, though not in form, the arrangement effected between the respondent and the A. F. of L. Affiliates on or about April 3, 1937, was an abandonment of the oral agreement as insufficient to meet the exigencies of the situation and its replacement by a closed-shop agreement," is unsupported by substantial evidence.

We have noted the employer's objection to the burden of back pay placed upon it because of the Board's alleged

delay in entering the final order. Handling of complaints as quickly as is consistent with good administration is of course essential. It is important both to the employer, who may have to pay back wages, and to the employee, who must live without his job. Unfortunately, this cause took from June 10, 1937, to December 31, 1939. There is nothing in the record, beyond a failure of the Board to file an intermediate report, which would tend to justify us, however, in shortening the period for compensation. This error was admitted and corrected by the Board. We cannot penalize the employees for this happening.

The judgment of the Circuit Court of Appeals is reversed with directions to enforce the order of the Board except as to reimbursement of federal, state and local work-relief projects.

Reversed.

MR. JUSTICE ROBERTS is of the opinion the judgment should be affirmed for the reasons stated in the opinion of the Circuit Court of Appeals. 120 F. 2d 611.

MILES ET AL. *v.* ILLINOIS CENTRAL RAILROAD CO.

CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE.

No. 272. Argued February 10, 1942.—Decided March 30, 1942.

Section 6 of the Federal Employers' Liability Act prevents a state court from enjoining, on the ground of the inconvenience or expense to the railroad, a resident citizen of the State from prosecuting or furthering an action under the Act (or receiving the proceeds of any judgment therein) in a state court of another State which has jurisdiction under the Act. P. 705.

Reversed.

CERTIORARI, 314 U. S. 602, to review a decree of injunction. The highest court of the State had refused a review by certiorari.

Mr. William G. Cavett, with whom *Mr. Louis E. Miller* was on the brief, for petitioners.

Messrs. Thomas A. Evans and *Larry Creson,* with whom *Messrs. Marion G. Evans* and *Clinton H. McKay* were on the brief, for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

The effect of § 6 of the Federal Employers' Liability Act[1] on the power of a state court to enjoin its citizens, on the ground of oppressiveness and inequity to the defendant carrier, from suing on a F. E. L. A. claim in the state courts of another state, furthering such a suit in any manner, or receiving the proceeds of any judgment so obtained, is before us for decision.

The respondent, an Illinois corporation, hereafter referred to as the Illinois Central, brought an original bill in the Chancery Court of Shelby County, Tennessee, seeking to enjoin one of the petitioners here, Mrs. Miles, then the Tennessee administratrix of her husband, a resident of that State, from further prosecuting in a Missouri state court her F. E. L. A. claim against the Illinois Central for the death of her husband, its employee. The fatal accident had occurred at Memphis, Tennessee. After a temporary injunction issued, Mrs. Miles promptly dismissed her Missouri suit and was discharged as administratrix by

[1] 36 Stat. 291. "SEC. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

"Under this Act an action may be brought in a circuit 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. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States." 45 U. S. C. § 56.

the Tennessee probate court. A Missouri administrator was then appointed at her suggestion, and he instituted another Missouri suit for the same cause of action. The Illinois Central filed an amended and supplemental bill, adding decedent's children, likewise residents of Tennessee, as defendants, and enlarging its prayer to forbid furthering the new suit in any manner or receiving the proceeds of any judgment. A new temporary injunction was issued as prayed.

The grounds for the injunction were the inconvenience and expense to the Illinois Central of taking its Memphis employees to St. Louis, and the resulting burden upon interstate commerce. The anticipated extra expense was several hundred dollars per day for an estimated two days of actual trial and whatever additional time might be lost by continuances or delay. Inconvenience was expected through the withdrawal of some twelve to twenty employees and officials from their duties for the same period. The defense relied upon a timely plea that § 6 of the F. E. L. A. prevented the enjoining of proceedings in the Missouri courts.

The trial court found that the continued prosecution of the pending Missouri case would be "oppressive and inequitable" to the Illinois Central and "a burden on the commerce and business of the complainant." As a matter of law, the court concluded, however, that the Illinois Central was not entitled to permanent injunctions. On appeal the Court of Appeals reversed the decree and made the temporary injunctions permanent. Further state review by certiorari in the Supreme Court of Tennessee was refused, and we granted certiorari to the Court of Appeals to settle an important federal question [2] as to the ap-

[2] Judicial Code § 237 (b). *Southern Ry. Co.* v. *Painter*, 314 U. S. 155, 159–60: "If a state court proceeds as the Chancery Court of Tennessee acted, the ultimate vindication of any federal right lies with this Court." *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, 52.

plicability of § 6 of the F. E. L. A. to this situation. 314 U. S. 602. Cf. *Payne* v. *Knapp,* 197 Iowa 737, 198 N. W. 62; *Peterson* v. *Chicago, B. & Q. R. Co.,* 187 Minn. 228, 244 N. W. 823; *Baltimore & Ohio R. Co.* v. *Kepner,* 137 Ohio St. 409, 30 N. E. 2d 982, affirmed 314 U. S. 44.

The *Kepner* case dealt with the power of a state court to enjoin a resident from continued prosecution of a suit under the F. E. L. A. in a distant federal district court on the ground of inequity, vexatiousness and harassment. The decision denied the power to interfere with the privileges of federal venue "for the benefit of the carrier or the national transportation system."

As in the *Kepner* case, there is in this case no occasion to go into the question of the availability, as support for an injunction, of a charge of interference with interstate commerce by reason of the burden of expense and inconvenience. The trial court found a burden on the commerce of the Illinois Central, but made no finding as to any burden on interstate commerce. Moreover, the Court of Appeals stated that the Illinois Central "expressly abandoned the contention" "that the prosecution of the suit in St. Louis was a burden on interstate commerce." No contention is made here that there is any such burden or that the Illinois Central is not doing substantial business in Missouri, as found by the trial court. It operates daily passenger trains with its own crews into St. Louis over the St. Louis Terminal Company tracks, maintains passenger and freight offices and had total receipts, in St. Louis, of a million-and-a-half the year the suit was filed. Under the rule announced in *Denver & R. G. W. R. Co.* v. *Terte,* 284 U. S. 284, 287, the Illinois Central is properly suable in Missouri. In the *Kepner* case, 314 U. S. 44, 51, we pointed out, with a discussion of the applicable cases, that the carrier must submit to inconvenience and expense, if there is jurisdiction, "although thereby interstate commerce is in-

cidentally burdened." There is no occasion to repeat the comments here. The specific declaration in § 6 that the United States courts should have concurrent jurisdiction with those of the several states, and the prohibition against removal, point clearly to the conclusion that Congress has exercised its authority over interstate commerce to the extent of permitting suits in state courts, despite the incidental burden, where process may be obtained on a defendant, not merely soliciting business but actually carrying on railroading by operating trains and maintaining traffic offices within the territory of the court's jurisdiction.[3]

The real point of controversy here is whether that portion of § 6 of the F. E. L. A., which holds litigation in the state court where it is instituted, prevents the court of another state from enjoining citizens, within its jurisdiction, from continued prosecution of the suit on grounds of inequity. Here, as in Kepner's case, there is no question but that the Missouri court has venue of the proceeding. Here, too, we need to look no farther into Tennessee law than the opinion of the state's highest court, in this record, to conclude that under state law a court of equity may enjoin a resident citizen from attempting to enforce his rights, oppressively and inequitably,[4] and that the expense and inconvenience hereinbefore set out resulted in oppressiveness and inconvenience in the eye of the state court.

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[3] *Hoffman* v. *Missouri ex rel. Foraker*, 274 U. S. 21. Cf. International *Milling Co.* v. *Columbia Co.*, 292 U. S. 511, limiting *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312; *Atchison, T. & S. F. Ry. Co.* v. *Wells*, 265 U. S. 101, and *Michigan Central R. Co.* v. *Mix*, 278 U. S. 492, to the rule that suits upon extra-state causes of action under F. E. L. A. burden commerce and will not be permitted in courts of states where the defendant carriers do no more than maintain facilities for solicitation of business. The three cases last mentioned and the *Foraker* case were all written by the same justice, within the space of a few years.

[4] Cf. *Chambers* v. *Baltimore & Ohio R. Co.*, 207 U. S. 142, 149.

In the legislative history of § 6,[5] the provision that removal may not be had from a "state court of competent jurisdiction" was added to the House bill on the floor of the Senate and later accepted by the House, in order to assure a hearing to the employee in a state court. Words were simultaneously adopted recognizing the jurisdiction of the state courts by providing that the federal jurisdiction should be concurrent. The venue of state court suits was left to the practice of the forum. The opportunity to present causes of action arising under the F. E. L. A. in the state courts came, however, not from the state law but from the federal. By virtue of the Constitution, the courts of the several states must remain open to such litigants on the same basis that they are open to litigants with causes of action springing from a different source. This is so because the Federal Constitution makes the laws of the United States the supreme law of

[5] House Resolution 17263, 61st Congress, 2d Session, which eventually became the Act of 1910, contained no prohibition or restriction upon removal of suits from state courts when it passed the House, and was reported to the Senate by the Senate Committee on the Judiciary. Sen. Rep. No. 432, 61st Cong., 2d Sess., March 22, 1910. Upon the floor of the Senate several amendments were proposed, varying in terms, but all seeking to achieve some such limitation. 45 Cong. Rec. 3995, 3998, 4051. Senator Paynter's second version was the amendment eventually adopted. 45 Cong. Rec. 4093. The House concurred in the Senate amendment without modification. 45 Cong. Rec. 4159.

The reason for the amendment was stated by Senator Paynter thus:

"I offer an amendment which will give to the plaintiff the right to select the forum in which his case shall be tried. He can select the federal or the state court, as he may prefer, to try his case arising under the act in question." P. 4051.

"If this amendment is adopted, the Congress has not conferred by the act under consideration the exclusive jurisdiction upon state courts. The plaintiff can choose either the federal or state court in which to prosecute his action. The effect of my amendment is to prevent the removal of the action from the state courts when brought there." P. 4093.

the land, binding on every citizen and every court and enforceable wherever jurisdiction is adequate for the purpose. *Second Employers' Liability Cases,* 223 U. S. 1, 56–59. The Missouri court here involved must permit this litigation. To deny citizens from other states, suitors under F. E. L. A., access to its courts would, if it permitted access to its own citizens, violate the Privileges and Immunities Clause. Constitution, Art. IV, § 2; *McKnett* v. *St. Louis & S. F. Ry. Co.,* 292 U. S. 230, 233.[6] Since the existence of the cause of action and the privilege of vindicating rights under the F. E. L. A. in state courts spring from federal law, the right to sue in state courts of proper venue where their jurisdiction is adequate is of the same quality as the right to sue in federal courts. It is no more subject to interference by state action than was the federal venue in the *Kepner* case.

This is not to say that states cannot control their courts. We do not deal here with the power of Missouri by judicial decision or legislative enactment to regulate the use of its courts generally, as was approved in the *Douglas* or the *Chambers* cases, note 6 *supra.* We are considering another state's power to so control its own citizens that they cannot exercise the federal privilege of litigating a federal right in the court of another state.

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[6] *Chambers* v. *Baltimore & Ohio R. Co.,* 207 U. S. 142, or *Douglas* v. *New York, N. H. & H. R. Co.,* 279 U. S. 377, do not impinge upon this principle. In the former case, an Ohio statute forbade suits in its courts for wrongful death occurring in another state unless the decedent was a citizen of Ohio. This Court saw no discrimination against personal representatives of any decedent, since their right to sue did not depend upon their citizenship but upon the citizenship of their decedent. In the latter case, a statute of New York, which gave only discretionary jurisdiction to suits by nonresidents but compulsory jurisdiction to suits by residents was held valid because it treated citizens and noncitizens alike and tested their right to maintain an action by their residence or nonresidence.

State courts have assumed the right to enjoin their citizens from proceeding in the courts of other states. This was done, for example, in *Reed's Admrx.* v. *Illinois Central R. Co.*, 182 Ky. 455, 206 S. W. 794. The basis of the decision was the inequity of allowing a suit at a distant point in a state or federal court, page 464.[7] *Reed's* case was relied upon by *Kern* v. *Cleveland, C., C. & St. L. Ry. Co.*, 204 Ind. 595, 185 N. E. 446, for the authority of a state court to enjoin its citizens from inequitable conduct under the F. E. L. A. Other state courts deny their authority to issue such injunctions.[8]

The permission granted by Congress to sue in state courts may be exercised only where the carrier is found doing business. If suits in federal district courts at those points do not unduly burden interstate commerce, suits in similarly located state courts cannot be burdensome. As Congress has permitted both the state and federal suits, its determination that the carriers must bear the incidental burden is a determination that the state courts may not treat the normal expense and inconvenience of trial in permitted places, such as the one selected here, as inequitable and unconscionable.

The judgment below is reversed and the cause is remanded to the Court of Appeals of Tennessee for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE JACKSON, concurring:

I agree with the conclusion and, with exceptions stated herein, with the opinion of MR. JUSTICE REED, though I

[7] This is not the position of the federal courts. *Connelly* v. *Central R. Co.*, 238 F. 932; *Schendel* v. *McGee*, 300 F. 273, 278; *Chesapeake & Ohio Ry. Co.* v. *Vigor*, 90 F. 2d 7.

[8] *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.

am not able to sublimate the conflict that underlies this case to the level of either of the conflicting opinions. Realistically considered, the issue is earthy and unprincipled. So viewed, the real issue is whether a plaintiff with a cause of action under the Federal Employers' Liability Act may go shopping for a judge or a jury believed to be more favorable than he would find in his home forum. An advantage which it is hoped will be reflected in a judgment is what makes plaintiffs leave home and incur burdens of expense and inconvenience that would be regarded as oppressive if forced upon them. And that is what makes railroads seek injunctions such as this one.

The judiciary has never favored this sort of shopping for a forum. It has sought to protect its own good name as well as to protect defendants by injunctions against the practice of seeking out soft spots in the judicial system in which to bring particular kinds of litigation. But the judges, with lawyerly indirection, have not avowed the interest of the judiciary in orderly resort to the courts as a basis for their decision, and have cast their protective doctrines in terms of sheltering defendants against vexatious and harassing suits. This judicial treatment of the subject of venue leads Congress and the parties to think of the choice of a forum as a private matter between litigants, and in cases like the present obscures the public interest in venue practices behind a rather fantastic fiction that a widow is harassing the Illinois Central Railroad. If Congress had left us free to consult the ultimate public interest in orderly resort to the judicial system, I should agree with MR. JUSTICE FRANKFURTER'S conclusion. But the plaintiffs say that they go shopping, not by leave of the courts themselves, but by the authority of Congress. Whether the Congress has granted such latitude is our question.

Unless there is some hidden meaning in the language Congress has employed, the injured workman or his sur-

viving dependents may choose from the entire territory served by the railroad any place in which to sue, and in which to choose either a federal or a state court of which to ask his remedy. There is nothing which requires a plaintiff to whom such a choice is given to exercise it in a self-denying or large-hearted manner. There is nothing to restrain use of that privilege, as all choices of tribunal are commonly used by all plaintiffs to get away from judges who are considered to be unsympathetic, and to get before those who are considered more favorable; to get away from juries thought to be small-minded in the matter of verdicts, and to get to those thought to be generous; to escape courts whose procedures are burdensome to the plaintiff, and to seek out courts whose procedures make the going easy.

That such a privilege puts a burden on interstate commerce may well be admitted, but Congress has the power to burden. The Federal Employers' Liability Act itself leaves interstate commerce under the burden of a medieval system of compensating the injured railroad worker or his survivors. He is not given a remedy, but only a lawsuit. It is well understood that in most cases he will be unable to pursue that except by splitting his speculative prospects with a lawyer. The functioning of this backward system of dealing with industrial accidents in interstate commerce burdens it with perhaps two dollars of judgment for every dollar that actually reaches those who have been damaged, and it leaves the burden of many injuries to be borne by them utterly uncompensated. Such being the major burden under which the workmen and the industry must function, I see no reason to believe that Congress could not have intended the relatively minor additional burden to interstate commerce from loading the dice a little in favor of the workman in the matter of venue. It seems more probable that Congress intended to give the disadvantaged workman some leverage in

the choice of venue, than that it intended to leave him in a position where the railroad could force him to try one lawsuit at home to find out whether he would be allowed to try his principal lawsuit elsewhere. This latter would be a frequent result if we upheld the contention made in this case and in the *Kepner* case. I think, therefore, that the petitioner had a right to resort to the Missouri court under the circumstances of this case for her remedy.

I do not, however, agree with the statement in MR. JUSTICE REED'S opinion that "the Missouri court here involved must permit this litigation." It is very doubtful if any requirement can be spelled out of the Federal Constitution that a state must furnish a forum for a nonresident plaintiff and a foreign corporation to fight out issues imported from another state where the cause of action arose. It seems unnecessary to decide now whether this litigation could be imposed on the Missouri court, for it appears to have embraced the litigation. Even if Missouri, by reason of its control of its own courts might refuse to open them to such a case, it does not follow that another state may close Missouri's courts to one with a federal cause of action. If Missouri elects to entertain the case, the courts of no other state can obstruct or prevent its exercise of jurisdiction as conferred by the federal statute or its right to obtain evidence and to distribute the proceeds, if any, in accordance with the Federal Employers' Liability Act. I therefore favor reversal.

MR. JUSTICE FRANKFURTER, dissenting:

The decision in this case mutilates principles that have long been regarded as basic in the law. Few legal doctrines have been more universally accepted than those recognizing the powers which this Court now denies to the states when suits under the Federal Employers' Liability Act are brought in state courts: the power of a court to prevent injustice by restraining a person subject to its

authority from maintaining an inequitable suit in the courts of another state, *Cole* v. *Cunningham,* 133 U. S. 107; the right of a court to decline its facilities to a suit that "in the interest of justice" should be tried elsewhere, *Canada Malting Co.* v. *Paterson Co.,* 285 U. S. 413, 422–23. The decision disregards the constitutional relationship between the "judicial power" of the federal government and that of the states whereby state courts enforce federal rights (when such remedies have not been exclusively entrusted to the federal courts) as part of their "duty to safeguard and enforce the right of every citizen without reference to the particular exercise of governmental power from which the right may have arisen." *Minneapolis & St. Louis R. Co.* v. *Bombolis,* 241 U. S. 211, 222.

For a decision so far-reaching in its implications, warrant is found in the inarticulate radiations of § 6 of the 1910 amendment to the Federal Employers' Liability Act. While the words of a statute do not by themselves distil its meaning, we must at least begin with them. The language of § 6 is simple and direct. After establishing a two-year period of limitations, it continues: "Under this Act an action may be brought in a circuit 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. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States." 36 Stat. 291.

This is a conventional provision. There is nothing novel or distinctive about it. Recognition of concurrent jurisdiction in the state courts to vindicate federal rights is found in the first Judiciary Act of 1789. 1 Stat. 73, 77.

And the statute books are replete with instances in which Congress has acknowledged the existence of this jurisdiction in the state courts unless explicitly withheld from them. See the discussion of Mr. Justice Bradley in *Claflin* v. *Houseman,* 93 U. S. 130, 139–43. The essence of § 6 is merely that the state courts are open to a plaintiff suing under the Act, and that if he chooses to bring suit in a state court, the defendant may not remove the cause to a federal court. So far as language conveys ideas, the Act affords no intimation that Congress intended anything more.

We are not of course concerned here, as we were in the *Kepner* case, decided the other day, 314 U. S. 44, with an attempt by a state court to prevent resort to a federal court. Historically, the problem of interferences, direct or indirect, between federal and state courts is entirely separate from the problem of the relations of the state courts to each other. See Warren, *Federal and State Court Interference,* 43 Harv. L. Rev. 345. The question now before us—relating to the power of a state to enjoin those subject to its jurisdiction from unjustly resorting to the courts of a sister state—is an aspect of the latter problem. In the *Kepner* case, this Court held only that the provision of § 6 "filled the entire field of venue in federal courts" and that what had thus been legislatively given to the federal courts could not judicially be taken away. The *Kepner* decision cast no cloud upon *Douglas* v. *New York, N. H. & H. R. Co.,* 279 U. S. 377, which sustained the power of a state to apply the principle of *forum non conveniens* to suits under the Act brought in its courts by non-residents. The issue in the case at bar is essentially another phase of the problem in the *Douglas* case—whether, merely by authorizing access to the state courts to enforce rights created by the Federal Employers' Liability Act, Congress impliedly repealed *pro tanto* the means for

achieving justice which the states customarily employ in similar cases. Specifically, the question for decision is this: Has Congress, by providing explicitly that state courts shall have concurrent jurisdiction of suits under the Act, withdrawn from each state its recognized power to enjoin persons within its jurisdiction from bringing a suit under the Act "contrary to equity and good conscience" in the courts of another state? This question was wholly outside the scope of the *Kepner* case. It was not presented, and was therefore not decided, by that case.

The relevant circumstances here are these. A resident of Tennessee was killed in a railroad accident occurring in Tennessee. The railroad, an Illinois corporation, has its principal offices in Tennessee. All of the witnesses reside in Tennessee, as do the deceased's legal representatives. But suit was brought in a state court of Missouri, where the railroad does some business. Finding that the Missouri suit was "oppressive and inequitable," the Tennessee Court of Appeals sustained the power of the chancellor to restrain the further prosecution of that suit. The finding that the Missouri suit was "oppressive and inequitable" was challenged by the petitioners neither before us nor in the courts of Tennessee, and the propriety of the action taken by the Tennessee court, as a matter of equitable discretion, is not here in issue. We are called upon to decide only whether Congress has deprived Tennessee of the power which it has asserted in this case.

It is admitted that the courts of Tennessee customarily exercise this power in situations like the present case. See *American Express Co.* v. *Fox,* 135 Tenn. 489, 187 S. W. 1117. If the accident here had occurred while the deceased was engaged in intrastate commerce, and consequently had not given rise to a right of action under the federal statute, Tennessee would unquestionably have

had the power to do what she has done here. For while the Privileges and Immunities Clause, Art. IV, § 2, secures to citizens of other states such right of access to the courts of a state as that state gives to its own citizens, *Chambers* v. *Baltimore & Ohio R. Co.*, 207 U. S. 142, 148; *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U. S. 230, 233, it does not take away from a state its historic power to prevent unjust resort to the courts of another state. *Cole* v. *Cunningham*, 133 U. S. 107. Moreover, the Constitution would not prevent Missouri from declining to entertain a suit to vindicate a federal right, such as was brought here, if an action to enforce a similar non-federal right would also not lie in her courts. The availability of state courts for the enforcement of federal rights has not resulted in putting federal rights on any different footing from state rights. "A state may not discriminate against rights arising under federal laws," *McKnett* v. *St. Louis & S. F. Ry. Co.*, *supra*, at 234, but neither the Constitution nor Congress has compelled the states to discriminate in favor of federal rights. And this Court has expressly held that the rights created by the Federal Employers' Liability Act are not different, in this respect, from other federal rights. "As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned." *Douglas* v. *New York, N. H. & H. R. Co.*, *supra*, at 387.

