UNITED STATES REPORTS

VOLUME 317

CASES ADJUDGED

IN

THE SUPREME COURT

AT

JULY SPECIAL TERM, 1942

AND

OCTOBER TERM, 1942

FROM JULY 31, 1942, TO AND INCLUDING (IN PART) JANUARY 18, 1943

ERNEST KNAEBEL
REPORTER

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1943

For sale by the Superintendent of Documents, U. S. Government Printing Office
Washington, D. C. - Price $2.75 (Buckram)

Erratum.—314 U. S. 307, n. 2, line 2: "Part 1" should be Part 2.

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.[1]
ROBERT H. JACKSON, Associate Justice.

RETIRED

CHARLES EVANS HUGHES, Chief Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.[2]

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

---

[1] Mr. Justice Byrnes resigned on October 3, 1942. See *post*, pp. v, vii.

[2] Mr. Justice Sutherland, who retired from active service on January 18, 1938 (303 U. S. iv), died in Washington, D. C., on July 18, 1942.

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.)

SUPREME COURT OF THE UNITED STATES

MONDAY, OCTOBER 5, 1942

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

The CHIEF JUSTICE said:

"In deep sorrow I announce the death on July 18th last of George Sutherland, a retired Justice of this Court.

"A citizen and member of the Bar of the State of Utah, he was United States Senator from that State from 1905 to 1917. He was in active service as a member of this Court from his appointment in 1922 to his retirement on January 18, 1938. As a Justice he brought to the service of his country a well-grounded knowledge of the law, a thorough understanding of the art of government, derived from a wide and varied experience in public affairs, and an unswerving devotion to constitutional government as the safeguard of cherished institutions and traditions of the Republic.

"His death has brought to a close a career of eminent public service, and has severed the ties of friendship which his unfailing kindliness and winning personality inspired in his colleagues and all those who knew him."

The CHIEF JUSTICE then voiced the regret of himself and his colleagues over the resignation of Mr. Justice Byrnes from his office as an Associate Justice of this Court, and their wish for the success of the resigning Justice in the new and arduous public undertaking which induced his separation from the court.

MR. GEORGE MAURICE MORRIS addressed the Court as follows:

"On behalf of the bar of the United States, I have been requested by certain members of the bar of this Court to present for the artistic archives of the Court a bronze bust of the late Louis D. Brandeis. The bust is the work of Miss Eleanor Platt, a sculptor of New York City. The bust has been set up in the library of this building. It would be inappropriate at this time to say anything respecting the career and virtues of the Justice so well known to your Honors and who sat with several of you. It is my understanding that adequate eulogy respecting Mr. Justice Brandeis will be presented at the memorial services which the Court has in mind."

The CHIEF JUSTICE replied:

"Mr. Morris, it is altogether fitting that on this, the first anniversary of the death of Justice Brandeis, there should be placed in this building a permanent memorial of his life and public service.

"In accepting it we are happy in the recognition that the bust which you present is something more than a mere record of his countenance. For it is a work of art in which the hand of the artist has revealed the spiritual beauty and intellectual distinction which were characteristic of the man.

"It will be placed in the Supreme Court Library. There it will stand for generations to come, a daily reminder to his surviving colleagues and to his successors on this Bench, to the members of the Bar, and to students of the law, of all those qualities of mind and heart which made Justice Brandeis a great law giver and an inspiring leader in the thought of men."

ORDER

It is ordered by the Court that the accompanying correspondence between members of the Court and Mr. Justice Byrnes be this day spread upon the Minutes and that it also be printed in the reports of the Court.

OCTOBER 4, 1942.

DEAR JUSTICE BYRNES:

We learn of your resignation with a deep sense of the loss which it brings to the Court and to all of us personally.

In the all too brief period of our association since your appointment to the Court we have come to value highly your contribution to its deliberations, drawn from the wide knowledge of affairs which you have gained in the course of a long and eminent public service. We cherish the happy personal relationship which that association has established. All of us part with you reluctantly and with regret. We are reconciled to your going only by the realization that you are moved by a sense of duty to render a needed service of public importance in a time of great national emergency.

We wish you all success in this new and arduous undertaking, and that you may find in it that durable satisfaction which is the true reward for a great task greatly performed.

Faithfully yours,

HARLAN F. STONE.
OWEN J. ROBERTS.
HUGO L. BLACK.
STANLEY REED.
FELIX FRANKFURTER.
WILLIAM O. DOUGLAS.
FRANK MURPHY.
ROBERT H. JACKSON.

SUPREME COURT OF THE UNITED STATES

Washington, D. C.

Chambers of
Justice JAMES F. BYRNES

OCTOBER 5, 1942.

MY DEAR BRETHREN:

I shall always treasure your generous words of esteem and affection.