The utilization of state courts for the vindication of federal rights does not require that their established procedures be remodelled or that their customary modes for administering justice be restricted. "And it was of course presumably an appreciation of the principles so thoroughly settled which caused Congress in the enactment of the Employers' Liability Act to clearly contemplate the

existence of a concurrent power and duty of both Federal and state courts to administer the rights conferred by the statute in accordance with the modes of procedure prevailing in such courts." *Minneapolis & St. Louis R. Co.* v. *Bombolis,* 241 U. S. 211, 218; and see *Second Employers' Liability Cases,* 223 U. S. 1, 56. The mere fact that a federal right is the basis of suit cannot therefore deprive the state courts of the power to use their customary procedures for the achievement of justice. In simply taking advantage of the facilities afforded by the courts of the states, Congress cannot be deemed to have altered the settled jurisprudence of the states so as to operate more favorably for federal rights than for similar rights created by the states themselves. Such drastic inroads upon the authority of the states should be made only upon clear Congressional mandate.

The Court finds such a plain command in the Act because Congress has explicitly provided in § 6 that the jurisdiction of the state courts "shall be concurrent" with that of the federal courts. But Congress thereby merely spelt out what has always been unquestioned constitutional doctrine. "It is a general rule that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive. . . . Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution and laws of the United States whenever those rights are involved in any suit or proceedings before them." *United States* v. *Bank of New York Co.,* 296 U. S. 463, 479; see *Claflin* v. *Houseman,* 93 U. S. 130, 136–37, *Robb* v. *Connolly,* 111 U. S. 624, 635–37. And in *Grubb* v. *Public Utilities Comm'n,* 281 U. S. 470, 476, the Court reaffirmed the doctrine that "the state and federal courts have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United

States, save in exceptional instances where the jurisdiction has been restricted by Congress to the federal courts." The source of these formulations is Hamilton's classic statement in No. 82 of the Federalist (sesquicentennial ed., p. 536):

"I hold that the State courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation betwen parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. . . . When in addition to this we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited."

Therefore, if Congress had been silent with respect to the jurisdiction of state courts of suits arising under the Act, the state courts would still have had such jurisdiction. If it be suggested that by articulating what would otherwise have been implied, Congress must have had some purpose, some interest of emphasis, it would be enough to say that such punctiliousness, and perhaps redundancy, of phrasing is not uncommon in procedural legislation. But, in any event, the legislative history of the 1910 amendment conclusively shows that Congress did not insert this

provision in order to cut down the normal powers of state courts. The concurrent jurisdiction of the state courts was explicitly defined in order to dissipate an unwarranted doubt as to the right and duty of state courts to entertain suits arising under the Act. Congress wanted to avoid an implication of denial to the state courts of power to entertain cases under the Act, and not to create an implication of denial to the state courts of their traditional powers in dealing with such cases.

The Act of 1908 contained no provision specifically dealing with venue. 35 Stat. 65. On January 7, 1910, Representative Sterling introduced a bill, H. R. 17263, that eventually became the 1910 amendment to the Act. The bill had this provision: "This Act shall not be construed as excluding the exercise of a concurrent jurisdiction of cases arising under the Act by the courts of the several States." The House Committee on the Judiciary reporting on the bill explained its purpose:

"It is proposed to further amend the act by making the jurisdiction of the courts of the United States 'concurrent with the courts of the several States.'

"This is proposed in order that there shall be no excuse for courts of the States to follow in the error of . . . Hoxie v. N. Y., N. H. & H. R. R. Co. [82 Conn. 352] (73 Atlantic Rep., 754) in which the court declined jurisdiction upon the ground, inter alia, that Congress did not intend that jurisdiction of cases arising under the act should be assumed by state courts.

"It is clear under the decisions of the Supreme Court of the United States, that this conclusion of the Connecticut court is erroneous. And the reasons recited by the Connecticut court lead to an opposite conclusion from that which the opinion declares upon the subject. But no harm can come, and much injustice and wrong to suitors may be prevented by an express declaration that

there is no intent on the part of Congress to confine remedial actions brought under the employers' liability act to the courts of the United States." H. Rep. No. 513, 61st Cong., 2d Sess., p. 7.

The Committee also recommended that the wording of the provision be changed to read as follows: "The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States." This language was embodied in the Act.

When the bill came to the floor of the House, Representative Sterling, who was in charge of the measure, underscored the sole reason for the provision:

"The second change in the law provides that the federal courts and the state courts shall have concurrent jurisdiction. I am very sure that they have concurrent jurisdiction as the law is now, but on account of a decision of one of the state courts of Connecticut, where one judge declined to take jurisdiction in a case because it was under a federal statute, the committee thought best to expressly provide in the law that the federal courts and the state courts should have concurrent jurisdiction to avoid the possibility of such a construction in the future." 45 Cong. Rec. 2253.

In reply to a question as to the Committee's purpose in recommending this provision, "Did you intend to limit the state courts in any way in this matter?", the answer was, "Oh, no; just the contrary." 45 Cong. Rec. 2254.

With these authoritative explanations the bill was passed by the House on February 23, 1910. 45 Cong. Rec. 2260. It was then sent to the Senate and there referred to its Judiciary Committee. The report of that Committee repeated *in haec verba* the explanation of the provision made by the House Committee. See Sen. Rep. No. 432, 61st Cong., 2d Sess., p. 5. Senator Borah, who steered the bill in the Senate, said:

"The amendment which has been proposed in the latter portion of section 6 was necessitated, if that term can properly be used, by reason of a decision of the supreme court of the State of Connecticut. My individual view is that the law is now as the amendment attempts to make it—that is to say, that both the federal and state courts have jurisdiction of this matter—concurrent jurisdiction. . . . As I understand the law, unless there is a clause prohibiting or inhibiting the state court it always has concurrent jurisdiction with the federal courts in such a subject-matter as this. The report cites a number of authorities to this effect. But the supreme court of Connecticut refused to assume jurisdiction or to take jurisdiction of the matter, though the well-established legal principle seems to be absolutely different. I do not believe this amendment is necessary. I believe it is thoroughly established that the federal courts and the state courts have concurrent jurisdiction. But in order to avoid courts being misled upon this proposition this specific provision is thought to be necessary in the law." 45 Cong. Rec. 3995. See also his remarks at 45 Cong. Rec. 4034–35.

The Court appears to draw comfort from the provision of the Act prohibiting removal of a suit from a state court of competent jurisdiction to a federal court. The bill as passed by the House contained no such provision. It was offered as an amendment on the floor of the Senate by Senator Paynter who, in proposing the amendment, made a few remarks that are unenlightening for present purposes. The amendment was approved by the Senate without further discussion. 45 Cong. Rec. 4093. When the bill came back to the House, Representative Clayton, a member of the House Judiciary Committee, explained the purpose of this amendment:

"The real amendment [made by the Senate] and the one that I think is a distinct improvement of the bill,

certainly more so than the other two, is to add . . . these words: 'And no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.' And the gentleman, being, as I am, a states-rights Democrat, will certainly say that is a decided improvement upon the bill as it originally passed the House. Furthermore, I say that this amendment will tend to relieve the federal courts of some litigation which can be as well, if not better, determined in the courts of the States." 45 Cong. Rec. 4158.

Such a restriction against removal of litigation normally arising in the state courts is not unique in the history of legislation dealing with the business of the lower federal courts. Thirty years earlier, Congress had begun to limit the right of removal to the federal courts. See, e. g., Act of July 12, 1882, § 4, 22 Stat. 162, 163; Act of March 3, 1887, 24 Stat. 552, corrected by Act of August 13, 1888, 25 Stat. 433. The removal prohibition of the 1910 Act must be regarded as a phase of the movement to ease the pressure upon the lower federal courts by curtailing access to them rather than by multiplying unduly the number of federal judges. Nothing warrants the inference that thereby Congress intended a reversal of the historic relation of state courts to one another.

That no expression of Congress, nor the purposes revealed by it outside of the language it employed, calls for a break with the past in giving effect to the 1910 amendment was the conclusion reached by this Court upon the fullest consideration of the significance of the provision. "The amendment, as appears by its language," it was held in the *Second Employers' Liability Cases*, 223 U. S. 1, 56, "instead of granting jurisdiction to the state courts, presupposes that they already possessed it." Later, in the *Douglas* case, the Court noted that the amendment "does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far

as the authority of the United States is concerned." 279 U. S. at 387. And again in *McKnett's* case, 292 U. S. at 233, the Court emphasized that "Congress has not attempted to compel states to provide courts for the enforcement of the Federal Employers' Liability Act." In short, every time the question has arisen this Court has recognized that by the 1910 amendment Congress did not write a new chapter in judicial history, nor did it modify the historic function of state courts as agencies for the enforcement of federal rights employing the same instruments for achieving justice as they employ when enforcing rights having their source in state law.

The Court now holds that, where considerations of equity and justice are otherwise compelling, § 6 has deprived the state courts of the power to enjoin a plaintiff from pursuing a suit against a carrier in the courts of any state in which the carrier does business. But a series of decisions following *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, enforces a contrary proposition. In these cases, notably *Denver & R. G. W. R. Co.* v. *Terte*, 284 U. S. 284, and *Michigan Central R. Co.* v. *Mix*, 278 U. S. 492, suits against a carrier in a state where it did business were nevertheless found to constitute an unjustifiable burden on commerce and therefore could not be maintained. If Congress had conferred obligatory jurisdiction upon the state courts, it would have been entirely beyond the province of this Court to hold, as it did in these decisions, that a suit in a state court which was given "concurrent jurisdiction" by the 1910 amendment constituted a burden on commerce. To suggest that the grant of "concurrent jurisdiction" repealed the historic powers of equity sanctioned by *Cole* v. *Cunningham*, 133 U. S. 107, is to imply that in all these cases the Court disregarded what is now found to be the right of a plaintiff to resort to a state court, unhampered by the authority of the state courts to invoke their familiar equitable powers to restrain oppressive and

vexatious suits in other state courts. This is to say that in all these cases over a period of years this Court disregarded the jurisdictional requirements of the Federal Employers' Liability Act. Yet the Act was constantly before the Court, and, it may not be amiss to recall, no member of this Court, in modern times at least, was more familiar with and more mindful of jurisdictional requirements than Mr. Justice Brandeis, who spoke for a unanimous Court in both the *Davis* and *Mix* cases.

The Court does not now overrule these decisions. They stand as unchallenged authorities that, in giving the state courts concurrent jurisdiction of suits under the Act, Congress did not thereby preclude the application of principles of equity and justice to such suits. These decisions show clearly that § 6 did not give the state courts compulsive jurisdiction; it merely conferred authority to be administered in the context of existing law.

The power invoked by Tennessee in this case was a familiar head of equity jurisdiction long before the Constitution. Injunctions by the chancellor against suits in other courts go back to at least the late sixteenth century. See *Cliffe* v. *Turnor,* Cary 83 (1579); *Chock* v. *Chea,* Cary 83 (1579); *Tanfield* v. *Davenport,* Tot. 114 (1638); *Trinick* v. *Bordfield,* Tot. 117 (1638). When Lord Chancellor Clarendon in 1677 refused to enjoin a foreign attachment, *Love* v. *Baker,* Ch. Cas. 67, the reporter noted that "all the bar was of another opinion. It was said, the injunction did not lie for foreign jurisdictions, nor out of the king's dominions. But to that it was answered, the injunction was not to the court, but to the party." The opinion of the bar soon became the accepted law of England. In the leading case of *Lord Portarlington* v. *Soulby,* 3 Myl. & K. 104, Brougham, L. C., expressed the historic doctrine of equity jurisdiction. Referring to the attitude of the bar towards *Love* v. *Baker,* he commented: "A very sound answer, as it appears to me; for the same argument might

apply to a Court within this country, which no order of this Court ever affects to bind, our orders being only pointed at the parties to restrain them from proceeding. Accordingly, this case of *Love* v. *Baker* has not been recognized or followed in later times." 3 Myl. & K. at 107. See *Wharton* v. *May,* 5 Ves. Jr. 27; *Kennedy* v. *Earl of Cassillis,* 2 Swans. 313; *Harrison* v. *Gurney,* 2 Jac. & W. 563; *Bushby* v. *Munday,* 5 Madd. 184; *Beauchamp* v. *Marquis of Huntley,* Jac. 546; Eden on Injunctions (1822 ed.) pp. 3 *et seq.,* 101–02.

This doctrine of equitable power has been universally accepted by American courts. See, e. g., *Dehon* v. *Foster,* 4 Allen 545, 550; *Cole* v. *Young,* 24 Kan. 435, 438; *Bigelow* v. *Old Dominion Co.,* 74 N. J. Eq. 457, 473, 71 A. 153. And the power has been exercised by the state courts generally to enjoin oppressive suits brought under the Act in other state courts. 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. Ry. Co.,* 204 Ind. 595, 185 N. E. 446. Of course, since a federal right is involved, no state court can screen denial of or discrimination against a federal right, under the guise of enforcing its local law. *Davis* v. *Wechsler,* 263 U. S. 22; *Southern Ry. Co.* v. *Painter,* 314 U. S. 155, 159–60.

The power of equity to restrain the prosecution of unconscionable suits has been part of the very fabric of the state courts as we have known them in our whole history. And nothing in the Federal Employers' Liability Act, its language, its history, or its policy, warrants a denial of this power to the states.

The CHIEF JUSTICE, MR. JUSTICE ROBERTS and MR. JUSTICE BYRNES join in this dissent.

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CARPENTERS & JOINERS UNION OF AMERICA, LOCAL NO. 213, ET AL. *v.* RITTER'S CAFE ET AL.

CERTIORARI TO THE COURT OF CIVIL APPEALS, FIRST SUPREME JUDICIAL DISTRICT, OF TEXAS.

No. 527. Argued January 13, 1942.—Decided March 30, 1942.

1. The freedom of speech guaranteed by the due process clause of the Fourteenth Amendment is not infringed by a decree of a state court enjoining, as a violation of the state anti-trust law, the picketing of a restaurant by union carpenters and painters having no grievance against its owner other than that he had contracted for the construction of a building not connected with the restaurant business, and a mile-and-a-half away, with a contractor who employed non-union labor. P. 726.
2. This Court is not concerned with the wisdom of the policy underlying state laws, but with their constitutional validity. P. 728.

149 S. W. 2d 694, affirmed.

CERTIORARI, 314 U. S. 595, to review a decree affirming an order enjoining petitioners from certain picketing. The highest court of the State refused a writ of error.

Messrs. Sewall Myer and *Joseph A. Padway* argued the cause, and *Mr. Myer* was on the brief, for petitioners.

Mr. Bernard A. Golding, with whom *Mr. William A. Vinson* was on the brief, for respondents.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The facts of this case are simple. Ritter, the respondent, made an agreement with a contractor named Plaster for the construction of a building at 2810 Broadway, Houston, Texas. The contract gave Plaster the right to make his own arrangements regarding the employment of labor in the construction of the building. He employed non-union carpenters and painters. The respondent was also

the owner of Ritter's Cafe, a restaurant at 418 Broadway, a mile and a half away. So far as the record discloses, the new building was wholly unconnected with the business of Ritter's Cafe. All of the restaurant employees were members of the Hotel and Restaurant Employees International Alliance, Local 808. As to their restaurant work, there was no controversy between Ritter and his employees or their union. Nor did the carpenters' and painters' unions, the petitioners here, have any quarrel with Ritter over his operation of the restaurant. No construction work of any kind was performed at the restaurant, and no carpenters or painters were employed there.

But because Plaster employed non-union labor, members of the carpenters' and painters' unions began to picket Ritter's Cafe immediately after the construction got under way. Walking back and forth in front of the restaurant, a picket carried a placard which read: "This Place is Unfair to Carpenters and Joiners Union of America, Local No. 213, and Painters Local No. 130, Affiliated with American Federation of Labor." Later on, the wording was changed as follows: "The Owner of This Cafe Has Awarded a Contract to Erect a Building to W. A. Plaster Who is Unfair to the Carpenters Union 213 and Painter Union 130, Affiliated With the American Federation of Labor." According to the undisputed finding of the Texas courts, which is controlling here, Ritter's Cafe was picketed "for the avowed purpose of forcing and compelling plaintiff [Ritter] to require the said contractor, Plaster, to use and employ only members of the defendant unions on the building under construction in the 2800 block on Broadway." Contemporaneously with this picketing, the restaurant workers' union, Local No. 808, called Ritter's employees out on strike and withdrew the union card from his establishment. Union truck drivers refused to cross the picket line to deliver food and other supplies to the res-

taurant. The effect of all this was "to prevent members of all trades-unions from patronizing plaintiff's cafe and to erect a barrier around plaintiff's cafe, across which no member of defendant-unions or an affiliate will go." A curtailment of sixty per cent of Ritter's business resulted.

Holding the petitioners' activities to constitute a violation of the state anti-trust law, Texas Penal Code, Art. 1632 *et seq.*, the Texas Court of Civil Appeals enjoined them from picketing Ritter's Cafe. The decree forbade neither picketing elsewhere (including the building under construction by Plaster) nor communication of the facts of the dispute by any means other than the picketing of Ritter's restaurant. 149 S. W. 2d 694. We brought the case here to consider the claim that the decree of the Court of Civil Appeals (the Supreme Court of Texas having refused a writ of error) infringed the freedom of speech guaranteed by the Due Process Clause of the Fourteenth Amendment. 314 U. S. 595.

The economic contest between employer and employee has never concerned merely the immediate disputants. The clash of such conflicting interests inevitably implicates the well-being of the community. Society has therefore been compelled to throw its weight into the contest. The law has undertaken to balance the effort of the employer to carry on his business free from the interference of others against the effort of labor to further its economic self-interest. And every intervention of government in this struggle has in some respect abridged the freedom of action of one or the other or both.

The task of mediating between these competing interests has, until recently, been left largely to judicial lawmaking and not to legislation. "Courts were required, in the absence of legislation, to determine what the public welfare demanded;—whether it would not be best subserved by leaving the contestants free to resort to any means not

involving a breach of the peace or injury to tangible property; whether it was consistent with the public interest that the contestants should be permitted to invoke the aid of others not directly interested in the matter in controversy; and to what extent incidental injury to persons not parties to the controversy should be held justifiable." Mr. Justice Brandeis in *Truax* v. *Corrigan,* 257 U. S. 312, 363. The right of the state to determine whether the common interest is best served by imposing some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted. See Mr. Justice Holmes in *Aikens* v. *Wisconsin,* 195 U. S. 194, 205, and Mr. Justice Brandeis in *Truax* v. *Corrigan, supra,* at 372, *Dorchy* v. *Kansas,* 272 U. S. 306, 311, and *Senn* v. *Tile Layers Protective Union,* 301 U. S. 468, 481. But the petitioners now claim that there is to be found in the Due Process Clause of the Fourteenth Amendment a constitutional command that peaceful picketing must be wholly immune from regulation by the community in order to protect the general interest, that the states must be powerless to confine the use of this industrial weapon within reasonable bounds.

The constitutional right to communicate peaceably to the public the facts of a legitimate dispute is not lost merely because a labor dispute is involved, *Thornhill* v. *Alabama,* 310 U. S. 88, or because the communication takes the form of picketing, even when the communication does not concern a dispute between an employer and those directly employed by him. *American Federation of Labor* v. *Swing,* 312 U. S. 321. But the circumstance that a labor dispute is the occasion of exercising freedom of expression does not give that freedom any greater constitutional sanction or render it completely inviolable. Where, as here, claims on behalf of free speech are met with claims on be-

half of the authority of the state to impose reasonable regulations for the protection of the community as a whole, the duty of this Court is plain. Whenever state action is challenged as a denial of "liberty," the question always is whether the state has violated "the essential attributes of that liberty." Mr. Chief Justice Hughes in *Near* v. *Minnesota,* 283 U. S. 697, 708. While the right of free speech is embodied in the liberty safeguarded by the Due Process Clause, that Clause postulates the authority of the states to translate into law local policies "to promote the health, safety, morals and general welfare of its people. . . . The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise." *Ibid.,* at 707. "The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side." *Hudson Water Co.* v. *McCarter,* 209 U. S. 349, 355.

In the circumstances of the case before us, Texas has declared that its general welfare would not be served if, in a controversy between a contractor and building workers' unions, the unions were permitted to bring to bear the full weight of familiar weapons of industrial combat against a restaurant business, which, as a business, has no nexus with the building dispute but which happens to be owned by a person who contracts with the builder. The precise question is, therefore, whether the Fourteenth Amendment prohibits Texas from drawing this line in confining the area of unrestricted industrial warfare.

Texas has undertaken to localize industrial conflict by prohibiting the exertion of concerted pressure directed at the business, wholly outside the economic context of the real dispute, of a person whose relation to the dispute arises from his business dealings with one of the dispu-

tants. The state has not attempted to outlaw whatever psychological pressure may be involved in the mere communication by an individual of the facts relating to his differences with another. Nor are we confronted here with a limitation upon speech in circumstances where there exists an "interdependence of economic interest of all engaged in the same industry," *American Federation of Labor* v. *Swing*, 312 U. S. 321, 326. Compare *Journeymen Tailors Union Local No. 195* v. *Miller's, Inc.*, 312 U. S. 658, and *Bakery & Pastry Drivers & Helpers Local No. 802* v. *Wohl, post*, p. 769. The line drawn by Texas in this case is not the line drawn by New York in the *Wohl* case. The dispute there related to the conditions under which bakery products were sold and delivered to retailers. The business of the retailers was therefore directly involved in the dispute. In picketing the retail establishments, the union members would only be following the subject-matter of their dispute. Here we have a different situation. The dispute concerns the labor conditions surrounding the construction of a building by a contractor. Texas has deemed it desirable to insulate from the dispute an establishment which industrially has no connection with the dispute. Texas has not attempted to protect other business enterprises of the building contractor, Plaster, who is the petitioners' real adversary. We need not therefore consider problems that would arise if Texas had undertaken to draw such a line.

It is true that by peaceful picketing workingmen communicate their grievances. As a means of communicating the facts of a labor dispute, peaceful picketing may be a phase of the constitutional right of free utterance. But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. Restriction of picketing

to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication. To deny to the states the power to draw this line is to write into the Constitution the notion that every instance of peaceful picketing—anywhere and under any circumstances—is necessarily a phase of the controversy which provoked the picketing. Such a view of the Due Process Clause would compel the states to allow the disputants in a particular industrial episode to conscript neutrals having no relation to either the dispute or the industry in which it arose.

In forbidding such conscription of neutrals, in the circumstances of the case before us, Texas represents the prevailing, and probably the unanimous, policy of the states.[1] We hold that the Constitution does not forbid Texas to draw the line which has been drawn here. To hold otherwise would be to transmute vital constitutional liberties into doctrinaire dogma. We must be mindful that "the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants." *Thornhill* v. *Alabama,* 310 U. S. 88, 103-04.

It is not for us to assess the wisdom of the policy underlying the law of Texas. Our duty is at an end when we find that the Fourteenth Amendment does not deny her the power to enact that policy into law.

Affirmed.