You are correct. Only a sense of duty impelled me to resign from the Court. My association with you has been enjoyable and inspiring and I leave with great respect and genuine affection for each of you. The cordial expressions of your letter make me happy; they encourage me to hope that I may still continue to enjoy your companionship.

Sincerely yours,

JAMES F. BYRNES.

THE CHIEF JUSTICE,
MR. JUSTICE ROBERTS,
MR. JUSTICE BLACK,
MR. JUSTICE REED,
MR. JUSTICE FRANKFURTER,
MR. JUSTICE DOUGLAS,
MR. JUSTICE MURPHY,
MR. JUSTICE JACKSON.

PROCEEDINGS IN MEMORY OF MR. JUSTICE BRANDEIS.

Members of the Bar of the Supreme Court of the United States met in the Supreme Court Building on Monday, December 21, 1942, at 10 o'clock a. m.[1]

The meeting was called to order by Mr. Solicitor General Fahy.

MR. FAHY said:

This meeting of the Bar of the Supreme Court is now convened, with the guests of the Bar, to think for a while together of the life and work of Louis D. Brandeis, and to take action appropriate for communication by the Bar to his Court.

Louis D. Brandeis became an Associate Justice of the Supreme Court June 5, 1916. He retired from active participation in the work of the Court February 13, 1939. Upon his death little more than a year ago, loved and honored by countless people, sorrow was softened by a warm and universal sense of gratitude that he had lived, greatly, simply, courageously.

His courage possessed the quality that led him to do right because it was right, and bore unusual fruit due to the tremendous labors he assumed, and the ability he exercised, to persuade the reason and convince the hearts of his fellowmen. His character, combined with an untiring, studious and intelligent devotion to the problems of his time, caused him to be one of the greatest jurists of all time.

[1] The members of the Committee on Arrangements for this meeting were: Mr. Solicitor General Fahy, *Chairman;* Messrs. Dean G. Acheson, James M. Landis, Edward F. McClennen, and George Rublee.

Many of his friends, not here today, have been called this last year to other tasks and places that need them during the war. They, like ourselves, because of him are better able to understand and win through for Democracy, an ideal that held his faith and that he did so much to make a practical reality.

In honoring him this morning, the inspiration that always came from him during life will come anew to us.

On motion of MR. SOLICITOR GENERAL FAHY, JUDGE CALVERT MAGRUDER was elected Chairman and MR. CHARLES ELMORE CROPLEY, Secretary.

On taking the Chair, JUDGE MAGRUDER said:

Amid the din and distractions of war, we do not forget to honor our great men of peace. Thus, we are met today to pay merited tribute to Louis D. Brandeis and to his work as citizen, lawyer and judge. Your Committee on Resolutions [2] has prepared a report, which will now be presented by Mr. Lloyd Garrison.

MR. LLOYD GARRISON, acting on behalf of this Committee, presented resolutions which, after the following addresses by Judge Learned Hand, Mr. Paul A. Freund and Senator George W. Norris, were adopted and later presented to the Court, *post*, pp. XXIX—XXXVI.

---

[2] The members of this Committee were: Honorable Calvert Magruder, *Chairman;* Messrs. H. Thomas Austern, Charles C. Burlingham, W. Graham Claytor, Jr., Benjamin V. Cohen, Warren S. Ege, Herbert B. Ehrmann, Morris Ernst, Alvin E. Evans, George E. Farrand, Adrian S. Fisher, Bernard Flexner, Henry J. Friendly, Lloyd Garrison, Henry M. Hart, Arthur D. Hill, Mark Howe, Charles E. Hughes, Jr., Willard Hurst, Louis L. Jaffe, David Lilienthal, Jack Neale Lott, Jr., Archibald MacLeish, Joseph Warren Madden, Samuel H. Maslon, William E. McCurdy, Robert N. Miller, George Maurice Morris, Nathaniel L. Nathanson, John Lord O'Brian, Robert G. Page, David Riesman, Jr., William G. Rice, Jr., Harry S. Shulman, Henry L. Stimson, Hatton W. Sumners, William A. Sutherland, Frederick Van Nuys, Robert F. Wagner, and Charles Warren.

The CHAIRMAN responded:

Mr. Justice Brandeis was a man of many sides. We are now to hear addresses from various viewpoints: from a distinguished federal judge; from a former law clerk of the Justice, a law professor now serving in the Office of the Solicitor General; and from an honored elder statesman, who has labored in the halls of Congress to make a political reality of the principles for which Louis D. Brandeis stood.