[1] The authorities are collected in Teller, Labor Disputes and Collective Bargaining (1940), § 123; Hellerstein, Secondary Boycotts in Labor Disputes, 47 Yale L. J. 341; Frey, Cases on Labor Law (1941), pp. 239-73; cf. Galenson and Spector, The New York Labor-Injunction Statute and the Courts, 42 Col. L. Rev. 51, 68-71.

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

The petitioners sought to convey to the public certain information. The injunction here sustained imposed two restraints on their doing so: (1) it enjoined them from picketing the respondent's cafe; (2) it enjoined them from carrying banners in front of the respondent's cafe, banners which contained inscriptions telling the public that the respondent had awarded a building contract to a man who was unfair to organized labor.

One member of the petitioner unions at a time peacefully walked in front of the respondent's cafe, carrying such a banner. It is not contended that the inscriptions were untruthful, nor that the language used was immoderate. There was no violence threatened or apprehended. Passers-by were not molested. It is clear from the opinion of the Texas Court of Civil Appeals that the injunction against picketing was granted not because of any law directly aimed at picketing—Texas has no statute against picketing as such—nor to prevent violence, disorder, breach of the peace, or congestion of the streets. The immediate purpose of the injunction was to frustrate the union's objective of conveying information to that part of the public which came near the respondent's place of business, an objective which the court below decided was a violation of Texas antitrust laws. Conveying this truthful information in the manner chosen by the union was calculated to, and did, injure the respondent's business. His business was injured because many of those whom the information reached were sympathetic with the union side of the controversy and declined to patronize the respondent's cafe or have any other business transactions with him. Does injury of this kind to the respondent's business justify the Texas courts in thus restricting freedom of expression?

I am unable to agree that the controversy which prompted the unions to give publicity to the facts was no more than a private quarrel between the union and the non-union contractor. Whether members or non-members of the building trades unions are employed is known to depend to a large extent upon the attitude of building contractors. Their attitude can be greatly influenced by those with whom they do business. Disputes between one or two unions and one contractor over the merits and justice of union as opposed to non-union systems of employment are but a part of the nationwide controversy over the subject. I can see no reason why members of the public should be deprived of any opportunity to get information which might enable them to use their influence to tip the scales in favor of the side they think is right.

If there had been any doubt before, I should have thought that our decision in *Thornhill* v. *Alabama,* 310 U. S. 88, settled the question. There we said at pages 102–104: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem. . . . It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. . . . But the group in power at any moment may not impose penal sanctions on

peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests."

Whatever injury the respondent suffered here resulted from the peaceful and truthful statements made to the public that he had employed a non-union contractor to erect a building. This information, under the *Thornhill* case, the petitioners were privileged to impart and the public was entitled to receive. It is one thing for a state to regulate the use of its streets and highways so as to keep them open and available for movement of people and property, *Schneider* v. *State,* 308 U. S. 147, 160; or to pass general regulations as to their use in the interest of public safety, peace, comfort, or convenience, *Cantwell* v. *Connecticut,* 310 U. S. 296, 306–307; or to protect its citizens from violence and breaches of the peace by those who are upon them, *Thornhill* v. *Alabama, supra,* 105. It is quite another thing, however, to "abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature. . . ." *Schneider* v. *State, supra,* 160. The court below did not rest the restraints imposed on these petitioners upon the state's exercise of its permissible powers to regulate the use of its streets or the conduct of those rightfully upon them. Instead, it barred the petitioners from using the streets to convey information to the public, because of the particular type of information they wished to convey. In so doing, it directly restricted the petitioners' rights to express themselves publicly concerning an issue which we recognized in the *Thornhill* case to be of public importance. It imposed the restriction for the reason that the public's response to such information would result in injury to a particular person's business, a reason which we said in the *Thornhill* case was insufficient to justify curtailment of free expression.

The injunction is defended, however, on the ground that the petitioners have been prohibited from passing information to the public at only some, but not at all, places. It may be that the petitioners are left free to inform the public at other places or in other ways. Possibly they might, at greater expense, reach the public over the radio or through the newspapers, although, if the theory of the court below be correct, it would seem that they could be enjoined from using these means of communication, too, to persuade people not to patronize the respondent's cafe. In any event, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State, supra,* 163.

Accepting the Constitutional prohibition against any law "abridging the freedom of speech or of the press"—a prohibition made applicable to the states by the Fourteenth Amendment—"as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow," *Bridges* v. *California,* 314 U. S. 252, 263, I think the judgment should be reversed.

MR. JUSTICE REED, dissenting:

The Texas court enjoined petitioners, a labor union of carpenters and joiners, another union of painters, and all of their members from picketing the restaurant of the respondent, E. R. Ritter, plaintiff below, doing business under the trade name of Ritter's Cafe, at 418 Broadway, in Houston, "and from carrying banners peacefully and in any other manner upon the sidewalks in front" of the restaurant. There had been no violence. Only two pickets, one from each union, walked back and forth, carrying placards which before the injunction issued were modified to read, "The Owner of This Cafe Has Awarded a Contract to Erect a Building to W. A. Plaster Who is Unfair to the

Carpenters Union 213 and Painter Union 130, Affiliated with the American Federation of Labor."

Plaster, a building contractor, was putting up a structure for respondent, Ritter, in the 2800 block of Broadway, under a contract which did not require Plaster to employ union labor. The record does not show whether or not this new building is to be used in the restaurant business. He was employing non-union workers. The restaurant, however, was unionized, its employees being members of Hotel and Restaurant Employees' Local 808. They quit on the day the picketing began, union drivers refused to deliver supplies, and the business slumped sixty per cent. The court found petitioners' conduct an invasion of respondents' right to conduct a legitimate business and an attempt to interfere illegally with a contract with third parties.

The injunction was issued by the Texas court because such invasion or attempt at invasion of the rights of a business man was held "to create restrictions in the free pursuit" of business, contrary to the Texas anti-trust laws. Tex. Rev. Civ. Stat. (Vernon, 1936) Arts. 7426, 7428; Tex. Penal Code (Vernon, 1936) Arts. 1632, 1634, 1635. 149 S. W. 2d 694. The petitioners' challenge to the validity of the injunction is based on the constitutional right of free speech, guaranteed them by the Fourteenth Amendment to the Constitution of the United States. *Schneider* v. *State,* 308 U. S. 147, 160.

This challenge involves two particularly delicate relationships. These are that between the federal and state governments, and that between a state and labor unions within its borders. So far as the injunction depends upon the action of the Texas court in construing its anti-trust statutes to forbid such interference with the restaurant business, the order is unassailable here. But if such an interpretation denies to Texans claimed rights guaranteed to them by the federal Constitution, the state authority must

accommodate its orders to preserve that right. Cf. *International Harvester Co.* v. *Kentucky,* 234 U. S. 216; *Lindsey* v. *Washington,* 301 U. S. 397, 400; *Minnesota* v. *Probate Court,* 309 U. S. 270, 273.

Recent cases in this Court have sought to make more definite the extent and limitations of the rights of free speech in labor disputes. For some time, there has been general acceptance of the fundamental right to publicize "the facts of a labor dispute in a peaceful way through appropriate means." One of the recognized means is by orderly picketing with banners or placards. *Thornhill* v. *Alabama,* 310 U. S. 88, 104. In *Carlson* v. *California,* 310 U. S. 106, 113, we said: "For the reasons set forth in our opinion in *Thornhill* v. *Alabama, supra,* publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a State." The desire of both sides in labor controversies to gain advantages for themselves and limit similar opportunities for their opponents has led each to seek to expand or contract the constitutionally protected area for picketing operations as suits their respective purposes. Recognition of the basic right to picket made the location of lines beyond which picketing could not be employed an important objective of those who suffer from its use.

In the *Carlson* and *Thornhill* cases, legislation forbidding picketing for the purpose of interfering with the business of another was invalidated because it was an unconstitutional prohibition of the worker's right to publicize his situation. It was not thought of sufficient importance in either case to mention in the opinion whether the picket was an interested disputant with those picketed or an utter stranger to the controversy and the industry. In those

carefully phrased decisions the possibility of state control of socially menacing evils, flowing from industrial disputes, was recognized, but those general evils were not of the kind which were considered to warrant interference with free speech by peaceful picketing.[1] We said:

"It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants. See Mr. Justice Brandeis in 254 U. S. at 488. It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern. A contrary conclusion could be used to support abridgment of freedom of speech and of the press concerning almost every matter of importance to society." [2]

An instance of state control over peaceful picketing soon appeared. In *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287, this Court, though not without dissent, upheld Illinois' ruling that, where "acts of picketing in themselves peaceful" are enmeshed in violence, immediate future peaceful picketing may be enjoined. This decision compelled a less extreme result in *Hotel & Restaurant Employees' Alliance* v. *Wisconsin Employment Relations Board, ante,* p. 437. In the latter case, the order approved "forbids only violence" and "permits peaceful picketing." Nothing more than the validity of prohibitions against violence was decided as to the constitutionality of the Wisconsin Employment Peace Act.

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[1] Evidently the conception was that of "imminent and aggravated danger," *A. F. of L.* v. *Swing,* 312 U. S. 321, 325.

[2] 310 U. S. 88, 103–104.

On the same day that *Meadowmoor* was handed down, *A. F. of L.* v. *Swing,* 312 U. S. 321, was decided. In *Swing's* case a union of beauty shop workers picketed a beauty parlor. They were not and had not been employees of the establishment. We stated the issue thus:

"More thorough study of the record and full argument have reduced the issue to this: is the constitutional guarantee of freedom of discussion infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute?" [3]

There was nothing in the opinion to intimate that the answer would have varied, if the union had been a local of the teamsters or painters. The injunction granted by Illinois was set aside with these words:

"Such a ban of free communication is inconsistent with the guarantee of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184, 209. The right of free communication cannot therefore be mutilated by denying it to work-

[3] 312 U. S. 321, 323.

ers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in *Thornhill's* case. 'Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.' *Senn* v. *Tile Layers Union,* 301 U. S. 468, 478." [4]

Today this Court decides *Bakery & Pastry Drivers & Helpers Local 802* v. *Wohl, post,* p. 769. In this case the union picketed manufacturing bakers who sold to, and threatened to picket grocers and retail bakers who bought from, peddlers. The peddlers purchased bakery goods and sold them to the trade. The labor controversy was the effort of the unions to compel the peddlers to hire a union driver one day a week. The state forbade the picketing of the manufacturers and of the retailers, regardless of whether the picketing placards were directed at the product or the general business of the retailers.[5] Although there is no possible labor relation between the peddlers and their customers, or between the grocers and retail bakers, and the union, we decline to permit New York to take steps to protect the places of business of those who dealt with the peddlers against picketing. It seems obvious that the selling of baked products, distributed by

[4] 312 U. S. 321, 325-326.

[5] "It is hereby ordered, . . . that the defendants, . . . are perpetually restrained and enjoined:

(a) From picketing the places of business of manufacturing bakers who sell to the plaintiffs . . . because of the fact that said manufacturing bakers sell to these plaintiffs; and

(b) From picketing the places of business of customers of these plaintiffs because such customers purchase baked products from these plaintiffs; . . ."

the peddlers, is a minor part of the grocery business. Recent cases illustrate the present tendency of state courts to permit workers outside the industry picketed to publicize their labor disputes with others.[6] To permit the *Wohl* injunction, without evidence of special embarrassment to peace and order, would, we hold, go beyond permissible limitations on free speech.

We are of the view that the right of free speech upheld in these decisions requires Texas to permit the publicizing of the dissatisfaction over Mr. Ritter's contract for his new building. Until today, orderly, regulated picketing has been within the protection of the Fourteenth Amendment. Such picketing was obviously disadvantageous to the business affected. In balancing social advantages it has been felt that the preservation of free speech in labor disputes was more important than the freedom of enterprise from the burdens of the picket line. It was a limitation on state power to deal as it pleased with labor disputes; a limitation consented to by the state when it became a part of the nation, and one of precisely the same quality as those enforced in *Carlson, Thornhill* and *Swing*.

We are not here forced, as the Court assumes, to support a constitutional interpretation that peaceful picketing "must be wholly immune from regulation by the community in order to protect the general interest." We do not doubt the right of the state to impose not only some but many restrictions upon peaceful picketing. Reasonable numbers, quietness, truthful placards, open ingress and egress, suitable hours or other proper limitations, not

[6] *People* v. *Harris*, 104 Colo. 386, 91 P. 2d 989 (May, 1939); *Byck Bros. & Co.* v. *Martin*, 4 C. C. H. Labor Cases ¶ 60,430 (Ky. Cir. Ct., March, 1941); *Ellingsen* v. *Milk Wagon Drivers' Union*, 377 Ill. 76, 35 N. E. 2d 349 (June, 1941); *People* v. *Muller*, 286 N. Y. 281, 36 N. E. 2d 206 (July, 1941); *Maywood Farms Co.* v. *Milk Wagon Drivers' Union*, 313 Ill. App. 24, 38 N. E. 2d 972 (January, 1942); *Mason & Dixon Lines* v. *Odom*, 18 S. E. 2d 841 (Ga., February, 1942).

destructive of the right to tell of labor difficulties, may be required. The Court limits its holding to the peculiar circumstances of this case. All decisions necessarily are so limited, but from the decisions rules are drawn. By this decision a state rule is upheld which forbids peaceful picketing of businesses by strangers to the business and the industry of which it is a part. The legal kernel of the Court's present decision is that the "sphere" of free speech is confined to the "area of the industry within which a labor dispute arises." This rule is applied, in this case, even though the picketers are publicizing a labor dispute arising from a contract to which the sole owner of the business picketed is a party. Even if the construction contract covered an attached addition to the restaurant, the Court's opinion would not permit picketing directed against the restaurant. To construe this Texas decision as within state powers and the *Wohl* decision as outside their boundaries, plainly discloses the inadequacy of the test presumably employed, that is, the supposed lack of economic "interdependence" between the picketers and the picketed.

The philosophy behind the conclusion of the Court in this case gives to a state the right to bar from picket lines workers who are not a part of the industry picketed. We are not told whether the test of eligibility to picket is to be applied by crafts or enterprises, or how we are to determine economic interdependence or the boundaries of particular industries. Such differentiations are yet to be considered. The decision withdraws federal constitutional protection from the freedom of workers outside an industry to state their side of a labor controversy by picketing. So long as civil government is able to function normally for the protection of its citizens, such a limitation upon free speech is unwarranted.

ALLEN-BRADLEY LOCAL NO. 1111, UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, ET AL. *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD ET AL.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 252. Argued March 2, 1942.—Decided March 30, 1942.

1. Pursuant to the Wisconsin Employment Peace Act, the Wisconsin Employment Relations Board, upon findings of fact and conclusions of law in a dispute between an employer and a labor union, ordered the union, its officers, agents and members to cease and desist from mass picketing of the employer's factory, threatening personal injury or property damage to employees desiring to work, obstructing entrance to and egress from the employer's factory, obstructing the streets and public roads about the factory, and picketing the homes of employees. *Held,* that the order was not unconstitutional as conflicting with the National Labor Relations Act. Pp. 745–748.
2. As construed by the state supreme court, which construction is conclusive here, the Wisconsin Act affects the rights of parties to proceedings pending before the state board only in the manner and to the extent prescribed by the board's order. P. 747.
3. An intention of Congress to exclude States from exerting their police power must be clearly manifested. P. 749.
4. *Hines* v *Davidowitz,* 312 U. S. 52, distinguished. P. 749.

237 Wis. 164, 295 N. W. 791, affirmed.

APPEAL from the affirmance of a judgment sustaining an order of the Wisconsin Employment Relations Board.

Messrs. Max E. Geline and *Eugene Cotton* for appellants. *Messrs. Lee Pressman, Joseph Kovner,* and *Anthony Wayne Smith* were with *Mr. Geline* on the brief.

Messrs. N. S. Boardman, Assistant Attorney General of Wisconsin, and *Leo Mann* for appellees. *Messrs. John E. Martin,* Attorney General, *James Ward Rector,* Deputy

Attorney General, and *Harold H. Persons,* Assistant Attorney General, were on the brief with *Mr. Boardman* for the Wisconsin Employment Relations Board. *Mr. Louis Quarles* was on the brief with *Mr. Mann* for the Allen-Bradley Company.

Briefs of *amici curiae* were filed by *Solicitor General Fahy* on behalf of the United States, setting forth the position of the Government on the question whether the National Labor Relations Act supersedes the Wisconsin Employment Peace Act; and by *Messrs. Joseph A. Padway* and *I. E. Goldberg* on behalf of the Wisconsin State Federation of Labor, urging reversal.

Mr. Justice Douglas delivered the opinion of the Court.

The sole question presented by this case is whether an order of the Wisconsin Employment Relations Board, entered under the Wisconsin Employment Peace Act (L. 1939, ch. 57; Wis. Stat. (1939) ch. 111, pp. 1610–18), is unconstitutional and void as being repugnant to the provisions of the National Labor Relations Act. 49 Stat. 449; 29 U. S. C. § 151 *et seq.*

Sec. 111.06 (2) of the state Act provides in part:

"It shall be an unfair labor practice for an employe individually or in concert with others:

"(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04,[1] or to intimidate his family, picket his

[1] Sec. 111.04 provides: "Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities."

domicile, or injure the person or property of such employe or his family.

. . . . .

"(f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance."

The state Board is given authority on the filing of a complaint to conduct hearings, to make findings of fact, and to issue orders.[2] § 111.07. Orders of the state Board are enforceable by the circuit courts. *Id.* Appellee, Allen-Bradley Co., is engaged in the manufacturing business in Wisconsin. Appellant union is a labor organization composed of the employees of that company. The union had a contract with the company governing terms and conditions of employment. The contract was cancelled by the union. Thereafter the union, by secret ballot, ordered a strike, which was called on May 11, 1939. The strike lasted about three months, during which time the company continued to operate its plant. Differences arose between the employees who were on strike and the company and those employees who continued to work. The company thereupon filed a petition with the state Board, charging the union and certain of its officers and members

[2] Sec. 111.07 (4) provides in part: "Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend his rights, immunities, privileges or remedies granted or afforded by this chapter for not more than one year, and require him to take such affirmative action, including reinstatement of employes with or without pay, as the board may deem proper. Any order may further require such person to make reports from time to time showing the extent to which it has complied with the order."

with unfair labor practices. The union answered and objected, *inter alia,* to the jurisdiction of the state Board, on the ground that as respects the matters in controversy the company was subject exclusively to the provisions of the National Labor Relations Act and to the exclusive jurisdiction of the federal Board. The state Board made findings of fact and entered an order against the union and its officers and members. On a petition for review, the circuit court sustained and enforced the Board's order. The Supreme Court of Wisconsin affirmed that judgment. 237 Wis. 164, 295 N. W. 791. The case is here on appeal. Judicial Code, § 237 (a); 28 U. S. C. § 344 (a).

The findings and order of the state Board as summarized by the Supreme Court (237 Wis. pp. 168–170) are as follows:

"Briefly, from the findings the following facts appear:

"(a) Appellants engaged in mass picketing at all entrances to the premises of the company for the purpose of hindering and preventing the pursuit of lawful work and employment by employees who desired to work.

"(b) They obstructed and interfered with the entrance to and egress from the factory and obstructed and interfered with the free and uninterrupted use of the streets and sidewalks surrounding the factory.

"(c) They threatened bodily injury and property damage to many of the employees who desired to continue their employment.

"(d) They required of persons desiring to enter the factory, to first obtain passes from the union. Persons holding such passes were admitted without interference.

"(e) They picketed the homes of employees who continued in the employment of the company.

"(f) That the union by its officers and many of its members injured the persons and property of employees who desired to continue their employment.

"(g) That the fourteen individual appellants who were striking employees, had engaged in various acts of mis-

conduct. The facts relating to those were found specifically. The acts consisted of intimidating and preventing employees from pursuing their work by threats, coercion, and assault; by damaging property of employees who continued to work; and as to one of them by carrying concrete rocks which he intended to use to intimidate employees who desired to work.

"Based upon these findings the board found as conclusions of law, that the union was guilty of unfair labor practices in the following respects:

"(a) Mass picketing for the purpose of hindering and preventing the pursuit of lawful work.

"(b) Threatening employees desiring to work with bodily injury and injury to their property.

"(c) Obstructing and interfering with entrance to and egress from the factory.

"(d) Obstructing and interfering with the free and uninterrupted use of the streets and public roads surrounding the factory.

"(e) Picketing the homes of employees.

"As to the fourteen individual appellants, the board concluded that each of them was guilty of unfair labor practices by reason of threats, assaults, and other misdemeanors committed by them as set out in the findings of fact.

"Based upon its findings of fact and conclusions of law the board ordered that the union, its officers, agents, and members—

"(1) Cease and desist from:

(a) Mass picketing.

(b) Threatening employees.

(c) Obstructing or interfering with the factory entrances.

(d) Obstructing or interfering with the free use of public streets, roads, and sidewalks.

(e) Picketing the domiciles of employees.

"The order required the union to post notices at its headquarters that it had ceased and desisted in the manner aforesaid and to notify the board in writing of steps taken to comply with the order.

"As to the fourteen individual appellants, the order made no determination based upon the finding that they were individually guilty of unfair labor practices."

It was admitted that the company was subject to the National Labor Relations Act. The federal Board, however, had not undertaken in this case to exercise the jurisdiction which that Act conferred on it. Accordingly, the Supreme Court of Wisconsin upheld the order of the state Board, stating that "there can be no conflict between the acts until they are applied to the same labor dispute." It was urged before that court, as it has been here, that there was nevertheless a conflict between that part of the findings of the state Board which deals with the individual appellants and the National Labor Relations Act. The contention is that the individual appellants who were found guilty of unfair labor practices, as defined in the state Act, are, under the terms of the federal Act, still employees of the company,[3] while under the state Act that relationship is severed.[4] As to that alleged conflict, the Wisconsin Supreme Court made two answers: First, the federal Act had not been applied to this labor dispute. Second, it is the order, not the findings, of the state Board which affects the employer and employee relationship. Since there was no provision in the order which suspended the status as employees of the fourteen individual appel-

[3] See *Republic Steel Corp.* v. *Labor Board,* 107 F. 2d 472, 479 (aff'd 311 U. S. 7); *Labor Board* v. *Stackpole Carbon Co.,* 105 F. 2d 167, 176; Hart & Prichard, The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board, 52 Harv. L. Rev. 1275.

[4] Sec. 111.02 (3) defines the term "employe" as including "any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practice on the part of an employer and . . . (b) who has not been found to have committed or to have been a party to any unfair labor practice hereunder, . . ."

lants who were found guilty of unfair labor practices, there was no conflict as to their employee status under the state and federal Acts.

Various views have been advanced here. On the one hand, it is urged that, in this situation, as in the case of federal control over intrastate transportation rates (*Shreveport Case*, 234 U. S. 342, 357; *Board of Railroad Comm'rs* v. *Great Northern Ry. Co.*, 281 U. S. 412, 424, 426–428), state action should not be foreclosed in absence of a finding by the federal Board under § 10 (a) that an employer's labor practice so affects interstate commerce (*Labor Board v. Fainblatt*, 306 U. S. 601) that it should be prevented. On the other hand, it is earnestly contended that the state Act, viewed as a whole, so undermines rights protected and granted by the federal Act and is so hostile to the policy of the federal Act that it should not be allowed to survive. Acceptance of the latter theory would necessitate a reversal of the judgment below. Acceptance of the former would mean that in all cases orders of the state Board would be upheld if the federal Board had not assumed jurisdiction.

We deal, however, not with the theoretical disputes but with concrete and specific issues raised by actual cases. *Associated Press* v. *Labor Board*, 301 U. S. 103, 132; *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 423, and cases cited. "Constitutional questions are not to be dealt with abstractly." *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8, 22; *Arizona* v. *California*, 283 U. S. 423, 464. They will not be anticipated but will be dealt with only as they are appropriately raised upon a record before us. *Tennessee Publishing Co.* v. *American National Bank*, 299 U. S. 18, 22. Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the federal Constitution or an act of Congress. *Mountain Timber Co.* v. *Washing-*

ton, 243 U. S. 219, 246; *Great Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412, 429–430; *Watson* v. *Buck,* 313 U. S. 387. Hence we confine our discussion to the precise facts of this case and intimate no opinion as to the validity of other types of orders in cases where the federal Board has not assumed jurisdiction.

We are not under the necessity of treating the state Act as an inseparable whole. Cf. *Watson* v. *Buck, supra.* Rather, we must read the state Act, for purposes of the present case, as though it contained only those provisions which authorize the state Board to enter orders of the specific type here involved. That Act contains a broad severability clause.[5] The Wisconsin Supreme Court seems to have been liberal in interpreting such clauses so as to separate valid from void provisions of statutes.[6] Aside from that, Wisconsin in this case has in fact applied only a few of the many provisions of its Act to appellants. And we have the word of the Wisconsin Supreme Court that "the act affects the rights of parties to a controversy pending before the board only in the manner and to the extent prescribed by the order." 237 Wis. p. 183. That construction is conclusive here. *Senn* v. *Tile Layers Union,* 301 U. S. 468, 477; *Minnesota* v. *Probate Court,* 309 U. S. 270, 273, and cases cited. Hence we need not speculate as to whether the portions of the statute on which the order rests are so intertwined

[5] Sec. 111.18 provides: "If any provision of this chapter or the application of such provision to any person or circumstances shall be held invalid the remainder of this chapter or the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby."

[6] See *State* v. *Tuttle,* 53 Wis. 45, 9 N. W. 791; *State* v. *Ballard,* 158 Wis. 251, 148 N. W. 1090; *State* v. *Board of State Canvassers,* 159 Wis. 216, 150 N. W. 542; *State* v. *Lange Canning Co.,* 164 Wis. 228, 157 N. W. 777, 160 N. W. 57; *State* v. *Marriott,* 237 Wis. 607, 296 N. W. 622.

with the others that the various provisions of the state Act must be considered as inseparable. Since Wisconsin has enforced an order based only on one part of the Act, we must consider that portion exactly as Wisconsin has treated it—"complete in itself and capable of standing alone." *Watson* v. *Buck, supra,* p. 397. Viewed in that light, no conflict with the National Labor Relations Act exists.

The only employee or union conduct and activity forbidden by the state Board in this case was mass picketing, threatening employees desiring to work with physical injury or property damage, obstructing entrance to and egress from the company's factory, obstructing the streets and public roads surrounding the factory, and picketing the homes of employees. So far as the fourteen individuals are concerned, their status as employees of the company was not affected.

We agree with the statement of the United States as *amicus curiae* that the federal Act was not designed to preclude a State from enacting legislation limited to the prohibition or regulation of this type of employee or union activity. The Committee Reports[7] on the federal Act plainly indicate that it is not "a mere police court meas-

[7] S. Rep. No. 573, 74th Cong., 1st Sess., p. 16: "Nor can the committee sanction the suggestion that the bill should prohibit fraud or violence by employees or labor unions. The bill is not a mere police court measure. The remedies against such acts in the State and Federal courts and by the invocation of local police authorities are now adequate, as arrests and labor injunctions in industrial disputes throughout the country will attest. The Norris-LaGuardia Act does not deny to employers relief in the Federal courts against fraud, violence or threats of violence. See 29 U. S. C. § 104 (e) and (i)." And see H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 16-17; Report of the National Labor Relations Board, Hearings before the Senate Committee on Education and Labor, 76th Cong., 1st Sess., on S. 1000, S. 1264, S. 1392, S. 1550, S. 1580, and S. 2123, Part 3, p. 521.

ure" and that authority of the several States may be exerted to control such conduct. Furthermore, this Court has long insisted that an "intention of Congress to exclude States from exerting their police power must be clearly manifested." *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 611, and cases cited; *Kelly* v. *Washington*, 302 U. S. 1, 10; *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177; *H. P. Welch Co.* v. *New Hampshire*, 306 U. S. 79, 85; *Maurer* v. *Hamilton*, 309 U. S. 598, 614; *Watson* v. *Buck, supra.* Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board. Nor are we faced here with the precise problem with which we were confronted in *Hines* v. *Davidowitz*, 312 U. S. 52. In the *Hines* case, a federal system of alien registration was held to supersede a state system of registration. But there we were dealing with a problem which had an impact on the general field of foreign relations. The delicacy of the issues which were posed alone raised grave questions as to the propriety of allowing a state system of regulation to function alongside of a federal system. In that field, any "concurrent state power that may exist is restricted to the narrowest of limits." p. 68. Therefore, we were more ready to conclude that a federal Act in a field that touched international relations superseded state regulation than we were in those cases where a State was exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways. *Maurer* v. *Hamilton, supra,* and cases cited. Here, we are dealing with the latter type of problem. We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard.

Furthermore, in the *Hines* case the federal system of alien registration was a "single integrated and all-

embracing" one, p. 74. Here, as we have seen, Congress designedly left open an area for state control. Nor can we say that the control which Congress has asserted over the subject matter of labor disputes is so pervasive (Cf. *Cloverleaf Butter Co.* v. *Patterson, ante,* p. 148) as to prevent Wisconsin, under the familiar rule of *Pennsylvania R. Co.* v. *Public Service Comm'n,* 250 U. S. 566, 569, from supplementing federal regulation in the manner of this order. Sec. 7 of the federal Act guarantees labor its "fundamental right" (*Labor Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 33) to self-organization and collective bargaining. Sec. 8 affords employees protection against unfair labor practices of employers including employer interference with the rights secured by § 7. Sec. 9 affords machinery for providing appropriate collective bargaining units. And § 10 grants the federal Board "exclusive" power of enforcement. It is not sufficient, however, to show that the state Act *might* be so construed and applied as to dilute, impair, or defeat those rights. *Watson* v. *Buck, supra.* Nor is the unconstitutionality of the provisions of the state Act which underlie the present order established by a showing that other parts of the statute are incompatible with and hostile to the policy expressed in the federal Act. Since Wisconsin has applied to appellants only parts of the state Act, the conflict with the policy or mandate of the federal Act must be found in those parts. But, as we have said, the federal Act does not govern employee or union activity of the type here enjoined. And we fail to see how the inability to utilize mass picketing, threats, violence, and the other devices which were here employed impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the federal Act. Nor is the freedom to engage in such conduct shown to be so essential or intimately related to a realization of the guarantees of the federal Act that its denial is an impairment of the federal

policy. If the order of the state Board affected the status of the employees, or if it caused a forfeiture of collective bargaining rights, a distinctly different question would arise. But since no such right is affected, we conclude that this case is not basically different from the common situation where a State takes steps to prevent breaches of the peace in connection with labor disputes. Since the state system of regulation, as construed and applied here, can be reconciled with the federal Act and since the two as focused in this case can consistently stand together, the order of the state Board must be sustained under the rule which has long obtained in this Court. See *Sinnot* v. *Davenport,* 22 How. 227, 243.

In sum, we cannot say that the mere enactment of the National Labor Relations Act, without more, excluded state regulation of the type which Wisconsin has exercised in this case. It has not been shown that any employee was deprived of rights protected or granted by the federal Act or that the status of any of them under the federal Act was impaired. Indeed, if the portions of the state Act here invoked are invalid because they conflict with the federal Act, then so long as the federal Act is on the books it is difficult to see how any State could under any circumstances regulate picketing or disorder growing out of labor disputes of companies whose business affects interstate commerce.

We rest our decision on the narrow grounds indicated. We have here no question as to constitutional limitations on state control of picketing under the rule of *Thornhill's* case, 310 U. S. 88. Nor are any other constitutional questions concerning the Wisconsin Act properly presented. And in view of our disposition of the case we find it unnecessary to pass on other questions raised by the appellees.

Affirmed.

JACOB *v.* NEW YORK CITY.

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

No. 589. Argued March 6, 1942.—Decided March 30, 1942.

1. Contributory negligence and assumption of risk are not available as defenses to suits under the Jones Act; the admiralty doctrine of comparative negligence applies. P. 755.
2. Upon the evidence, the plaintiff in this action under the Jones Act for personal injuries suffered in a fall caused by his use of a defective wrench, which he had asked his superior to replace, was entitled to have the case submitted to the jury on the issue whether his injuries resulted from defect or insufficiency, due to the employer's negligence, in its appliances; and the dismissal of his complaint was a denial of his statutory right of jury trial. P. 756.
3. Under the Jones Act, it is a duty of the employer to furnish reasonably safe and suitable simple tools when he is aware that those in use are defective; the employee need not furnish his own simple tools when he finds those of the employer defective. P. 758.
4. The trial court's exclusion of opinion evidence as to the best type of tool for the work, was not error warranting reversal. P. 758.

119 F. 2d 800, reversed.

CERTIORARI, 314 U. S. 595, to review the affirmance of a judgment dismissing the complaint in an action for personal injuries under the Jones Act.

Mr. Dominick Blasi, with whom *Mr. Silas B. Axtell* was on the brief, for petitioner.

Mr. Alfred T. White, with whom *Messrs. William C. Chanler* and *Paxton Blair* were on the brief, for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen,

whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts. The present case is a suit by petitioner under the Jones Act [1] for personal injuries sustained when he fell because the wrench he was using to tighten a nut slipped under the torque applied to it. We are called upon to determine whether on the evidence adduced by petitioner, and in contravention of accepted juridical standards, petitioner was wrongfully deprived of his statutory right to jury trial by the action of the trial court in dismissing his complaint,[2] thereby refusing to submit the case to a jury which had been duly empanelled to try it. In holding that petitioner had failed to prove facts sufficient to warrant submitting the issue of respondent's negligence to the jury, the trial court relied on the so-called simple tool doctrine. The Circuit Court of Appeals affirmed. 119 F. 2d 800. The novel questions thus presented in the administration of the Jones Act prompted us to grant certiorari. 314 U. S. 595.

Petitioner's testimony [3] is the complete answer to the question whether the case should have been taken from

[1] 41 Stat. 988, 1007, 46 U. S. C. § 688.

[2] The complaint set forth two causes of action—the first for personal injuries, and the second for maintenance and cure. Respondent moved to dismiss only the first cause of action. At the same time, in settlement of the second cause of action, respondent offered to consent to judgment for loss of wages from the time of the accident until petitioner returned to work. This offer was refused by petitioner's counsel and the second cause was thereupon dismissed. The Circuit Court of Appeals, *sua sponte*, directed that judgment be entered on the second cause of action for petitioner, in the amount admitted to be due from respondent. That judgment is not in issue here. Only the first cause of action, that for personal injuries, survives for our consideration.

[3] Petitioner was the sole witness in his own behalf. The trial court did not allow an opinion witness, called for the purpose of establishing the best type of wrench for the work petitioner was doing at the time of the accident, to testify.

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the jury. The gist of that testimony is as follows: For three weeks prior to the accident, petitioner, an employee with twenty years' experience, had been serving as water-tender in charge of the fire-room on the "Dongan Hills," a ferryboat operated by respondent between Staten and Manhattan Islands in New York harbor. One of his duties was to change oil strainers. This was done about three times a week, and required the removal and replacement of a manifold head, housing the strainers, which was held in place by six studs and nuts. When the manifold was replaced, the nuts had to be very tight. The best tool to remove and to tighten the nuts was a straight end wrench fitting a 1¼" nut. Petitioner used an S-shaped end wrench of the proper size which was "well worn," "had seen a lot of service," was "a loose fit," and "had a lot of play on it." There was about one-sixteenth of an inch "play in the jaws; it was worn." The wrench was about eighteen inches long and the "play" at the end was "about an inch." Petitioner asked the chief engineer for a new wrench three times, the first request being when petitioner first had occasion to use the worn wrench to change an oil strainer, and the last, two or three days before the accident. In answer to this last request, the chief engineer "said for me [petitioner] to look in the tool closet and see if there was one in there; and I went up there and couldn't find any and I believe he said he sent an order out for one." The regular way of requisitioning needed tools was by a report to the chief engineer. All petitioner was supposed to do was order; he did not know what respondent kept in its storeroom. The "Dongan Hills" docked at Manhattan Island on the average of six or seven times each day. On the day of the accident, petitioner did not renew his request, but he did look in the chief engineer's tool set. He found no end wrench of the proper size, did not know if a Stillson wrench was there, but believed

that a monkey wrench was. A monkey wrench could "probably" be used on any nut. At the time of the accident, petitioner was using the worn, S-shaped, end wrench to tighten the nuts after changing the oil strainer. There was about five-eighths of an inch of thread on the studs, and petitioner had changed the wrench on one nut four times. As he started the fifth tightening, the wrench slipped, causing him to fall from the eighteen inch square platform on which he was standing to the catwalk eighteen inches below. In the course of the fall, petitioner sustained an injury to his right side, which struck an angle iron alongside the catwalk.

The Jones Act, in addition to giving injured seamen the right to trial by jury in actions arising under the Act, also incorporates "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees." Among such statutes is 45 U. S. C. § 51, which provides in part that a carrier is liable for "injury or death . . . by reason of any defect or insufficiency, due to its [the carrier's] negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Although proof of negligence is an essential to recovery under the Jones Act, *Kunschman* v. *United States,* 54 F. 2d 987; cf. *Beadle* v. *Spencer,* 298 U. S. 124, 128, contributory negligence and assumption of risk are not available defenses. The admiralty doctrine of comparative negligence applies. *Socony-Vacuum Co.* v. *Smith,* 305 U. S. 424. The salient points of petitioner's testimony, summarized above, made a sufficient showing to allow the jury to consider the issue of respondent's negligence. The wrench petitioner was using had become defective for the purpose for which it was designed. After discovering that defect, petitioner made three requests to the proper person, the chief engineer, for a new wrench. The

first of those requests was about three weeks prior to the accident, the last but two or three days before it occurred. At that time, the chief engineer said he sent out an order for one, but it was not forthcoming in the two or three days intervening before the accident, despite the fact that the "Dongan Hills" docked at Manhattan Island six or seven times a day. While the best tool for doing the work was a straight end wrench of the proper size, petitioner had access to a monkey wrench which "probably" could be used on any nut. We think these facts entitled petitioner to have the jury consider whether his injury was caused by any "defect or insufficiency, due to its [respondent's] negligence, in its appliances." That is to say, it was for the jury to decide whether a monkey wrench was a reasonably safe and suitable tool for petitioner's work, whether respondent's failure, although it had at least two days' and possibly three weeks' notice of the defect, to supply petitioner with a new wrench amounted to negligence on its part, and whether respondent, after it had knowledge of the defect, might not have reasonably foreseen the possibility of resulting harm if it allowed the worn wrench to remain in use. Cf. *Socony-Vacuum Co.* v. *Smith, supra.* Without doubt the case is close and a jury might find either way. But that is no reason for a court to usurp the function of the jury. We are satisfied that a due respect for the statutory guaranty of the right of jury trial, with its resulting benefits, requires the submission of this case to the jury.

The simple tool doctrine, used by the courts below to bolster their belief that the evidence was insufficient, does not affect our conclusion. In the first place, the contrariety of opinion as to the reasons for and the scope of the simple tool doctrine, and the uncertainty of its application,[4] suggest that it should not apply to cases arising under

[4] See 3 Labatt, Master and Servant (2d ed.), pp. 2476–2484.

legislation, such as the Jones Act, designed to enlarge in some measure the rights and remedies of injured employees.[5] But even assuming its applicability, the doctrine does not justify withdrawing this case from the jury. For the only possible basis for the doctrine which is compatible with the provisions and policy of the Jones Act is that the master is not negligent in the case of defective simple tools because the possibility of injury from such tools is so slight as to impose no duty on him to see that they are free from defects in the first instance or to inspect them thereafter,[6] *Newbern* v. *Great Atlantic & Pacific Tea Co.*, 68 F. 2d 523; cf. *Hedicke* v. *Highland Springs Co.*, 185 Minn. 79, 239 N. W. 896—or to put it another way, the master is relieved of the duty to inspect simple tools for defects because the servant's opportunity for ascertaining such defects is equal to or greater than the master's. *O'Hara* v. *Brown Hoisting Mach. Co.*, 171 F. 394; *Miller* v. *Erie R. Co.*, 21 App. Div. (N. Y.) 45, 47 N. Y. S. 285; 2 Agency A. L. I. § 503 (d). Petitioner inspected the wrench, found it defective and then asked three times for a new one. This satisfied the burden of inspection placed on his shoulders by the doctrine, and it was then for the jury to say whether respondent's failure to comply with those repeated requests was negligence on

[5] Compare *McCarthy* v. *Palmer*, 113 F. 2d 721, with *Spain* v. *Powell*, 90 F. 2d 580.

[6] If the doctrine is but a phase of assumption of risk or contributory negligence, as has been suggested (see Labatt, *op. cit.*, pp. 2479, 2480, 2484), it is manifestly not applicable to actions under the Jones Act, for those common-law affirmative defenses are not available in such actions. *Socony-Vacuum Co.* v. *Smith*, 305 U. S. 424.

And, if the scope of the doctrine is that a master is under no duty to furnish reasonably safe and suitable simple tools (see *Allen Gravel Co.* v. *Yarbrough*, 133 Miss. 652, 98 So. 117; *Middleton* v. *National Box Co.*, 38 F. 2d 89), the doctrine is hardly compatible with the scheme of the Jones Act fixing liability on a master for injuries caused by defects and insufficiencies in his appliances due to his negligence.

its part. To deny petitioner the right to have the jury pass on that issue because of the simple tool doctrine is to say that doctrine relieves the master of any duty to furnish reasonably safe and suitable simple tools in spite of the fact that he knows they are defective, and requires the servant not only to inspect simple tools for defects, but also to supply his own simple tools when he finds those of the master defective. This is so obvious a perversion of the Jones Act as to require no comment.[7]

Since there must be a new trial, we deem it appropriate to state that, in our opinion, no reversible error was committed when the trial court refused to allow opinion testimony as to the best type of tool for the work.[8] Respondent's duty was not to supply the best tools, but only tools which were reasonably safe and suitable. Cf. *The Tawmie*, 80 F. 2d 792; *The Cricket*, 71 F. 2d 61.

The judgment is reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON concur in the result.

The CHIEF JUSTICE, MR. JUSTICE ROBERTS, and MR. JUSTICE REED are of opinion that the judgment below should be affirmed.

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[7] See note 6, *ante*.

[8] See note 3, *ante*.

MUNCIE GEAR WORKS, INC. ET AL. *v.* OUTBOARD, MARINE & MANUFACTURING CO. ET AL

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

No. 323. Argued February 12, 1942.—Decided March 30, 1942.

1. The Court considered as a reason for the granting of certiorari to review a decision of a Circuit Court of Appeals sustaining claims of a patent as to which there was no conflict of decision, the fact that the patent dominated a substantial portion of an industry so concentrated in one circuit that a conflict of decision was unlikely. P. 765.
2. Claims 11, 12, 13 and 14 of Johnson patent No. 1,716,962, for an alleged invention to overcome cavitation in the operation of relatively large and fast outboard motors, *held* invalid under R. S. § 4866, because of public use, or sale, of devices embodying the alleged invention, more than two years before the first disclosure thereof to the Patent Office. P. 768.
3. Upon the record in this case, *held* that a decision by this Court of the question under R. S. § 4866 was not foreclosed by the obscurity of its presentation in the courts below. P. 768.

119 F. 2d 404, reversed.

CERTIORARI, 314 U. S. 594, to review a judgment which reversed a judgment of the District Court, and held the claims of a patent valid and infringed.

Mr. Samuel E. Darby, Jr., with whom *Messrs. Charles W. Rummler* and *Floyd H. Crews* were on the brief, for petitioners.

Mr. Henry M. Huxley, with whom *Messrs. George L. Wilkinson, S. L. Wheeler,* and *Isadore Levin* were on the brief, for respondents.

MR. JUSTICE JACKSON delivered the opinion of the Court.

We are required in this case to determine the validity of claims numbered 11, 12, 13 and 14 of letters patent No.

1,716,962, granted on June 11, 1929, to Harry L. Johnson for invention in a "water propulsion device." Respondent Johnson Brothers Engineering Corporation is the owner of the patent, and respondent Outboard, Marine & Manufacturing Company, is the exclusive licensee thereunder. Petitioner Muncie Gear Works, Inc., manufactured outboard motors which are claimed to infringe, and petitioner Bruns & Collins, Inc., sold them.

Respondents contend that this is a validly issued patent covering an invention which solved the problems of "cavitation" by relatively large and fast outboard motors. "Cavitation" is the drawing of air by the propeller from above the surface of the water to the propeller itself. Air so drawn reduces the propulsive effect of the propeller and causes "racing" of the motor with consequent risk of its disintegration and danger to the user. Increased speed or power entails a greater tendency to cavitate. Cavitation may be diminished by setting the propeller deeper in the water, but this increased projection increases resistance and retards speed.

Long before the patent in question, it was known that cavitation could be controlled, and in practice it was controlled, in at least all but relatively large and fast outboard motors, by setting a flat plate horizontally above the propeller and beneath the surface of the water, to act as a baffle and prevent the propeller from drawing air.[1] Respondents presented expert testimony to the effect that relatively large and fast water-cooled outboard motors cannot be successful unless they embody the asserted invention which respondents say is the subject matter of the claims in question. In general, this may be said to consist in the use of an anti-cavitation plate on a housing for the engine and propeller shafts enclosing the water passages for the cooling system, shaped both above and

[1] Smith, No. 1,226,400 (1917); Johnson, No. 1,467,641 (1923).

below the plate so as to reduce water displacement and resistance, and thus to reduce or eliminate eddy currents forming vortexes through which air can be sucked into the propeller. This permits adequate control of cavitation by means of a not unduly large anti-cavitation plate.