Address of the Honorable Learned Hand, Circuit Judge

A man's life, like a piece of tapestry, is made up of many strands which interwoven make a pattern; to separate a single one and look at it alone, not only destroys the whole, but gives the strand itself a false value. So it must be with what I say today; this is no occasion to appraise the life and work of the man whose memory we have met to honor. It would be impossible at this time to do justice to the content of so manifold a nature and so full a life; its memorial stands written at large, chiefly in the records of his court; perhaps best preserved in the minds of living men and women. Before passing to my theme, I can therefore do no more than allude to much that I can ill afford to leave out: for instance, to his almost mystic reverence for that court, whose tradition seemed to him not only to consecrate its own members, but to impress its sacred mission upon all who shared in any measure in its work, even menially. To his mind nothing must weaken its influence or tarnish its lustre; no matter how hot had been the dispute, how wide the final difference, how plain the speech, nothing ever appeared to ruffle or disturb his serenity, or to suggest that he harbored anything but regard and respect for the views of his colleagues, however far removed from his own. Nor can I more than mention the clear, ungarnished style which so well betrayed the will that lay behind; the undiverted purpose to clarify and convince. How it eschewed all that might distract attention from the thought to its expression. The telling

phrase, the vivid metaphor, the far-fetched word that teases the reader and flatters him with the vanity of recognition—these must not obtrude upon that which alone mattered: that conviction should be carried home. So put it that your hearers shall not be aware of the medium; so put it that they shall not feel you, yet shall be possessed of what you say. If style be the measure of the man, here was evidence of that insistence upon fact and reason which was at once his weapon and his shield. Others too must speak of the fiery nature which showed itself when stirred, but which for the most part lay buried beneath an iron control; of that ascesis, which seemed so to increase that towards the end one wondered at times whether, like some Eastern sage, the body's grosser part had not been quite burnt away and mere spirit remained; of those quick flashes of indignation at injustice, pretence, or oppression. These and much more which would make the figure stand out more boldly against its background, I shall not try to portray:—I must leave them to others who can speak more intimately and with more right.

At the risk of which I spoke a moment ago, I mean to choose a single thread from all the rest, which I venture to believe leads to the heart and kernel of his thinking, and—at least at this present—to the best of his teaching. I mean what I shall describe as his hatred of the mechanization of life. This he carried far indeed; as to it he lived at odds with much of the movement of his time. In many modern contrivances which to most of us seem innocent acquisitions of mankind—the motor car for instance—he saw a significance hostile to life's deeper, truer values. If he compromised as to a very few, the exceptions only served to emphasize the consistency of his conviction that by far the greater part of what passes for improvement, and is greedily converted into necessity, is tawdry, vain and destructive of spiritual values. In addition, he also thought that the supposed efficiency with which these wants were supplied was illusory, even technologically. He had studied large industrial aggregations as few have

and was satisfied that long before consolidation reached its modern size, it began to go to pieces at the top. There was a much earlier limit to human ability; minds did not exist able to direct such manifold and intricate structures. But that was only an incident; the important matter was the inevitable effect of size upon the individual, even though it neither limited nor impaired efficiency. Allied with this was his attitude towards concentration of political power which appeared so often in what he said from the bench. Indeed, his determination to preserve the autonomy of the states—though it went along with an unflinching assertion of federal power in matters which he reckoned truly national—amounted almost to an obsession. Haphazard as they might be in origin, and even devoid of much present significance, the states were the only breakwater against the ever pounding surf which threatened to submerge the individual and destroy the only kind of society in which personality could survive.

As is the case with all our convictions, the foundation for all this lay in his vision of the Good Life. It is, I know, a little incongruous to quote from another's vision of the Good Life who was in most respects at the opposite pole of belief and feeling; but nevertheless there comes to my mind a scrap from the inscription above the gate of the Abbey of Thelême.

"Here enter you, pure, honest, faithful, true,

. . . . .

"Come, settle here a charitable faith,
"Which neighborly affection nourisheth."

He believed that there could be no true community save that built upon the personal acquaintance of each with each; by that alone could character and ability be rightly gauged; without that "neighborly affection" which would result no "faith" could be nourished, "charitable" or other. Only so could the latent richness which lurks in all of us come to flower. As the social group grows too large for mutual contact and appraisal, life quickly begins to lose

its flavor and its significance. Among multitudes relations must become standardized; to standardize is to generalize, and to generalize is to ignore all those authentic features which mark, and which indeed alone create, an individual. Not only is there no compensation for our losses, but most of our positive ills have directly resulted from great size. With it has indeed come the magic of modern communication and quick transport; but out of these has come the sinister apparatus of mass suggestion and mass production. Such devices, always tending more and more to reduce us to a common model, subject us—our hard-won immunity now gone—to epidemics of hallowed catchword and formula. The herd is regaining its ancient and evil primacy; civilization is being reversed, for it has consisted of exactly the opposite process of individualization—witness the history of law and morals. These many inventions are a step backward; they lull men into the belief that because they are severally less subject to violence, they are more safe; because they are more steadily fed and clothed, they are more secure from want; because their bodies are cleaner, their hearts are purer. It is an illusion; our security has actually diminished as our demands have become more exacting; our comforts we purchase at the cost of a softer fibre, a feebler will and an infantile suggestibility.