Harry L. Johnson, an experienced engineer and manufacturer of outboard motors, filed his application for the patent on August 25, 1926, but in no way suggested the combination now asserted as his invention. The single sheet of drawing accompanying the application was not changed during the prosecution of the application, and is the same as the drawing of the issued patent. This drawing showed an outboard motor assembly comprising, among other things, an engine at the top connected with a propeller at the bottom, with an anti-cavitation plate located horizontally above the propeller, approximately midway between top and bottom of the housing for the engine and propeller shafts. All water passages for the cooling system beneath the normal water level were shown to be enclosed in the housing. No cross section of this housing was drawn or indicated, and for all that appears from the drawing it might have been circular, triangular or rectangular. The drawing showed an arched member extending from the housing and anti-cavitation plate over the top and to the rear of the propeller, containing openings and passages for the intake and discharge of water, and ending in a curved "deflection plate" extending rearwardly like a fixed rudder. From the specifications and claims, it appeared that the purpose of the deflection plate was to compensate for the side and pivotal force of the moving propeller, which tended to draw the boat off its course unless the operator made constant adjustment to offset the "side throw." The specifications and drawings both indicated an anti-cavitation plate which the specifications said "prevents cavitation," but it was in no way asserted that the cavitation plate was new, or that it

was being employed in any novel coöperative relation to the other elements.

All of the claims of the application as originally made were rejected on December 15, 1926. On December 13, 1927, Johnson offered amendments which retained and amended the prior claims and added others directed to the feature of the deflection plate. In urging allowance, he said, among other things, "It is conceded that cavitation plates are old in the art as shown in the patent to Johnson cited," and he proceeded to urge as an invention the combination of the cavitation plate and the arching member or deflection plate. A similar supplemental amendment was filed on January 19, 1928. Several of the original claims as amended were allowed, and the rest of the claims rejected, on June 7, 1928.

On December 8, 1928, Johnson came forward with new claims. Claims 20 to 25 offered by this amendment made no mention of the deflection plate or of the arching members, but did not even suggest the presently asserted invention. On March 30, 1929, Johnson cancelled these claims and offered further amendments to his original application, together with a supplemental oath that he had invented the subject matter of the application as so amended, prior to the filing of the original amendment.[2] The effect of those changes was aptly described by the patent examiner: "The amendments have been such that the claims now emphasize the anti-cavitation plate rather than the anti-torque plate." With changes which are immaterial here, the new claims so offered became the claims in issue. In them, Johnson, for the first time, made claims relating to the exterior surface of the housing. Claim 12 described the housing as having "unbroken outer wall surfaces at each side," and claim 14, as having

[2] No question has ever been raised in this case respecting the veracity of this oath. Cf. *Elizabeth* v. *Pavement Co.*, 97 U. S. 126, 130.

"smooth and unbroken walls." Claims 11 and 13 were silent on the subject. The amendment also set forth an addition to the description which was incorporated in the description of the patent as issued. Here we find the expression "relatively smooth and substantially stream-line surfaces." Other than these, no indication of the nature of the surface or cross section of the housing was given at any time during the prosecution of the application.

The petitioners interposed defenses to all of the eight patents upon which respondents sued them in the District Court for the Northern District of Illinois, Eastern Division,[3] which we take to have put in issue the question whether the claims were void because made more than two years after the first public use of the device.[4]

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[3] The patent here involved and two others were litigated in one suit, with which was consolidated another suit involving five other patents. One of the patents was withdrawn prior to trial, and the courts below disposed of six of the seven remaining patents adversely to the respondents.

[4] These read as follows:

"The defendants are informed and believe and therefore aver that each of the Letters Patent in suit was and is void and of no effect in law in that the alleged inventions or improvements described therein were invented by, or known to, or used by others in the United States, before the alleged inventions of the said patentees of the patents in suit, and for more than two years prior to the respective applications for said patents; among which prior inventors and users and those having prior knowledge are the patentees and their assigns of the several Letters Patents named in the annexed schedule 'A', at the places and addresses named in said Letters Patent, and other prior inventors, users and those having prior knowledge the names of whom, and the times and places of such other public uses, being at the present time unknown to defendants, but which, when fully ascertained, defendants pray leave to insert in this Answer by amendments thereto. [No such amendment was ever made or attempted.]

"Defendants are informed and believe and therefore aver that each of the Letters Patent in suit is invalid and void for the reason that the alleged invention thereof purported to be patented thereby are not

At the trial, two of the officers of respondent Outboard, Marine & Manufacturing Company testified on direct examination as respondents' witnesses to the effect that in January or February of 1926 one of this respondent's predecessors put on the market licensed outboard motors equipped with smooth-walled housings, anti-cavitation plates, and internal water passages as described in the claims in suit; and that at least one competitor (which was also a predecessor) had brought out a substantially similar, but unlicensed, motor about a year later.[5]

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the same as were disclosed in the application therefor as originally filed, but are substantially different from any invention indicated, described, or suggested in the original applications therefor; that the applications therefor were amended in the specification and claims during the prosecution thereof and the alleged patented subject matter is not supported by oath as required by law; that the said applications were unlawfully enlarged during the prosecution thereof; and that the claims of said Letters Patent are invalid and void for the reason that they include matter not shown or adequately described in the said patents."

[5] Tanner, Vice President in charge of the sales of the Johnson Motors Division, testified as follows:

"Q. Are you familiar with the type of lower unit construction which is shown on this chart reproduced from the drawings of the Johnson patent No. 1,716,962? A. I am.

"Q. Do you recall when such a construction was introduced to the market, and by whom? A. To the best of my recollection it was for the model year of 1926, which would mean it was probably introduced about January or February of 1926.

"Q. By whom? A. By Johnson Motor Company.

"Q. At that time was Evinrude Motor Company a competitor of Johnson Motor Company? A. Yes, they were.

"Q. At that time was Elto Motor Company a competitor of Johnson Motor Company? A. Yes.

"Q. At that time was Lockwood-Ash Motor Company a competitor of Johnson Motor Company? A. Yes.

"Q. What was the result of the introduction of this model by Johnson Motor Company in 1926? A. As far as I was concerned, I was connected with the Lockwood-Ash Motor Company that was making a

In an unreported decision the District Court did not touch on this question, but found as a matter of fact and of law that the claims in question were invalid because merely aggregational. On appeal to the Circuit Court of Appeals the issue of sale or public use was not clearly presented,[6] if indeed it was presented at all; and the opinion rendered by that court did not advert to it, although it held that the claims here involved were valid and infringed. 119 F. 2d 404. While there was no conflict

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motor in 1926 and not having that combination; and, not having it, we did not have the satisfactory performance that the Johnson combination had.

"Q. In what respect did your motor not have as satisfactory a performance? A. It had cavitation.

"Q. What did your motor lack particularly of the structure shown in this Johnson patent? A. We did not have an anti-cavitation plate.

"Q. What did you do to remedy this difficulty? A. In the fall of 1926, for the 1927 model year, we put on an anti-cavitation plate.

"Q. Did that remedy your difficulty, so far as cavitation was concerned? A. Yes.

"Q. Do you know what was done by Evinrude and Elto? A. My recollection is that possibly, not at the same moment, I doubt Evinrude did the same year, put on an anti-cavitation plate on the stream line housing. I don't remember clearly whether Elto did it that year or the next, but they subsequently did put on the same combination."

Irgens, Chief Engineer and Production Manager of the Evinrude Division, testified as follows:

"Q. How long has it been true that all of the larger sizes of outboard motors have been equipped with smooth walled lower unit housings, anti-cavitation plates intermediate the top and bottom thereof, and internal water passages? A. They became popular about 1926, and from then on practically all of them have been made that way."

[6] The brief of petitioners in the Circuit Court of Appeals, which has been certified to this Court by the Clerk of that court, contained the following statement under the heading of anticipation: "In considering these claims it is appropriate to first have in mind their historical background, in view of the importance that Plaintiffs place upon them as being for subject matter that 'solved a problem' pre-

of decision with respect to these claims,[7] we granted certiorari in view of the questions presented and because the patent dominates a substantial portion of an industry so concentrated in the Seventh Circuit that litigation in other circuits, resulting in a conflict of decisions, is unlikely. 314 U. S. 594. *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47.

Section 4886 of the Revised Statutes, as amended and applicable to the present case, provided for the issuance of a patent to an inventor upon certain conditions, one of which was that his invention was "not in public use or on sale in this country for more than two years prior to his application." [8]

In an effort to avoid the effect of this provision, respondents contend that the question of its applicability was not raised either in the District Court or in the Circuit Court of Appeals; that there was no opportunity to meet the issue; and that the invention as finally claimed was disclosed by the application as originally made or in any event as amended on December 8, 1928.

However, the evidence of public use and sale, given, as we have pointed out, by respondents' own officers and witnesses,[9] has not been questioned or contradicted, and

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viously 'stalling' a great industry. In the first place the subject matter of these claims was in no way considered in or made a part of the original application . . . It was not until more than two years later that the patentee on December 6, 1928, by his amendment 'C', added claims to his application covering any of the matter that is now deemed to be of such great importance. Then, for the first time the patentee claimed, in claims originally numbered 17 to 25, inclusive, the anticavitation plate apart from the limitations which characterized his originally filed disclosures and originally filed claims."

[7] They had previously been sustained by a District Court in the Sixth Circuit. *Johnson Brothers Engineering Corp.* v. *Caille Bros. Co.*, 8 F. Supp. 198. Caille is no longer in the business.

[8] The period is now one year. Act of August 5, 1939, 53 Stat. 1212, 35 U. S. C. § 31.

[9] See footnote 5, *supra*.

is interpreted by respondents' counsel in accordance with our view of it. In their brief they say "It is true that after Johnson Motor Company, licensee under the patent in suit, had popularized devices embodying the subject matter of the claims in suit, at least one competitor copied the combinations of the claims in suit from the Johnson motor before claims closely resembling those in suit were presented to the Patent Office in December 1928. This was done by Lockwood Ash Motor Company, then a competitor, but subsequently merged to constitute a predecessor of Respondent, Outboard, Marine & Manufacturing Company. . . . Lockwood Ash first adopted this combination for the 1927 season. The model year commenced in January or February. . . . Concededly, the original claims were limited additionally either to the deflection plate or to the arched support. But claims without these limitations had, contrary to Petitioners' assertions, been filed December 8, 1928. The difference in date is critical because the record shows that the only manufacture of devices embodying the invention which had occurred more than two years prior to December 8, 1928, was licensed manufacture by Johnson Motor Company, predecessor of Respondent Outboard, Marine & Manufacturing Company, and in 1926, exclusive licensee of Respondent Johnson Brothers Engineering Corporation, owner of the application for the patent in suit. . . . The only concern which produced outboard motors in accordance with the invention of the patent in 1926 was the exclusive licensee under the application for the patent in suit. . . . March, 1929, would be more than two years after the opening of the 1927 model year; but the actual date in December, 1928, when the patentee claimed the specific invention in controversy, without regard to deflection plate or arched support, was well within two years of the first competitive use of the invention, even assuming that the

two year period is of any significance in the present case. . . ."

It is clear to us, however, that the amendments of December 8, 1928, like the original application, wholly failed to disclose the invention now asserted.

The claims in question are invalid if there was public use, or sale, of the device which they are claimed to cover, more than two years before the first disclosure thereof to the Patent Office. Cf. *Railway Co.* v. *Sayles,* 97 U. S. 554, 557, 559, 563–64; *Schriber-Schroth Co.* v. *Cleveland Trust Co., supra,* at 57. Section 4886 of the Revised Statutes would in terms provide for their invalidity had they been offered by application rather than by amendment; and whatever may be the efficacy of an amendment as a substitute for an application, it surely can effect no more than the application itself.

We think the conclusion is inescapable that there was public use, or sale, of devices embodying the asserted invention, more than two years before it was first presented to the Patent Office. We are not foreclosed from a decision under § 4886 on the point by the obscurity of its presentation in the courts below. This issue has been fully presented to this Court by the petition for a writ of certiorari, and in subsequent briefs and argument; and there is not the slightest indication that respondents have been prejudiced by such obscurity. To sustain the claims in question upon the established and admitted facts would require a plain disregard of the public interest sought to be safeguarded by the patent statutes, and so frequently present but so seldom adequately represented in patent litigation.

We therefore hold that the claims in question are invalid under § 4886 of the Revised Statutes, and accordingly have no occasion to decide any other question in the case.

Reversed.

BAKERY & PASTRY DRIVERS & HELPERS LOCAL 802 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS ET AL. *v.* WOHL ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 901, October Term 1940. Argued January 13, 1942.—Decided March 30, 1942.

1. Members of a labor union of drivers, engaged in the distribution of baked goods, in an endeavor to induce peddlers to work but six days a week and to hire an unemployed union member one day a week, peacefully picketed bakeries from which the peddlers obtained their goods, and places of business of the peddlers' customers, carrying placards with the peddlers' names and a true statement of the union's grievances. *Held,* that a state court injunction against such picketing was an unconstitutional invasion of the right of free speech. Pp. 772, 775.
2. The right of free speech does not depend in such a case on whether or not a "labor dispute," as defined by the state statutes, is involved. P. 774.

284 N. Y. 788, 31 N. E. 2d 765, reversed.

CERTIORARI, 313 U. S. 548, to review the affirmance of a judgment sustaining an injunction. A petition for rehearing of the judgment of reversal, *id.*, was granted, 314 U. S. 701.

Mr. Edward C. Maguire, with whom *Mr. Samuel J. Cohen* was on the brief, for petitioners.

Mr. Arthur Steinberg, with whom *Mr. Joseph Apfel* was on the brief, for respondents.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The petitioners are a labor union and certain of its officers. The union membership consists of truck drivers occupied in the distribution of baked goods. The respondents Wohl and Platzman are, and for some years have

been, peddlers of baked goods. They buy from bakeries and sell and deliver to small retailers, and keep the difference between cost and selling price, which in the case of Wohl is approximately thirty-two dollars a week, and in the case of Platzman, about thirty-five dollars a week. Out of this each must absorb credit losses and maintain a delivery truck which he owns—but has registered in the name of his wife. Both are men of family. Neither has any employee or assistant. Both work seven days a week, Wohl putting in something over thirty-three hours a week, and Platzman about sixty-five hours a week. It was found that neither has any contract with the bakeries from whom he buys, and it does not appear that either had a contract with any customer.

The conflict between the union and these peddlers grows out of certain background facts found by the trial court and summarized here. The union has for some years been engaged in obtaining collective bargaining agreements prescribing the wages, hours, and working conditions of bakery drivers. Five years before the trial, there were in New York City comparatively few peddlers or so-called independent jobbers—fifty at most, consisting largely of men who had a long-established retail trade. About four years before the trial, the social security and unemployment compensation laws, both of which imposed taxes on payrolls, became effective in the State of New York. Thereafter, the number of peddlers of bakery products increased from year to year, until at the time of hearing they numbered more than five hundred. In the eighteen months preceding the hearings, baking companies which operated routes through employed drivers had notified the union that, at the expiration of their contracts, they would no longer employ drivers, but would permit the drivers to purchase trucks for nominal amounts, in some instances fifty dollars, and thereupon to continue to distribute their baked goods as peddlers. Within such period, a hundred

and fifty drivers, who were members of the union and had previously worked under union contracts and conditions, were discharged and required to leave the industry unless they undertook to act as peddlers.

The peddler system has serious disadvantages to the peddler himself. The court has found that he is not covered by workmen's compensation insurance, unemployment insurance, or by the social security system of the State and Nation. His truck is usually uninsured against public liability and property damage, and hence commonly carried in the name of his wife or other nominee. If injured while working, he usually becomes a public charge, and his family must be supported by charity or public relief.

The union became alarmed at the aggressive inroads of this kind of competition upon the employment and living standards of its members. The trial court found that if employers with union contracts are forced to adopt the "peddler" system, "the wages, hours, working conditions, six-day week, etc., attained by the union after long years of struggle will be destroyed and lost." In the spring of 1938, the union made an effort in good faith to persuade the peddlers to become members, and those who desired were admitted to membership and were only required to abide by the same constitution, by-laws, rules and regulations as were all other members. That, however, included a requirement that no union member should work more than six days per week.

These particular peddlers were asked to join the union, and each signed an application, but neither joined. The union then determined to seek an understanding with peddlers who failed to join the union that they work only six days a week and employ an unemployed union member one day in a week. The union did not insist that the relief man be paid beyond the time that he actually worked, but

asked that he be paid on the basis of the union's daily wage, which fixed a scale for part of a day if but part of a day was required for the service of the route. For some ten weeks, Wohl employed a relief driver, who was paid $6.00 per day, the normal day's wage for a full day being $9.00.

When Wohl and Platzman finally refused either to join the union or to employ a union relief man, and continued to work seven days each week, the union took the measures which led to this litigation. On the twenty-third of January, 1939, the union caused two pickets to walk in the vicinity of the bakery which sold products to Wohl and Platzman, each picket carrying a placard, one bearing the name of Wohl and the other that of Platzman, and under each name appeared the following statement: "A bakery route driver works seven days a week. We ask employment for a union relief man for one day. Help us spread employment and maintain a union wage hour and condition. Bakery & Pastry Drivers & Helpers Local 802, I. B. of T. Affiliated with A. F. L." The picketing on that day lasted less than two hours. Again, on the twenty-fifth of January, the union caused two pickets to display the same placards in the same vicinity for less than an hour; and on the same day a picket with a placard bearing the name of Wohl over the same statement, picketed for a very short time in the vicinity of another bakery from which Wohl had purchased baked products. It was also found that a member of the union followed Platzman as he was distributing his products and called on two or three of his customers, advising them that the union was seeking to persuade Platzman to work but six days per week and employ a union driver as a relief man, and stating to one that, in the event he continued to purchase from Platzman, a picket would be placed in the vicinity on the following day, with a placard reading as set forth above. It does not appear that this threat was carried out.

The trial court found that the placards were truthful and accurate in all respects; that the picketing consisted of no more than two pickets at any one time and was done in a peaceful and orderly manner, without violence or threat thereof; that it created no disorder; that it was not proved that any customers turned away from such bakeries by reason of the picketing; and it was not established that the respondents sustained any monetary loss by reason thereof.

The trial court issued injunctions which restrained the union and its officers and agents from picketing either the places of business of manufacturing bakers who sell to the respondents or the places of business of their customers. 14 N. Y. Supp. 2d 198. The judgment was affirmed without opinion by the Appellate Division of the First Department, two Justices thereof dissenting with opinion, 259 App. Div. 868, 19 N. Y. S. 2d 811; and was affirmed without opinion by the Court of Appeals, 284 N. Y. 788, 31 N. E. 2d 765. This Court denied a petition for a writ of certiorari because it did not appear that the federal question presented by the petition had necessarily been decided by the Court of Appeals. 313 U. S. 572. The Court of Appeals later certified that such question had been passed upon, a petition for rehearing was granted, the writ of certiorari granted, and the judgment summarily reversed. 313 U. S. 548. We later granted another petition for rehearing, 314 U. S. 701, and have since heard argument.

The controversy in the trial court centered about the issue as to whether a labor dispute was involved within the meaning of New York statutes. The trial court found itself constrained to hold that no labor dispute was involved, and seemed to be of the impression that therefore no Constitutional rights were involved. It concluded as a matter of law that the respondents "are the sole persons required to run their business and therefore they are not

subject to picketing by a union or by the defendants who seek to compel them to employ union labor." The trial court refused the petitioners' request for a finding that "it was lawful for the defendants to truthfully advise the public of its cause, whether in the vicinity of the places of business of bakers who sold to the plaintiffs, or otherwise." Likewise, it refused a request to find "that it was a constitutional right of the defendants to advise the public, accurately and truthfully and without violence or breach of the peace, that defendants worked seven days a week, and that the defendants were seeking to secure employment from the plaintiffs for unemployed members of the union, one day a week."

So far as we can ascertain from the opinions delivered by the state courts in this case, those courts were concerned only with the question whether there was involved a labor dispute within the meaning of the New York statutes, and assumed that the legality of the injunction followed from a determination that such a dispute was not involved. Of course that does not follow: one need not be in a "labor dispute" as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive.

The respondents say that the basis of the decision below was revealed in a subsequent opinion of the Court of Appeals, where it was said with regard to the present case that "we held that it was an unlawful labor objective to attempt to coerce a peddler employing no employees in his business and making approximately thirty-two dollars a week, to hire an employee at nine dollars a day for one day a week." *Opera-on-Tour* v. *Weber*, 285 N. Y. 348, 357, 34 N. E. 2d 349, certiorari denied, 314 U. S. 615. But this lacks the deliberateness and formality of a certification,[1]

[1] Compare *Ex Parte Texas*, 315 U. S. 8.

and was uttered in a case where the question of the existence of a right to free speech under the Fourteenth Amendment was neither raised nor considered.

We ourselves can perceive no substantive evil of such magnitude as to mark a limit to the right of free speech which the petitioners sought to exercise. The record in this case does not contain the slightest suggestion of embarrassment in the task of governance; there are no findings and no circumstances from which we can draw the inference that the publication was attended or likely to be attended by violence, force or coercion, or conduct otherwise unlawful or oppressive; and it is not indicated that there was an actual or threatened abuse of the right to free speech through the use of excessive picketing. A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual. But so far as we can tell, respondents' mobility and their insulation from the public as middlemen made it practically impossible for petitioners to make known their legitimate grievances to the public whose patronage was sustaining the peddler system except by the means here employed and contemplated; and those means are such as to have slight, if any, repercussions upon the interests of strangers to the issue.

The decision of the Court of Appeals must accordingly be

Reversed.

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

MR. JUSTICE DOUGLAS, concurring:

If the opinion in this case means that a State can prohibit picketing when it is effective but may not prohibit it when it is ineffective, then I think we have made a basic departure from *Thornhill* v. *Alabama,* 310 U. S. 88. We

held in that case that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." p. 102. While we recognized that picketing could be regulated, we stated (p. 104-105): "Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion." And we added (p. 105): "But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter." For that reason we invoked the test, employed in comparable situations (*Cantwell* v. *Connecticut,* 310 U. S. 296, 307; *Bridges* v. *California,* 314 U. S. 252) that the statute which is the source of the restriction on free speech must be "narrowly drawn to cover the precise situation giving rise to the danger." p. 105.

We recognized that picketing might have a coercive effect: "It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society." p. 104.

Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those as-

pects of picketing make it the subject of restrictive regulation.

But since "dissemination of information concerning the facts of a labor dispute" is constitutionally protected, a State is not free to define "labor dispute" so narrowly as to accomplish indirectly what it may not accomplish directly. That seems to me to be what New York has done here. Its statute (Civil Practice Act, § 876a), as construed and applied, in effect eliminates communication of ideas through peaceful picketing in connection with a labor controversy arising out of the business of a certain class of retail bakers. But the statute is not a regulation of picketing *per se*—narrowly drawn, of general application, and regulating the use of the streets by all picketeers. In substance it merely sets apart a particular enterprise and frees it from all picketing. If the principles of the *Thornhill* case are to survive, I do not see how New York can be allowed to draw that line.

MR. JUSTICE BLACK and MR. JUSTICE MURPHY join in this opinion.

DECISIONS PER CURIAM, ETC., FROM JANUARY 6, 1942, THROUGH MARCH 30, 1942.*

No. 108. IDENTIFICATION DEVICES, INC. *v.* UNITED STATES. January 12, 1942. The motion for leave to file an amended petition for appeal to the Court of Appeals for the District of Columbia is denied. *James M. Rulong, pro se.* Reported below: 121 F. 2d 895.

No. —, original. EX PARTE GEORGE ACRET. See *post,* p. 825.

No. 245. CUDAHY PACKING CO. *v.* FLEMING, ADMINISTRATOR;

No. 529. FLEMING, ADMINISTRATOR, *v.* LOWELL SUN CO.;

No. 622. FLEMING, ADMINISTRATOR, *v.* A. H. BELO CORPORATION; and

No. 805. CUDAHY PACKING CO. *v.* FLEMING, ADMINISTRATOR. January 12, 1942. Thomas W. Holland, present administrator of the Wage and Hour Division, U. S. Department of Labor, substituted as a party herein in the place and stead of Philip B. Fleming.

No. 816. C. H. MUSSELMAN CO. *v.* ALDERSON, STATE TAX COMMISSIONER. Appeal from the Circuit Court of

*MR. JUSTICE ROBERTS took no part in the consideration and decision of the orders announced on January 12th and 19th.

For decisions on applications for certiorari, see *post,* pp. 789, 796; rehearing, *post,* p. 825. For cases disposed of without consideration by the Court, *post,* p. 824.

Kanawha County, West Virginia. January 19, 1942. *Per Curiam:* The judgment is affirmed. *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459; *Aponaug Mfg. Co.* v. *Stone,* 314 U. S. 577; *Department of Treasury* v. *Ingram-Richardson Mfg. Co.,* 313 U. S. 252, 254; *Brown* v. *Houston,* 114 U. S. 622; *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, 51–53. *Messrs. Clarence E. Martin* and *Clarence E. Martin, Jr.,* for appellant. *Messrs. Clarence W. Meadows,* Attorney General of West Virginia, and *W. Holt Wooddell,* Assistant Attorney General, for appellee.

No. 184. BUCK, PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL. *v.* CASE, STATE TREASURER OF WASHINGTON, ET AL. Appeal from the District Court of the United States for the Western District of Washington. January 19, 1942. *Per Curiam:* The motion of appellee Lockhart to reinstate this case on the calendar is denied. On consideration of the stipulation of counsel the appeal is dismissed without costs. MR. JUSTICE JACKSON took no part in the consideration and decision of this case. *Messrs. Thomas G. Haight, Louis D. Frohlich,* and *Herman Finkelstein* for appellants. *Messrs. Smith Troy* and *John E. Belcher* for appellees.

No. 186. CITY OF TEXARKANA, TEXAS, *v.* ARKANSAS LOUISIANA GAS CO. Certiorari, 314 U. S. 591, to the Circuit Court of Appeals for the Fifth Circuit. January 19, 1942. *Per Curiam:* On consideration of the stipulation of the parties the judgment of the Circuit Court of Appeals is vacated and the cause is remanded to the District Court with directions to enter appropriate orders. The costs in this Court are to be paid by the respondent. *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.

No. —, original. Ex parte John A. Kennedy. January 19, 1942. The motion for leave to file petition for writ of habeas corpus is denied.

No. 832. Seago, Administratrix, *v.* New York Central Railroad Co. On petition for writ of certiorari to the Supreme Court of Missouri. February 2, 1942. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed on the ground that there was sufficient evidence of negligence for submission to the jury. The case is remanded to the Supreme Court of Missouri for its consideration of other questions presented on the appeal and for further proceedings not inconsistent with this opinion. *Messrs. Mark D. Eagleton* and *William H. Allen* for petitioner. *Mr. Samuel W. Baxter* for respondent. Reported below: 348 Mo. 761, 155 S. W. 2d 126.

No. 836. Hoblitzelle *v.* City of University Park et al. Appeal from the Court of Civil Appeals, Fifth Supreme Judicial District, of Texas. February 2, 1942. *Per Curiam:* The motions for leave to file a statement as to jurisdiction and an amended opposition are granted. 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. David A. Frank* for appellant. *Mr. Percy C. Fewell* for appellees. Reported below: 150 S. W. 2d 169.

No. —, original. Ex parte Edward Casebeer. February 2, 1942. The motion for leave to file petition for writ of mandamus is denied.

No. —, original. EX PARTE RUFO C. ROMERO. February 2, 1942. The motion for leave to file petition for writ of habeas corpus is denied without prejudice to an application to the District Court.

No. 280. JONES *v.* CITY OF OPELIKA. Certiorari, 314 U. S. 593, to the Supreme Court of Alabama. Argued February 5, 1942. Decided February 9, 1942. *Per Curiam:* The writ is dismissed for want of a final judgment. *Mr. Hayden Covington,* with whom *Mr. Joseph F. Rutherford* was on the brief, for petitioner. *Mr. Alfred A. Albert* entered an appearance for petitioner. *Mr. John W. Guider,* with whom *Mr. William S. Duke* was on the brief, for respondent. *Mr. Osmond K. Fraenkel* filed a brief on behalf of the American Civil Liberties Union, as *amicus curiae,* urging reversal. Reported below: 241 Ala. 279, 3 So. 2d 74, 76.

No. 868. BLACK ET AL. *v.* CALIFORNIA. Appeal from the District Court of Appeal, 2nd Appellate District, of California. February 9, 1942. *Per Curiam:* The appeal is dismissed for want of a properly presented substantial federal question. (1) *Gorin* v. *United States,* 312 U. S. 19, 26–28; (2) *Hurtado* v. *California,* 110 U. S. 516; *Gaines* v. *Washington,* 277 U. S. 81, 86. *Mr. Morris Lavine* for appellants. *Messrs. Earl Warren,* Attorney General of California, and *Frank Richards,* Deputy Attorney General, for appellee. Reported below: 45 Cal. App. 2d 87, 113 P. 2d 746.

No. 898. OHIO EX REL. THOMPSON *v.* INDUSTRIAL COMMISSION OF OHIO. Appeal from the Supreme Court of Ohio. February 9, 1942. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want

of a properly presented federal question. *Live Oak Water Users' Association* v. *Railroad Commission,* 269 U. S. 354, 358–59; *Ohio ex rel. Squire* v. *Brown,* 312 U. S. 652. *Mr. Paul V. Connolly* for appellant. *Mr. Thomas J. Herbert,* Attorney General of Ohio, for appellee. Reported below: 138 Ohio St. 439, 35 N. E. 2d 727.

No. —, original. Ex parte Robert G. Errington; and No. —, original. Ex parte Henry Long. February 9, 1942. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 738. United States *v.* Kerr, Administratrix. February 16, 1942. Death of Elizabeth Kerr suggested and Citizens Loan & Trust Co., Administrator *de bonis non* of the estate of Joseph Kelly Kerr, deceased, substituted as the party respondent herein, per stipulation of counsel, on motion of *Solicitor General Fahy* in that behalf. See 314 U. S. 605.

No. 325. Rodiek, Ancillary Executor, *v.* United States et al. Certiorari, 314 U. S. 597, to the Circuit Court of Appeals for the Second Circuit. Argued February 12, 13, 1942. Decided March 2, 1942. *Per Curiam:* The judgment is affirmed by an equally divided Court. The Chief Justice, Mr. Justice Murphy, and Mr. Justice Jackson took no part in the consideration or decision of this case. *Mr. Sherwood E. Silliman,* with whom *Messrs. Reuben D. Silliman, Russell C. Gay,* and *Charles H. Lawson* were on the brief, for petitioner. *Assistant Attorney General Shea,* with whom *Solicitor General Fahy* and *Messrs. Melvin H. Siegel, Harry LeRoy Jones, Frederick L. Smith, Oscar H. Davis,* and *Archibald Cox* were on the brief, for respondents. Reported below: 117 F. 2d 588; 120 F. 2d 760.

No. 529. HOLLAND, ADMINISTRATOR, WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR, *v.* LOWELL SUN CO. Certiorari, 314 U. S. 599, to the Circuit Court of Appeals for the First Circuit. Argued February 4, 5, 1942. Decided March 2, 1942. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE MURPHY took no part in the consideration or decision of this case. *Mr. Warner W. Gardner,* with whom *Solicitor General Fahy* and *Messrs. Richard S. Salant, Irving J. Levy,* and *Jacob D. Hyman* were on the brief, for petitioner. *Mr. Elisha Hanson,* with whom *Mr. Frank Goldman* was on the brief, for respondent. *Mr. Victor W. Klein* filed a brief, as *amicus curiae,* in support of respondent. Reported below: 120 F. 2d 213.

No. 161. STEWART, ADMINISTRATOR, *v.* SOUTHERN RAILWAY CO. Certiorari, 314 U. S. 591, to the Circuit Court of Appeals for the Eighth Circuit. March 9, 1942. *Per Curiam:* Upon petition for rehearing, it appearing that the case has been settled, the petition is granted and the judgment entered February 16, 1942, 315 U. S. 283, is vacated. The judgment of the Circuit Court of Appeals is reversed with costs and the case is remanded to the District Court with directions to dismiss the suit as moot.

No. 532. CENTERS *v.* SANFORD, WARDEN. Certiorari, 314 U. S. 603, to the Circuit Court of Appeals for the Fifth Circuit. Argued March 4, 1942. Decided March 9, 1942. *Per Curiam:* Upon consent of the Government, the judgment below is vacated and the case is remanded to the District Court with permission to both parties to reopen the case for the purpose of taking further evidence with respect to all issues in the case, and for find-

ings on those issues, including whether petitioner consulted with appointed counsel, whether such counsel appeared in court with him, or whether he waived such consultation or appearance, and whether he understood the charge to which he pleaded guilty. *Mr. Paul Crutchfield,* with whom *Mr. Augustus M. Roan* was on the brief, for petitioner. *Mr. Herbert Wechsler* argued the cause, and *Assistant Attorney General Berge* and *Messrs. Warner W. Gardner* and *W. Marvin Smith* were on the brief, for respondent. Reported below: 120 F. 2d 217.

No. 805. CUDAHY PACKING CO. *v.* HOLLAND, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR. On petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. March 9, 1942. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is reversed on the authority of *Cudahy Packing Co. v. Holland, ante,* p. 357. MR. JUSTICE MURPHY took no part in the consideration or decision of this case. *Mr. William C. Green* for petitioner. *Solicitor General Fahy* for respondent. Reported below: 122 F. 2d 1005.

No. 967. MCSWEENEY *v.* EQUITABLE TRUST CO. Appeal from the Court of Errors and Appeals of New Jersey. March 9, 1942. *Per Curiam:* The motion to dismiss the appeal is granted and the appeal is dismissed for the reason that the judgment was based upon a nonfederal ground adequate to support it. *Enterprise Irrigation Dist. v. Canal Co.,* 243 U. S. 157; *Utley v. St. Petersburg,* 292 U. S. 106, 111–112. *Messrs. Samuel Kaufman, William T. Connor,* and *Nathan Bilder* for appellant. *Mr. Louis J. Cohen* for appellee. Reported below: 127 N. J. L. 299, 22 A. 2d 282.

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No. —, original. Ex parte Daniel P. Doyle; and No. —, original. Ex parte Ralph W. Fleeman. March 9, 1942. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 28. Cloverleaf Butter Co. *v.* Patterson, Commissioner of Agriculture and Industries of Alabama, et al. The opinion of February 2, 1942, *ante*, p. 148, is amended as follows:

On page 4, line 5, strike out the words "comes under" and substitute therefor the words "is subject to."

On page 14, line 15, strike out the word "watches" and substitute therefor the words "has authority to watch."

On page 15, line 7, strike out the word "subjected" and substitute therefor the word "subject."

On page 15, lines 7 and 8, strike out the word "continuous."

Respondents' petition for rehearing is denied.

Opinion reported as amended, *ante*, p. 148.

No. 622. Holland, Administrator, *v.* A. H. Belo Corporation. March 9, 1942. L. Metcalfe Walling, present administrator of the Wage and Hour Division, U. S. Department of Labor, substituted as the party petitioner in the place and stead of Thomas W. Holland, resigned, on motion of *Solicitor General Fahy* for the petitioner.

No. 954. Public Service Company of Indiana et al. *v.* City of Lebanon. Appeal from the Supreme Court of Indiana. March 16, 1942. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *McGovern* v. *New York City*, 229 U. S. 363; *Roberts* v. *New York City*, 295 U. S. 264; *Shriver* v. *Woodbine Savings Bank*, 285 U. S. 467; *Pennsylvania Hospital* v. *Philadelphia*, 245 U. S. 20; *Violet Trapping Co.* v. *Grace*, 297 U. S. 119. *Messrs. William P. Evans, Edmond W. Hebel,*

Willett H. Parr, Willett H. Parr, Jr., Ara Allen Parr, and *Elza O. Rogers* for appellants. *Mr. Roscoe Hollingsworth* for appellee. Reported below: 219 Ind. 62; 34 N. E. 2d 20; 36 N. E. 2d 852.

No. 924. ARSENAL BUILDING CORP. ET AL. *v.* FLEMING, ADMINISTRATOR. March 16, 1942. The motion to substitute is granted and L. Metcalfe Walling, present Administrator of the Wage and Hour Division, U. S. Department of Labor, is substituted as the party respondent herein in the place and stead of Philip B. Fleming, resigned.

No. 523. WEBER *v.* UNITED STATES. Certiorari, 314 U. S. 600, to the Circuit Court of Appeals for the Ninth Circuit. Argued March 9, 1942. Decided March 30, 1942. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE JACKSON took no part in the consideration or decision of this case. *Mr. Archibald Cox,* with whom *Solicitor General Fahy* and *Mr. W. Marvin Smith* were on the brief, for the United States. *Messrs. A. L. Wirin* and *Arthur Garfield Hays* submitted for petitioner. *Mr. Allen W. Ashburn* filed a brief, as *amicus curiae,* urging affirmance. Reported below: 119 F. 2d 932.

No. 950. MCARTHUR ET AL., A COPARTNERSHIP, DOING BUSINESS AS ANACONDA VAN LINES, *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Northern District of Illinois. March 30, 1942. *Per Curiam:* It does not appear that the questions involved in this appeal are substantial. The motion to affirm is therefore granted and the judgment is affirmed. *United States* v. *N. E. Rosenblum Truck Lines, Inc., ante,* p. 50; *Lubetich* v. *United States, ante,* p. 57. *Mr. L. Q. C. Lamar* for appellants. *Solicitor General Fahy* and *Mr.*

Daniel W. Knowlton for appellees. Reported below: 44 F. Supp. 697.

No. —, original. Ex parte John St. Francis Slaughter; and

No. —, original. Ex parte Pedro E. Sanchez Tapia. March 30, 1942. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —, original. DeWindt et al. *v.* South Carolina. March 30, 1942. The motion for leave to file a petition is denied.

No. —. Smith *v.* Western Union Telegraph Co. et al. March 30, 1942. Application denied.

No. 49. Morton Salt Co. *v.* G. S. Suppiger Co. March 30, 1942. Ordered that the last three lines on page 1 of the opinion in this case be amended to read: "The Clayton Act authorizes those injured by violations tending to monoply to main—".

Opinion reported as amended, 314 U. S. 488.

No. 245. Cudahy Packing Co., Ltd. *v.* Holland, Administrator. March 30, 1942. Ordered that the opinion in this case be amended as follows:

1. Strike from the last line on page 5 the phrase "the Bituminous Coal Act of 1937,".

2. Strike from the fifth line of page 6 the phrase ", save possibly one,".

3. Strike footnotes 6 and 9.

4. Renumber the footnotes accordingly.

Opinion reported as amended, *ante,* p. 357.

DECISIONS GRANTING CERTIORARI, FROM JANUARY 6, 1942, THROUGH MARCH 30, 1942.

No. 782. SKINNER *v.* OKLAHOMA EX REL. WILLIAMSON, ATTORNEY GENERAL. January 12, 1942. Petition for writ of certiorari to the Supreme Court of Oklahoma granted. *Messrs. W. J. Hulsey* and *Heba I. Aston* for petitioner. Reported below: 189 Okla. 235, 115 P. 2d 123.

No. 814. STATE TAX COMMISSION OF UTAH *v.* ALDRICH ET AL., ADMINISTRATORS. January 12, 1942. Petition for writ of certiorari to the Supreme Court of Utah granted. *Mr. J. Lambert Gibson* for petitioner. *Mr. Henry G. Gray* for respondents. Reported below: 116 P. 2d 923.

No. 775. WILMINGTON TRUST CO., EXECUTOR, *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. January 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted, limited to the question whether the Circuit Court of Appeals should have set aside the findings of the Board of Tax Appeals relating to question 1 (a) of the petition for writ of certiorari. *Mr. Wm. S. Potter* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Morton K. Rothschild* for respondent. Reported below: 124 F. 2d 156.

No. 774. NATIONAL LABOR RELATIONS BOARD *v.* NEVADA CONSOLIDATED COPPER CORP. January 19, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Solicitor General Fahy* and *Mr. Robert B. Watts* for petitioner. *Messrs. C. C. Parsons* and *H. M. Fennemore* for respondent.

No. 832. SEAGO, ADMINISTRATRIX, *v.* NEW YORK CENTRAL RAILROAD CO. See *ante*, p. 781.

No. 799. UNITED STATES *v.* JOHNSON; and

No. 800. UNITED STATES *v.* SOMMERS ET AL. February 2, 1942. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Arnold Raum, J. Louis Monarch, Gordon B. Tweedy,* and *Earl C. Crouter* for the United States. *Messrs. Floyd E. Thompson* and *William J. Dempsey* for respondent in No. 799; and *Mr. John Elliott Byrne* for respondents in No. 800. Reported below: 123 F. 2d 111.

No. 798. SIOUX TRIBE OF INDIANS *v.* UNITED STATES. February 9, 1942. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Ralph H. Case, James S. Y. Ivins,* and *Richard B. Barker* for petitioner. *Solicitor General Fahy* and *Messrs. Roger P. Marquis* and *Archibald Cox* for the United States. Reported below: 94 Ct. Cls. 150.

No. 826. FEDERAL TRADE COMMISSION *v.* RALADAM COMPANY. February 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Solicitor General Fahy* for petitioner. *Mr. Rockwell T. Gust* for respondent. Reported below: 123 F. 2d 34.

No. 841. REEVES *v.* BEARDALL, EXECUTOR. February 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Dan-*

iel Burke for petitioner. *Messrs. Charles R. Scott* and *Charles P. Dickinson* for respondent.

No. 848. STEWART ET AL. *v.* UNITED STATES. February 16, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. J. M. Mannon, Jr., A. Crawford Greene,* and *Robert L. Lipman* for petitioners. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Oscar A. Provost, H. G. Ingraham,* and *Philip Buettner* for the United States. Reported below: 121 F. 2d 705.

No. 830. SEMINOLE NATION *v.* UNITED STATES. February 16, 1942. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Paul M. Niebell, C. Maurice Weidemeyer,* and *W. W. Pryor* for petitioner. *Solicitor General Fahy* and *Assistant Attorney General Littell* for the United States. Reported below: 94 Ct. Cls. 240.

No. 837. BETTS *v.* BRADY, WARDEN. February 16, 1942. Petition for writ of certiorari to Carroll T. Bond, a Judge of the State of Maryland, being a judge of the Court of Appeals of Maryland from the City of Baltimore, granted. Counsel are requested on the argument of this case to discuss the jurisdiction of this Court, particularly (1) whether the decision below is that of a court within the meaning of § 237 of the Judicial Code, and (2) whether state remedies, either by appeal or by application to other judges or any other state court, have been exhausted. *Messrs. William L. Marbury, Jr.* and *Jesse Slingluff, Jr.* for petitioner. *Mr. William C. Walsh,* Attorney General of Maryland, for respondent.

No. 939. OVERNIGHT MOTOR TRANSPORTATION CO., INC. *v.* MISSEL. February 16, 1942. Petition for writ

of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. The motion of respondent for leave to proceed further *in forma pauperis* is also granted. *Messrs. John R. Norris* and *J. Ninian Beall* for petitioner. *Messrs. W. Hamilton Whiteford, William O. Tydings,* and *George A. Mahone* for respondent. Reported below: 126 F. 2d 98.

No. 872. GEORGIA *v.* EVANS ET AL. March 2, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Ellis Arnall,* Attorney General of Georgia, for petitioner. *Messrs. Hal Lindsay, Felix T. Smith, B. B. Taylor, Barry Wright, Allen Post,* and *Marion Smith* for respondents. Reported below: 123 F. 2d 57.

No. 910. A. B. KIRSCHBAUM CO. *v.* FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR. March 2, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Wm. Clark Mason* and *Frederick H. Knight* for petitioner. *Solicitor General Fahy* and *Warner W. Gardner* for respondent. Reported below: 124 F. 2d 567.

No. 845. UNITED STATES *v.* CONSUMERS PAPER CO. March 2, 1942. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Fahy* for petitioner. *Messrs. Fred B. Rhodes* and *Robert F. Klepinger* for respondent. Reported below: 94 Ct. Cls. 713.

No. 924. ARSENAL BUILDING CORP. ET AL. *v.* FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR. March 2, 1942. Petition for writ

of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Walter Gordon Merritt* and *Kenneth C. Newman* for petitioners. *Solicitor General Fahy* and *Mr. Warner W. Gardner* for respondent. Reported below: 125 F. 2d 278.

No. 805. CUDAHY PACKING CO. *v.* HOLLAND, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, U. S. DEPT. OF LABOR. See *ante*, p. 785.

No. 903. PEYTON *v.* RAILWAY EXPRESS AGENCY, INC. ET AL. March 9, 1942. The motion for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit is also granted. *Robert L. Peyton, pro se. Messrs. Harry S. Marx* and *Charles C. Evans* for respondents. Reported below: 124 F. 2d 430.

No. 913. AMERICAN CHICLE CO. *v.* UNITED STATES. March 9, 1942. Petition for writ of certiorari to the Court of Claims granted. *Mr. Erwin N. Griswold* for petitioner. *Solicitor General Fahy* for the United States. Reported below: 94 Ct. Cls. 699, 21 F. Supp. 537.

No. 644. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* CEMENT INVESTORS, INC.;

No. 645. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* JAMES Q. NEWTON TRUST; and

No. 646. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* NEWTON. See *post*, p. 825.

No. 314. BOWDEN ET AL. *v.* CITY OF FORT SMITH. March 16, 1942. The order denying certiorari, 314 U. S.

651, is vacated and the petition for writ of certiorari to the Supreme Court of Arkansas is granted. *Messrs. Joseph F. Rutherford* and *Hayden Covington* for petitioners. Reported below: 202 Ark. 614, 151 S. W. 2d 1000.

No. 947. MAGRUDER, COLLECTOR OF INTERNAL REVENUE, *v.* SUPPLEE ET UX. March 16, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Solicitor General Fahy* for petitioner. *Messrs. Nathan J. Felsenberg* and *James M. Hoffa* for respondents. Reported below: 123 F. 2d 399.

No. 948. MARINE HARBOR PROPERTIES, INC. *v.* MANUFACTURERS TRUST CO. (SUCCESSOR TO MORTGAGE CORPORATION OF NEW YORK), TRUSTEE, ET AL. March 16, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Arthur E. Friedland* for petitioner. *Solicitor General Fahy* and *Messrs. Richard H. Demuth, Chester T. Lane, Martin Riger,* and *Homer Kripke* for the Securities & Exchange Commission; *Mr. Harold L. Smith* for the Manufacturers Trust Co., Trustee; and *Mr. Harold Stern* for Mortimer Rubenstein, Foreclosure Receiver, respondents. Reported below: 125 F. 2d 296.

No. 499. MEMPHIS NATURAL GAS CO. *v.* BEELER, ATTORNEY GENERAL OF TENNESSEE, ET AL. See *ante,* p. 649.

No. 920. STATE BANK OF HARDINSBURG *v.* BROWN ET AL. March 30, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Telford B. Orbison* for petitioner. *Messrs. Samuel E. Cook* and *Ulysses E. Lesh* for respondents. Reported below: 124 F. 2d 701.

Nos. 958 and 959. PFISTER *v.* NORTHERN ILLINOIS FINANCE CORP. ET AL. March 30, 1942. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Elmer McClain* for petitioner. *Mr. John K. Newhall* for respondents. Reported below: 123 F. 2d 543.

No. 979. WILLIAMS ET AL. *v.* NORTH CAROLINA. March 30, 1942. Petition for writ of certiorari to the Supreme Court of North Carolina granted. *Mr. W. H. Strickland* for petitioners. *Messrs. Harry McMullan,* Attorney General of North Carolina, and *T. W. Bruton,* Assistant Attorney General, for respondent. Reported below: 220 N. C. 445, 17 S. E. 2d 769.

No. 980. RIGGS, SPECIAL GUARDIAN, *v.* DEL DRAGO ET AL. March 30, 1942. Petition for writ of certiorari to the Surrogate's Court, New York County, New York, granted. *Messrs. John W. Davis* and *Otis T. Bradley* for petitioner. *Messrs. Henry Cohen* and *Ludwig M. Wilson* for Giovanni Del Drago et al., and *Messrs. Joseph C. Thomson* and *Littleton Fox* for Byron Clark, Jr., Executor, respondents. *Messrs. John J. Bennett, Jr.,* Attorney General of New York, and *Henry Epstein,* Solicitor General, filed a brief on behalf of the State of New York, as *amicus curiae,* in support of the petition. Reported below: 287 N. Y. 61, 764, 38 N. E. 2d 131, 40 N. E. 2d 46.

No. 964. WASHINGTON TERMINAL CO. *v.* BOSWELL ET AL. March 30, 1942. Petition for writ of certiorari to the Court of Appeals for the District of Columbia granted. In view of the act of August 24, 1937 (c. 754, 50 Stat. 751), the Court hereby certifies to the Attorney General of the United States that the constitutionality of the Railway

Labor Act is drawn in question in this cause. *Messrs. John Dickinson* and *Guy W. Knight* for petitioner. Reported below: 124 F. 2d 235.

DECISIONS DENYING CERTIORARI, FROM JANUARY 6, 1942, THROUGH MARCH 30, 1942.

No. 787. RALSTON *v.* COX, U. S. MARSHAL. January 12, 1942. 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. J. Frank Kemp* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for respondent. Reported below: 123 F. 2d 196.

No. 788. SHOTKIN ET AL. *v.* BEIDLER ET AL. January 12, 1942. 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. *Joseph Shotkin pro se.*

No. 793. BARWICK *v.* ROBERTS, COMMISSIONER OF AGRICULTURE, ET AL. January 12, 1942. Petition for writ of certiorari to the Supreme Court of Georgia, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Young H. Fraser* for petitioner. Reported below: 192 Ga. 783, 16 S. E. 2d 867.

No. 796. JACKSON *v.* O'GRADY, WARDEN. January 12, 1942. Petition for writ of certiorari to the Supreme Court of Nebraska, and motion for leave to proceed further *in forma pauperis,* denied. *James E. Jackson, pro se. Messrs. Walter R. Johnson* and *C. S. Beck* for respondent.

No. 804. WHITE *v.* HARRISBURG. January 12, 1942. Petition for writ of certiorari to the Supreme Court of Pennsylvania, and motion for leave to proceed further *in forma pauperis*, denied. *Caroline White, pro se.* Reported below: 342 Pa. 556, 20 A. 2d 751.

No. 98. OUGHTON ET AL. *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 170. GIBBS ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. January 12, 1942. Petitions for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles A. Wolfe* for petitioners in No. 98; and *Mr. Franklin S. Edmonds* for petitioners in No. 170. *Solicitor General Biddle* and *Messrs. Warner W. Gardner, Robert B. Watts,* and *Laurence A. Knapp* for respondents. Reported below: 118 F. 2d 486.

No. 733. FRIEDMAN *v.* UNITED STATES. January 12, 1942. 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. John H. Burnett* for petitioner. *Solicitor General Fahy* and *Messrs. J. Louis Monarch, Gordon B. Tweedy,* and *Earl C. Crouter* for the United States. Reported below: 122 F. 2d 930.

No. 781. ROYAL INDEMNITY CO. *v.* UNITED STATES. January 12, 1942. 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. Chas. I. Dawson* for petitioner. *Solicitor General Fahy, Assistant Attor-*

ney General Clark, and *Messrs. J. Louis Monarch* and *Paul R. Russell* for the United States. Reported below: 120 F. 2d 136.

No. 792. ESSARY, EXECUTRIX, *v.* LOWDEN ET AL., TRUSTEES, ET AL. January 12, 1942. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. MR. JUSTICE BLACK is of opinion that the petition should be granted. *Mr. Clarence C. Chilcott* for petitioner. *Messrs. M. L. Bell, W. F. Peter, Thomas P. Littlepage, W. R. Bleakmore, Robert E. Lee, M. G. Roberts,* and *M. K. Cruce* for respondents. Reported below: 116 P. 2d 712.

No. 756. STEWART *v.* DAVIDSON, JUDGE. January 19, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motion for leave to proceed furthen *in forma pauperis,* denied. *J. L. Stewart, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for respondent.

No. 842. RUBEN ET AL. *v.* UNITED STATES. January 19, 1942. 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 for the reason that the Court, upon examination of the papers herein submitted, finds that the application for writ of certiorari was not made within the time provided by law. Rule XI of the Criminal Appeals Rules, 292 U. S. 665–666. *Sam Ruben, James Foley, Barney Neufield,* and *Joseph Flynn, pro se.* Reported below: 73 App. D. C. 174, 118 F. 2d 375.

No. 795. PLOW CITY STEAMSHIP CO. *v.* TEXAS GULF SULPHUR CO., INC. January 19, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third

Circuit denied. The CHIEF JUSTICE took no part in the consideration and decision of this application. *Messrs. James S. Benn, Jr.* and *George E. Beechwood* for petitioner. *Mr. Otto Wolff, Jr.* for respondent. Reported below: 122 F. 2d 816.

No. 825. SCHAAF ET AL. *v.* ELEVENTH WARD BUILDING & LOAN ASSN. ET AL. January 19, 1942. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Mr. Jerome C. Eisenberg* for petitioners. *Mr. Fred G. Stickel, Jr.* for the Eleventh Ward Bldg. & Loan Assn.; and *Mr. Louis J. Cohen,* Assistant Attorney General of New Jersey, for the Commissioner of Banking & Insurance, respondents.

No. 836. HOBLITZELLE *v.* CITY OF UNIVERSITY PARK ET AL. See *ante,* p. 781.

No. 610. KENT *v.* SANFORD, WARDEN; and

No. 808. MILLER *v.* UNITED STATES. February 2, 1942. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motions for leave to proceed further *in forma pauperis,* denied. MR. JUSTICE JACKSON took no part in the consideration and decision of these applications. *Mr. Augustus M. Roan* for petitioner in No. 610. *William Roy Miller, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *W. Marvin Smith* for respondent in No. 610; and *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States in No. 808. Reported below: No. 610, 121 F. 2d 216.

No. 801. DUGGAN *v.* O'GRADY, WARDEN. On petition for writ of certiorari to the Supreme Court of Nebraska.

February 2, 1942. Neil Olson, present Warden of the Nebraska State Penitentiary, substituted as the party respondent in the place and stead of Joseph O'Grady, resigned, on motion of the petitioner. The motion for leave to proceed further *in forma pauperis* is denied for the reason that the Court, upon examination of the papers herein submitted, finds no ground upon which a writ of certiorari should be issued. The petition for writ of certiorari is therefore also denied. *Pat Duggan, pro se.*

No. 810. BOEHM *v.* UNITED STATES. February 2, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. John S. Leahy* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 123 F. 2d 791.

No. 813. SKIDMORE *v.* UNITED STATES. February 2, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration and decision of this application. *Mr. Wm. Scott Stewart* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch, Gordon B. Tweedy, Earl C. Crouter, Robert L. Stern, J. Albert Woll,* and *Paul M. Plunkett* for the United States. Reported below: 123 F. 2d 604.

No. 786. SABIN ET AL. *v.* HOME OWNERS' LOAN CORPORATION. February 2, 1942. The motion to proceed on typewritten papers is granted. Petition for writ of certi-

orari to the Supreme Court of Oklahoma denied. *Milton Roe Sabin* and *Bertha Florence Sabin, pro se. Solicitor General Fahy* for respondent. Reported below: 187 Okla. 504, 105 P. 2d 245.

No. 806. MANHEIM ET AL. *v.* MERLE-SMITH ET AL.; and

No. 811. SALOMON *v.* MERLE-SMITH ET AL. February 2, 1942. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Louis Connick* and *Hugh L. M. Cole* for petitioners in No. 806. *Solomon G. Salomon, pro se,* in No. 811. *Messrs. William C. Chanler, Chester W. Cuthell, Boykin C. Wright,* and *Clifton Murphy* for respondents. Reported below: 122 F. 2d 454.

No. 807. FEINBERG *v.* UNITED STATES. February 2, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Everett Jennings* and *George D. Sullivan* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 123 F. 2d 425.

No. 812. CHRISTIAN CORPORATION *v.* VIRGINIA ET AL. February 2, 1942. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. Martin Ashton Hutchinson* for petitioner. *Messrs. Abram P. Staples,* Attorney General of Virginia, *W. W. Martin,* Assistant Attorney General, and *Henry R. Miller, Jr.,* for respondents. Reported below: 178 Va. XXXIV.

No. 754. HAYES *v.* UNITED STATES. February 9, 1942. 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. James F. Kemp* for petitioner. *Solicitor General Fahy* and *Assistant Attorney General Berge* for the United States. Reported below: 123 F. 2d 53.

No. 817. KOSTECKA *v.* UNITED STATES; and

No. 818. LIVE STOCK NATIONAL BANK, ADMINISTRATOR, *v.* UNITED STATES. February 9, 1942. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit, and motions for leave to proceed further *in forma pauperis,* denied. *Mr. Warren E. Miller* for petitioner in No. 817. *Mr. Stephen A. Cross* for petitioner in No. 818. *Solicitor General Fahy* and *Messrs. Julius C. Martin, Wilbur C. Pickett, Keith L. Seegmiller,* and *W. Marvin Smith* for the United States. Reported below: 122 F. 2d 179.

No. 869. MARK *v.* WARDEN OF ATTICA STATE PRISON. February 9, 1942. 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. 564. MASCOT STOVE CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. February 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Robert A. Littleton* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Hubert L. Will* for respondent. Reported below: 120 F. 2d 153.

No. 644. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* CEMENT INVESTORS, INC. February 9, 1942. Petition for writ of certiorari to the Circuit Court of

Appeals for the Tenth Circuit denied. *Solicitor General Fahy* for petitioner. *Messrs. John L. J. Hart* and *James B. Grant* for respondent. Reported below: 122 F. 2d 380.

No. 645. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* JAMES Q. NEWTON TRUST; and

No. 646. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* NEWTON. February 9, 1942. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Solicitor General Fahy* for petitioner. *Mr. Richard M. Davis* for respondents. Reported below: 122 F. 2d 416.

No. 780. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* NEW HAVEN & SHORE LINE RAILWAY CO., INC. February 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Fahy* for petitioner. *Messrs. Edgar J. Goodrich, Neil Burkinshaw,* and *Walter J. Brobyn* for respondent. Reported below: 121 F. 2d 985.

No. 828. HERBERT, TRUSTEE, *v.* SULLIVAN ET AL. February 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *James A. Herbert, pro se. Mr. Charles B. Rugg* for respondents. Reported below: 123 F. 2d 447.

No. 831. MORANTE *v.* NEW YORK. February 9, 1942. Petition for writ of certiorari to the County Court, Westchester County, New York, denied. *Messrs. Joseph F. Rutherford* and *Hayden C. Covington* for petitioner. *Mr. Frank H. Myers* for respondent.

No. 833. STEVENS ET AL. *v.* SINCLAIR REFINING CO. February 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Morgan M. Moulder* for petitioners. *Mr. Roy T. Osborn* for respondent. Reported below: 123 F. 2d 186.

No. 838. GOGGIN, TRUSTEE IN BANKRUPTCY, *v.* UNITED STATES. February 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Reuben G. Hunt* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Bernard Chertcoff* for the United States. Reported below: 123 F. 2d 432.

No. 839. POLITO *v.* MOLASKY ET AL. February 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. N. Murry Edwards* and *George C. Dyer, II,* for petitioner. Reported below: 123 F. 2d 258.

No. 840. THOMSON, TRUSTEE, *v.* BOLES. February 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Warren Newcome, William T. Faricy,* and *Alfred E. Rietz* for petitioner. *Mr. Chester W. Johnson* for respondent. Reported below: 123 F. 2d 487.

No. 851. INDIANAPOLIS POWER & LIGHT CO. *v.* NATIONAL LABOR RELATIONS BOARD. February 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Arthur L. Gilliom* and *Elbert R. Gilliom* for petitioner. *Solicitor General Fahy* and *Messrs. Robert L. Stern, Robert B.*

Watts, Ernest A. Gross, and *Morris P. Glushien* for respondent. Reported below: 122 F. 2d 757.

No. 857. DURLACHER *v.* DURLACHER. February 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Hamilton Vreeland, Jr.* and *Samuel Platt* for petitioner. *Mr. Clyde D. Souter* for respondent. Reported below: 123 F. 2d 70.

No. 859. KLIMKIEWICZ *v.* WESTMINSTER DEPOSIT & TRUST CO. ET AL. February 9, 1942. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. James E. Shifflette* and *George E. Sullivan* for petitioner. *Mr. Paul D. Taggart* for respondents. Reported below: 122 F. 2d 957.

No. 864. HARTFORD ACCIDENT & INDEMNITY CO. *v.* CITY OF SULPHUR. February 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. F. A. Rittenhouse* for petitioner. *Mr. H. A. Ledbetter* for respondent. Reported below: 123 F. 2d 566.

No. 865. W. D. HADEN CO. *v.* MATHIESON ALKALI WORKS, INC. February 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Robert S. Blair, Daniel L. Morris,* and *Paul A. Blair* for petitioner. *Messrs. Raymond F. Adams* and *E. Howard McCaleb* for respondent. Reported below: 122 F. 2d 650.

No. 860. UNITED STATES EX REL. MAINIERI *v.* NEW YORK. February 16, 1942. Petition for writ of certiorari

to the Court of Appeals of New York, and motion for leave to proceed further *in forma pauperis*, denied. *Louis Mainieri, pro se.*

No. 888. NEW YORK EX REL. SMITH *v.* HUNT, WARDEN. February 16, 1942. Petition for writ of certiorari to the Court of Appeals of New York, and motion for leave to proceed further *in forma pauperis*, denied. *Stanley Smith, pro se.* Reported below: 287 N. Y. 678, 39 N. E. 2d 294.

No. 862. PENNSYLVANIA WATER & POWER CO. *v.* FEDERAL POWER COMMISSION. February 16, 1942. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this application. *Messrs. Walter C. Clephane, Charles Markell,* and *Arthur H. Clephane* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Melvin H. Siegel, Richard J. Connor,* and *Wallace H. Walker* for respondent. Reported below: 123 F. 2d 155.

No. 821. AIKEN ET AL. *v.* INSULL ET AL.;

No. 822. DEMET'S, INCORPORATED, ET AL. *v.* INSULL ET AL.;

No. 823. INSULL ET AL. *v.* AIKEN ET AL.;

No. 824. INSULL ET AL. *v.* DEMET'S, INCORPORATED; and

No. 827. FIELD *v.* DEMET'S, INCORPORATED. February 16, 1942. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Edmund D. Adcock, Lewis F. Jacobson, George F. Callaghan,* and *Albert W. Froehde* for petitioners in Nos. 821 and 822, and respondents in Nos. 823, 824, and 827. *Messrs. Conrad H. Poppenhusen, Edward R. Johnston,*

Floyd E. Thompson, Edward J. Farrell, and *John J. Healy* for Samuel Insull, Jr. et al., respondents in Nos. 821 and 822, and petitioners in Nos. 823 and 824; and *Messrs. Donald F. McPherson, Kenneth F. Burgess,* and *James F. Oates, Jr.,* for Stanley Field, petitioner in No. 827 and respondent in No. 822. Reported below: 122 F. 2d 746, 755.

No. 834. Dow *v.* Ickes, Secretary of the Interior, et al. February 16, 1942. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. William G. Symmers* for petitioner. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Mr. Archibald Cox* for respondents. Reported below: 123 F. 2d 909.

No. 853. Shick *v.* Goodman, Trustee. February 16, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Edwin C. Emhardt* for petitioner. *Mr. Charles H. Weidner* for respondent. Reported below: 122 F. 2d 932.

No. 861. United Services Automobile Association *v.* Harman et al. February 16, 1942. Petition for writ of certiorari to the Court of Civil Appeals, 4th Supreme Judicial District, of Texas, denied. *Mr. Henry I. Quinn* for petitioner. *Messrs. Max Sokol, Samuel S. Smalkin,* and *George Clark* for respondents. Reported below: 151 S. W. 2d 609.

No. 867. Herzog et al., Co-Partners, Trading as Columbia Pickle Works, *v.* Dorman, Trustee. February 16, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr.*

Emil Weitzner for petitioners. *Mr. Benjamin Siegel* for respondent. Reported below: 121 F. 2d 581.

No. 789. UNITED STATES EX REL. KITHCART *v.* GARDNER ET AL. March 2, 1942. 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. *Boyd L. Kithcart, pro se.* Reported below: 119 F. 2d 497.

No. 809. SUMMERS *v.* RICE ET AL. March 2, 1942. 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. *Jennie Summers, pro se. Paul Rice* and *Mabel Rice, pro se.*

No. 884. ROGOWAY *v.* WARDEN, U. S. PENITENTIARY, MCNEIL ISLAND, WASHINGTON. March 2, 1942. 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. *Ted Rogoway, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *W. Marvin Smith* for respondent. Reported below: 122 F. 2d 967.

No. 891. WELCH *v.* TEXAS. March 2, 1942. Petition for writ of certiorari to the Court of Criminal Appeals, of Texas, and motion for leave to proceed further *in forma pauperis,* denied. *W. C. Welch, pro se. Messrs. Gerald C. Mann,* Attorney General of Texas, and *Geo. W. Barcus,* Assistant Attorney General, for respondent. Reported below: 154 S. W. 2d 248; 155 S. W. 2d 616.

No. 890. MINNEC *v.* HUDSPETH, WARDEN. March 2, 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. *John M. Minnec, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for respondent. Reported below: 123 F. 2d 444.

No. 909. ADAMS *v.* STATE OF WASHINGTON. March 2, 1942. 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. *Thomas J. Adams, pro se.*

No. 829. BRADY ET AL. *v.* BEAMS ET AL.;
No. 846. TIGER ET AL. *v.* BEAMS ET AL.;
No. 847. BARNETT ET AL. *v.* CONNOR ET AL.;
No. 850. SCOTT *v.* BEAMS ET AL.; and
No. 906. ALLEN ET AL. *v.* BEAMS ET AL. March 2, 1942. On petitions for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit. In No. 846 the motion to consider the petition for certiorari on a typewritten record is granted. The petitions for writs of certiorari are denied. The motions in Nos. 829, 847, 850, and 906, for leave to proceed further *in forma pauperis,* are also denied. *Mr. Chas. E. McPherren* for petitioners in No. 829. *Messrs. Norman L. Meyers, James D. Simms,* and *Paul Pinson* for petitioners in No. 846. *Mr. Eck E. Brook* entered an appearance for petitioners in No. 847. *Miss Norma L. Comstock* entered an appearance for petitioner in No. 850. *Messrs. J. A. Fowler* and *Wm. C. Wilson* for petitioners in No. 906. *Messrs. W. T. Anglin, Leon C. Phillips, Charles A. Moon, Francis Stewart, Joseph C. Stone, D. A. Richardson, L. O. Lytle, Harry B. Parris,* and

Wilbur J. Holleman for respondents in Nos. 829, 846, and 906. *Mr. Joseph C. Stone* entered an appearance for respondents in Nos. 847 and 850. *Solicitor General Fahy* filed a memorandum on behalf of the United States. Reported below: 122 F. 2d 777.

No. 912. WEBER *v.* SQUIER, WARDEN. March 2, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied on the ground that the cause is moot, it appearing that petitioner has been released upon order of the United States Board of Parole and that he is no longer in the respondent's custody. The motion for leave to proceed further *in forma pauperis* is therefore also denied. *Max Weber, pro se. Solicitor General Fahy* for respondent. Reported below: 124 F. 2d 618.

No. 904. LANDMAN, SUPERINTENDENT OF THE FIVE CIVILIZED TRIBES, *v.* COMMISSIONER OF INTERNAL REVENUE. March 2, 1942. 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 or decision of this application. *Messrs. Huston Thompson* and *Oscar P. Mast* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Bernard Chertcoff* for respondent. Reported below: 123 F. 2d 787.

No. 894. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* SPROUSE. March 2, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY are of opinion that the petition for writ of certiorari should be granted. *Solici-*

tor General Fahy for petitioner. Reported below: 122 F. 2d 973.

No. 843. BENAVIDES *v.* TEXAS. March 2, 1942. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied. *Mr. M. C. Gonzales* for petitioner. *Messrs. Gerald C. Mann,* Attorney General of Texas, and *Geo. W. Barcus,* Assistant Attorney General, for respondent. Reported below: 154 S. W. 2d 260.

No. 854. STEWART, TRUSTEE, ET AL. *v.* DYAR. March 2, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Ben L. Britnell* for petitioners. *Mr. William L. Chenault* for respondent. Reported below: 123 F. 2d 278.

No. 863. MELVILLE ET AL., TRUSTEES, ET AL. *v.* WEYBREW ET AL. March 2, 1942. Petition for writ of certiorari to the Supreme Court of Colorado denied. *Mr. Irving B. Melville* for petitioners. Reported below: 108 Colo. 520, 120 P. 2d 189.

No. 866. SKAGGS *v.* COMMISSIONER OF INTERNAL REVENUE. March 2, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Robert Ash* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Warren F. Wattles* for respondent. Reported below: 122 F. 2d 721.

No. 870. BERNSTEIN *v.* UNITED STATES. March 2, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Herbert*

Zelenko for petitioner. *Solicitor General Fahy* and *Assistant Attorney General Berge* for the United States. Reported below: 124 F. 2d 164.

No. 871. PELTS *v.* RECONSTRUCTION FINANCE CORPORATION. March 2, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Meyer Abrams* for petitioner. *Solicitor General Fahy* and *Mr. Hans A. Klagsbrunn* for respondent. Reported below: 123 F. 2d 503.

No. 873. AFFILIATED ENTERPRISES, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. March 2, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Albert J. Gould* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Mr. J. Louis Monarch* and *Miss Louise Foster* for respondent. Reported below: 123 F. 2d 665.

No. 874. CHIANESE *v.* UNITED STATES. March 2, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Sidney Goldmann* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 124 F. 2d 520.

No. 886. UNITED BLOCK CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. March 2, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George H. Harris* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch, Carlton Fox,* and *Robert L. Stern* for respondent. Reported below: 123 F. 2d 704.

No. 892. HAZELTINE CORPORATION *v.* CROSLEY CORPORATION. March 2, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. William H. Davis* and *R. M. Adams* for petitioner. *Messrs. Samuel E. Darby, Jr.* and *Floyd H. Crews* for respondent. Reported below: 122 F. 2d 925.

No. 893. UNITED STATES GYPSUM CO. *v.* GALEOTA. March 2, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. T. Carl Nixon* for petitioner. *Mr. William L. Clay* for respondent. Reported below: 123 F. 2d 947.

No. 897. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS *v.* BENNER, ADMINISTRATRIX. March 2, 1942. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Carleton S. Hadley, Walter N. Davis,* and *Arnot L. Sheppard* for petitioner. *Messrs. Mark D. Eagleton* and *Roberts P. Elam* for respondent. Reported below: 348 Mo. 928, 156 S. W. 2d 657.

No. 902. BARKER *v.* LEVIN, TRUSTEE IN BANKRUPTCY. March 2, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Luke E. Hart* for petitioner. *Mr. Morris J. Levin* for respondent. Reported below: 122 F. 2d 969.

No. 849. NOVICK *v.* UNITED STATES. March 2, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Jacob W. Friedman* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. W. Marvin Smith* for the United States. Reported below: 124 F. 2d 107.

No. 889. LARSON *v.* LANE, TRUSTEE IN BANKRUPTCY, ET AL. March 2, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Lois G. Larson, pro se.* Reported below: 124 F. 2d 121.

No. 895. PUGET SOUND POWER & LIGHT CO. ET AL. *v.* PUBLIC UTILITY DISTRICT NO. 1 OF WHATCOM COUNTY. March 2, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Elmer E. Todd, Frank E. Holman, E. L. Skeel,* and *Ferd J. Schaaf* for petitioners. *Mr. E. K. Murray* for respondent. Reported below: 123 F. 2d 286.

No. 899. DAVIS ET AL. *v.* IOWA. March 2, 1942. Petition for writ of certiorari to the Supreme Court of Iowa denied. *Messrs. H. C. Harper* and *Carlos W. Goltz* for petitioners. *Mr. John E. Mulroney* for respondent. Reported below: 230 Iowa 309, 297 N. W. 274.

No. 901. PITTS *v.* DRUMMOND. March 2, 1942. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Mr. Ralph A. Barney* for petitioner. *Mr. Wm. S. Hamilton* for respondent. Reported below: 118 F. 2d 244.

No. 905. KEYSTONE AUTOMOBILE CLUB CASUALTY CO. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. March 2, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. R. Lester Moore* and *John W. Davis* for petitioners. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Arnold Raum, J. Louis Monarch,* and *Newton K. Fox* for respondent. Reported below: 122 F. 2d 886.

No. 908. NEW YORK & LONG BRANCH RAILROAD CO. *v.* FURY. March 2, 1942. Petition for writ of certiorari to the Monmouth County Court of Common Pleas, of New Jersey, denied. *Messrs. Howard L. Kern* and *William F. Hanlon* for petitioner. *Mr. John J. Quinn* for respondent. Reported below: 126 N. J. L. 25, 16 A. 2d 544; 127 N. J. L. 354, 22 A. 2d 286.

No. 915. MCINTOSH *v.* WIGGINS. March 2, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Paul Bakewell, Jr.* for petitioner. *Messrs. Harry W. Kroeger* and *Daniel N. Kirby* for respondent. Reported below: 123 F. 2d 316.

No. 916. TUTTLE ET AL. *v.* BELL, COUNTY TREASURER. March 2, 1942. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Leland K. Neeves* for petitioners. *Mr. Charles J. McKeown* for respondent. Reported below: 377 Ill. 510, 37 N. E. 2d 180.

No. 835. J. A. ZACHARIASSEN & CO. *v.* UNITED STATES. March 9, 1942. Petition for writ of certiorari to the Court of Claims denied. MR. JUSTICE REED took no part in the consideration or decision of this application. *Messrs. John G. Poore* and *James C. Webster* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Melvin H. Siegel* and *Paul A. Sweeney* for the United States. Reported below: 94 Ct. Cls. 315.

No. 900. SHERIDAN ET AL., TRUSTEES, ET AL. *v.* ROTHENSIES, COLLECTOR OF INTERNAL REVENUE. March 9, 1942. Petition for writ of certiorari to the Circuit Court of Ap-

peals for the Third Circuit denied. *Messrs. Morris M. Wexler* and *Harry Shapiro* for petitioners. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch, Newton K. Fox,* and *H. G. Ingraham* for respondent. Reported below: 123 F. 2d 311.

Nos. 921 and 922. BLACK DIAMOND LINES, INC. *v.* UNITED STATES NAVIGATION CO., INC. March 9, 1942. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John W. Crandall* for petitioner. *Mr. John Tilney Carpenter* for respondent. Reported below: 124 F. 2d 508.

No. 944. INTER-OCEAN CASUALTY CO. *v.* BROCKMAN. March 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Harry Scherr* for petitioner. Reported below: 123 F. 2d 1006.

No. 911. BULL STEAMSHIP LINES, INC. *v.* THOMPSON, TRUSTEE. March 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. M. G. Eckhardt, Jr.* for petitioner. *Mr. Harry R. Jones* for respondent. Reported below: 123 F. 2d 943.

No. 929. WILLIAMS *v.* LAWRENCE, SUPERINTENDENT. March 16, 1942. Petition for writ of certiorari to the Supreme Court of Georgia, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. William S. Shelfer* entered an appearance for petitioner. *Mr. Ellis Arnall* for respondent. Reported below: 18 S. E. 2d 463.

No. 932. VILES ET AL. *v.* PRUDENTIAL INSURANCE CO. March 16, 1942. Petition for writ of certiorari to the Cir-

cuit Court of Appeals for the Tenth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Edmond L. Viles* and *Frances N. Viles, pro se. Mr. Horace Phelps* for respondent. Reported below: 124 F. 2d 78.

No. 935. WRIGHT *v.* FIRST JOINT STOCK LAND BANK OF FORT WAYNE ET AL. March 16, 1942. 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. *Mr. John D. Shoaff* for respondents.

No. 844. BAKERY SALES DRIVERS LOCAL UNION No. 344 (A. F. OF L.) ET AL. *v.* CARPENTER BAKING CO. March 16, 1942. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Mr. Joseph A. Padway* for petitioners. *Mr. Van B. Wake* for respondent. Reported below: 238 Wis. 367, 299 N. W. 30, 300 N. W. 225.

No. 858. LAVIETES *v.* FERRO STAMPING & MANUFACTURING CO. ET AL. March 16, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frank C. Sibley* for petitioner. *Mr. Victor C. Swearingen* for the Ferro Stamping & Mfg. Co. et al., and *Mr. Raymond K. Dykema* for the Detroit Harvester Co., respondents. Reported below: 121 F. 2d 455.

No. 917. UNITED STATES FIDELITY & GUARANTY CO. *v.* DOHENY, ADMINISTRATRIX. March 16, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John E. Patterson* for petitioner. *Mr. E. J. McCabe* for respondent. Reported below: 123 F. 2d 746.

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No. 928. ARMAND SCHMOLL, INC. *v.* FEDERAL RESERVE BANK OF NEW YORK. March 16, 1942. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Hersey Egginton* for petitioner. *Messrs. Allen T. Klots, Walter S. Logan,* and *G. Schuyler Tarbell, Jr.* for respondent. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Melvin H. Siegel* filed a memorandum on behalf of the United States, as *amicus curiae,* urging denial of the petition. Reported below: 260 App. Div. 912, 1006, 23 N. Y. S. 2d 841, 24 N. Y. S. 2d 993; 286 N. Y. 503, 37 N. E. 2d 225.

No. 930. SCHERCK, RICHTER CO. *v.* DYSART ET AL., MEMBERS OF THE CENTRAL PROPERTIES FIRST MORTGAGE BONDHOLDERS' COMMITTEE, ET AL. March 16, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Lyle M. Allen* for petitioner. *Mr. Thomas S. McPheeters* for respondents. Reported below: 123 F. 2d 364.

No. 931. NORTH ELECTRIC MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. March 16, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Arthur D. Baldwin* and *Clare M. Vrooman* for petitioner. *Solicitor General Fahy* and *Messrs. Robert B. Watts, Ernest A. Gloss,* and *Morris P. Glushien* for respondent. Reported below: 123 F. 2d 887.

No. 936. CORBETT *v.* HALLIWELL. March 16, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Edward L. Corbett* and *Arthur B. O'Keefe* for petitioner. *Mr. William J. Larkin, Jr.* for respondent. Reported below: 123 F. 2d 331.

No. 941. D. W. KLEIN CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. March 16, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Richard S. Doyle* and *Frederick V. Arber* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Harry Marselli* for respondent. Reported below: 123 F. 2d 871.

No. 942. BRYAN COUNTY ET AL. *v.* UNITED STATES. March 16, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Mac Q. Williamson,* Attorney General of Oklahoma, for petitioners. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Mr. Vernon L. Wilkinson* for the United States. Reported below: 123 F. 2d 782.

No. 951. STANDARD OIL CO. OF NEW JERSEY *v.* JORGENSEN ET AL. March 16, 1942. Petition for writ of certiorari to the Municipal Court of the City of New York, Borough of Manhattan, First District, of New York, denied. *Mr. Vernon S. Jones* for petitioner. *Mr. William L. Standard* for respondents. Reported below: 262 App. Div. 999, 263 App. Div. 708; 30 N. Y. S. 2d 819, 31 N. Y. S. 2d 667.

No. 953. PRINCETON KNITTING MILLS, INC. *v.* ARCADIA KNITTING MILLS, INC. March 16, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. W. Hastings Swenarton* and *Benjamin Jaffe* for petitioner. *Mr. Herman Seid* for respondent. Reported below: 124 F. 2d 330.

No. 962. DEERE, ADMINISTRATRIX, *v.* SOUTHERN PACIFIC CO. March 30, 1942. 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. Frank C. Hanley* for petitioner. *Messrs. Ben C. Dey, Alfred A. Hampson, C. W. Durbrow,* and *James C. Dezendorf* for respondent. Reported below: 123 F. 2d 438.

No. 971. SANFORD *v.* BOARD OF PRISON, TERMS, AND PAROLES. March 30, 1942. 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. *Norman J. Sanford, pro se.* Reported below: 10 Wash. 2d 686, 118 P. 2d 179.

No. 978. PENNSYLVANIA EX REL. MAURICE *v.* SMITH, WARDEN, ET AL. March 30, 1942. Petition for writ of certiorari to the Supreme Court of Pennsylvania, and motion for leave to proceed further *in forma pauperis,* denied. *Alfred Maurice, pro se.* Reported below: 344 Pa. 60, 24 A. 2d 11.

No. 919. FIFTH AVENUE BANK, TRUSTEE, *v.* UNITED STATES. March 30, 1942. Petition for writ of certiorari to the Court of Claims denied. *Mr. Frederick L. Pearce* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Mr. J. Louis Monarch* and *Mrs. Elizabeth B. Davis* for the United States. Reported below: 94 Ct. Cls. 640, 41 F. Supp. 428.

No. 933. IN THE MATTER OF PETITION OF ETHYL M. SHIBE FOR WRIT OF PROHIBITION TO THE ORPHANS' COURT OF PHILADELPHIA COUNTY AND TO LEWIS H. VAN DUSEN.

March 30, 1942. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Ethyl M. Shibe, pro se.*

No. 934. TAYLOR ET AL. *v.* PROVIDENT IRRIGATION DISTRICT. March 30, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. Coburn Cook* for petitioners. *Mr. George R. Freeman* for respondent. Reported below: 123 F. 2d 965.

No. 946. CLISE ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. March 30, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Warren H. Lewis* for petitioners. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *J. M. Jones* for respondent. Reported below: 122 F. 2d 998.

No. 952. DUNN ET AL. *v.* REPUBLIC NATURAL GAS CO. March 30, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William R. Watkins* for petitioners. *Mr. B. D. Tarlton* for respondent. Reported below: 124 F. 2d 128.

No. 957. DOBRUSKY *v.* NEBRASKA. March 30, 1942. Petition for writ of certiorari to the Supreme Court of Nebraska denied. *Mr. Bernard M. Spencer* for petitioner. *Messrs. Walter R. Johnson,* Attorney General of Nebraska, and *Clarence S. Beck,* Assistant Attorney General, for respondent. Reported below: 140 Neb. 360, 299 N. W. 539.

No. 965. SHIMADZU ET AL. *v.* ELECTRIC STORAGE BATTERY CO. March 30, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Geo. Whitefield Betts, Jr.* and *George Yamaoka* for petitioners. *Messrs. Hugh M. Morris, A. B. Stoughton,* and *Alexander L. Nichols* for respondent. Reported below: 123 F. 2d 890.

No. 969. SONKEN-GALAMBA CORP. ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. March 30, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. William C. Boatright, Harry L. Jacobs,* and *Bernard L. Glover* for petitioners. *Messrs. Cyrus Crane, Geo. J. Mersereau, Dean Wood, R. S. Outlaw, Robert G. Payne, C. S. Burg, Hobert Price,* and *E. A. Neel* for respondents. Reported below: 124 F. 2d 952.

No. 1020. ANTHONY ET AL. *v.* UNITED STATES TRUST CO. March 30, 1942. Petition for writ of certiorari to the Surrogate's Court, New York County, New York, denied. *Mr. Eli J. Blair* for petitioners. *Messrs. George L. Shearer* and *McCready Sykes* for respondent. Reported below: 262 App. Div. 703, 27 N. Y. S. 2d 90; 287 N. Y. 645, 754, 39 N. E. 2d 275, 40 N. E. 2d 40.

Nos. 693 and 694. COVINGTON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. March 30, 1942. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Donald A. Callahan* for petitioners. *Mr. Warner W. Gardner* for respondent. Reported below: 120 F. 2d 768.

No. 907. CITIZENS NATIONAL BANK *v.* COMMISSIONER OF INTERNAL REVENUE. March 30, 1942. Petition for

writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James W. Broaddus* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *F. E. Youngman* for respondent. Reported below: 122 F. 2d 1011.

No. 956. GARDZIELEWSKI *v.* UNITED STATES. March 30, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Herman S. Waller* for petitioner. *Solicitor General Fahy* and *Assistant Attorney General Berge* for the United States. Reported below: 125 F. 2d 138.

No. 963. WALSH *v.* SCHOOL DISTRICT OF PHILADELPHIA. March 30, 1942. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Mr. George C. Klauder* for petitioner. *Messrs. Franklin S. Edmonds, C. Brewster Rhoads,* and *J. Warren Brock* for respondent. Reported below: 343 Pa. 178, 22 A. 2d 909.

No. 968. MASSACHUSETTS HAIR & FELT CO. *v.* B. F. STURTEVANT CO. March 30, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Wm. S. Hodges* for petitioner. *Messrs. Melvin R. Jenney* and *Harry Dexter Peck* for respondent. Reported below: 124 F. 2d 95.

No. 972. O'BRIEN *v.* PABST SALES CO. March 30, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. R. G. Storey* for petitioner. *Mr. Alex F. Weisberg* and *Wm. T. Woodson* for respondent. Reported below: 124 F. 2d 167.

No. 975. AETNA AUTO FINANCE, INC. *v.* AETNA CASUALTY & SURETY CO. March 30, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Armwell L. Cooper* for petitioner. *Messrs. Frank E. Spain* and *H. H. Grooms* for respondent. Reported below: 123 F. 2d 582.

No. 977. BURDICK ET AL. *v.* BURDICK ET AL., TRUSTEES, ET AL. March 30, 1942. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. E. Barrett Prettyman, F. G. Awalt,* and *Raymond Sparks* for petitioners. *Messrs. Dallas S. Townsend, Gardner Dugald Howie,* and *Spencer Gordon* for Burdick et al., Trustees, and *Mr. George C. Gertman* for George C. Gertman, Guardian, respondents. Reported below: 123 F. 2d 924.

No. 992. LLOYD BRASILEIRO *v.* LA GUERRA. March 30, 1942. Petition for writ of certioari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Oscar R. Houston* for petitioner. *Mr. Abraham S. Robinson* for respondent. Reported below: 124 F. 2d 553.

No. 1012. SOUTHERN STEEL CO. *v.* BUTEX GAS CO. ET AL. March 30, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. S. Austin Wier* for petitioner. *Mr. Jack A. Schley* for respondents. Reported below: 123 F. 2d 954.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM JANUARY 6, 1942, THROUGH MARCH 30, 1942.

No. 277. DINAN ET AL. *v.* FIRST NATIONAL BANK. February 2, 1942. Certiorari, 314 U. S. 593, to the Circuit

Court of Appeals for the Sixth Circuit. Dismissed on motion of counsel for the petitioners. *Mr. John R. Rood* for petitioners. *Messrs. Robert S. Marx* and *George P. Barse* for respondent. Reported below: 117 F. 2d 459.

REHEARINGS GRANTED, FROM JANUARY 6, 1942, THROUGH MARCH 30, 1942.

No. 161. STEWART, ADMINISTRATOR, *v.* SOUTHERN RAILWAY CO. See *ante*, p. 784.

No. 644. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* CEMENT INVESTORS, INC.;

No. 645. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* JAMES Q. NEWTON TRUST; and

No. 646. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* NEWTON. March 9, 1942. The petitions for rehearing are granted. The orders denying certiorari, *ante*, pp. 802–803, are vacated, and the petitions for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit are granted. *Solicitor General Fahy* for petitioner. *Messrs. John L. J. Hart* and *James B. Grant* for respondent in No. 644. *Mr. Richard M. Davis* for respondents in Nos. 645 and 646. Reported below: 122 F. 2d 380, 416.

REHEARINGS DENIED, FROM JANUARY 6, 1942, THROUGH MARCH 30, 1942.*

No. —, original. EX PARTE GEORGE ACRET. January 12, 1942. The petition for rehearing is denied. The motion for leave to file a supplemental or amended petition for writ of mandamus is also denied.

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* See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

Nos. 257, 258 and 259. MINNESOTA MINING & MANUFACTURING CO. *v.* COE, COMMISSIONER OF PATENTS. January 12, 1942. Petition for rehearing denied. MR. JUSTICE JACKSON took no part in the consideration and decision of this application.

Nos. 659 and 660. MOLONEY ELECTRIC CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. January 12, 1942.

Nos. 4 and 5. LISENBA *v.* CALIFORNIA. February 2, 1942. 314 U. S. 219.

No. 143. BOARD OF TRADE OF KANSAS CITY ET AL. *v.* UNITED STATES ET AL. February 2, 1942. 314 U. S. 534.

No. 618. FRETWELL *v.* PEOPLES SERVICE DRUG STORES, INC. February 2, 1942. 314 U. S. 670.

No. 54. UNITED STATES *v.* RAGEN;

No. 55. UNITED STATES *v.* ARNOLD W. KRUSE; and

No. 56. UNITED STATES *v.* LESTER A. KRUSE. February 2, 1942. Petitions for rehearing denied. MR. JUSTICE ROBERTS, MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration and decision of these applications. 314 U. S. 513.

No. 49. MORTON SALT CO. *v.* G. S. SUPPIGER CO.;

No. 763. FITZGERALD, TRUSTEE, *v.* GULF REFINING CO. OF LOUISIANA;

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No. 767. FITGERALD, 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. February 2, 1942. Petitions for rehearing denied. MR. JUSTICE ROBERTS took no part in the consideration and decision of these applications. 314 U. S. 488, 701.

No. 31. KRETSKE *v.* UNITED STATES. February 9, 1942. Petition for rehearing denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Ante,* p. 60.

No. —, original. EX PARTE STANLEY B. PEPLOWSKI. February 16, 1942. 314 U. S. 578.

No. 710. TEMPLETON *v.* CALIFORNIA. February 16, 1942. 314 U. S. 581.

No. 32. ROTH *v.* UNITED STATES. February 16, 1942. Petition for rehearing denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Ante,* p. 60.

No. 67. SOUTHPORT PETROLEUM CO. *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 756. STEWART *v.* DAVIDSON, JUDGE. February 16, 1942. Petitions for rehearing denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of these applications. No. 67, *ante,* p. 100.

No. 792. ESSARY, EXECUTRIX, *v.* LOWDEN ET AL., TRUSTEES, ET AL. February 16, 1942. The motion for leave to file petition for rehearing is granted. The petition for rehearing is denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of these applications.

No. 813. SKIDMORE *v.* UNITED STATES. February 16, 1942. Petition for rehearing denied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

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. March 2, 1942. Petition for rehearing denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. *Ante,* p. 126.

No. —, original. DEWOLFE *v.* CALIFORNIA. March 2, 1942. 314 U. S. 586.

No. —, original. EX PARTE ROBERT G. ERRINGTON. March 2, 1942.

No. 868. BLACK ET AL. *v.* CALIFORNIA. March 2, 1942.

No. 810. BOEHM *v.* UNITED STATES. March 2, 1942. Petition for rehearing denied. MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 28. CLOVERLEAF BUTTER CO. *v.* PATTERSON, COMMISSIONER OF AGRICULTURE & INDUSTRIES OF ALABAMA, ET AL. See *ante,* p. 148.

No. 286. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* SOUTHWEST CONSOLIDATED CORP. March 9, 1942. Petition for rehearing denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. 314 U. S. 598.

No. 780. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* NEW HAVEN & SHORE LINE RAILWAY CO., INC. March 9, 1942.

No. 786. SABIN ET AL. *v.* HOME OWNERS' LOAN CORPORATION. March 9, 1942.

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No. 81. RILEY ET AL., EXECUTORS, *v.* NEW YORK TRUST CO., ADMINISTRATOR, ET AL. March 16, 1942. *Ante*, p. 343.

No. 179. MACGREGOR, EXECUTOR, *v.* STATE MUTUAL LIFE ASSURANCE CO. March 16, 1942. 314 U. S. 591.

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No. 112. WILLIAMS ET AL. *v.* JACKSONVILLE TERMINAL CO.; and

No. 206. D'OENCH, DUHME & CO., INC. *v.* FEDERAL DEPOSIT INSURANCE CORP. March 30, 1942. Petitions for rehearing denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of these applications.

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