I am well aware of the reply to all this; it is on every tongue. "Do not talk to us," you say, "of the tiny city utopias of Plato or Aristotle; or of Jefferson with his dream of a society of hardy, self-sufficient freeholders, living in proud, honorable isolation, however circumscribed. Those days are gone forever, and they are well lost. The vast command over Nature which the last century gave to mankind and which is but a fragmentary earnest of the future, mankind will not forego. The conquest of disease, the elimination of drudgery, the freedom from famine, the enjoyment of comfort, yes even that most doubtful gift, the not too distant possession of a leisure we have not yet learned to use—on these, having once tasted them,

mankind will continue to insist. And, at least so far as we have gone, they appear to be conditioned upon the coöperation and organization of great numbers. Perhaps we may be able to keep and to increase our gains without working on so vast a scale; we do not know; show us and we may try; but for the present we prefer to keep along the road which has led us so far, and we will not lend an auspicious ear to jeremiads that we should retrace the steps which have brought us in sight of so glorious a consummation."

It is hard to see any answer to all this; the day has clearly gone forever of societies small enough for their members to have personal acquaintance with each other, and to find their station through the appraisal of those who have any first-hand knowledge of them. Publicity is an evil substitute, and the art of publicity is a black art; but it has come to stay, every year adds to its potency and to the finality of its judgments. The hand that rules the press, the radio, the screen and the far-spread magazine, rules the country; whether we like it or not, we must learn to accept it. And yet it is the power of reiterated suggestion and consecrated platitude that at this moment has brought our entire civilization to imminent peril of destruction. The individual is as helpless against it as the child is helpless against the formulas with which he is indoctrinated. Not only is it possible by these means to shape his tastes, his feelings, his desires and his hopes; but it is possible to convert him into a fanatical zealot, ready to torture and destroy and to suffer mutilation and death for an obscene faith, baseless in fact and morally monstrous. This, the vastest conflict with which mankind has ever been faced, whose outcome still remains undecided, in the end turns upon whether the individual can survive; upon whether the ultimate value shall be this wistful, cloudy, errant, You or I, or that Great Beast, Leviathan, that phantom conjured up as an ignis fatuus in our darkness and a scapegoat for our futility.

We Americans have at last chosen sides; we believe that if it may be idle to seek the Soul of Man outside Society,

it is certainly idle to seek Society outside the Soul of Man. We believe this to be the transcendent stake; we will not turn back; in the heavens we have seen the sign in which we shall conquer or die. But our faith will need again and again to be refreshed; and from the life we commemorate today we may gain refreshment. A great people does not go to its leaders for incantations or liturgies by which to propitiate fate or to cajole victory; it goes to them to peer into the recesses of its own soul, to lay bare its deepest desires; it goes to them as it goes to its poets and its seers. And for that reason it means little in what form this man's message may have been; only the substance of it counts. If I have read it aright, this was that substance. "You may build your Towers of Babel to the clouds; you may contrive ingeniously to circumvent Nature by devices beyond even the understanding of all but a handful; you may provide endless distractions to escape the tedium of your barren lives; you may rummage the whole planet for your ease and comfort. It shall avail you nothing; the more you struggle, the more deeply you will be enmeshed. Not until you have the courage to meet yourselves face to face; to take true account of what you find; to respect the sum of that account for itself and not for what it may bring you; deeply to believe that each of you is a holy vessel unique and irreplaceable; only then will you have taken the first steps along the path of Wisdom. Be content with nothing less; let not the heathen beguile you to their temples, or the Sirens with their songs. Lay up your treasure in the Heaven of your hearts, where moth and rust do not corrupt and thieves cannot break in and steal."

Address of

Mr. Paul A. Freund *

How shall one encompass in a few faltering words the life we have come to commemorate—a life so beautiful, so various, so fruitful? The achievements of Mr. Justice

*Mr. Freund assisted Justice Brandeis as law clerk from September 1932 until September 1933.

Brandeis were so many, his knowledge so profound, his resourcefulness so formidable, that it would be easy to mistake these for the measure of the man. These were, indeed, the marks of a dedicated life; but it was the dedication that gave it greatness. To realize the promise of America through law—that men might share to the limit of their capacity in the American adventure—was the end to which he devoted all his talents and his energies. In him the lawyer's genius was dedicated to the prophet's vision, and the fusion produced a magnificent weapon for righteousness. In his hand the sword was fringed with fire.

Thus dedicated, his life had the simplicity of greatness. All his labors were given coherence and direction and moral intensity by being made to serve two fundamental beliefs: That responsibility is the developer of men, and that excessive power is the great corruptor. "Care is taken," he liked to quote from the German, "that the trees do not scrape the skies." He believed with Lord Acton that all power corrupts and that great power corrupts greatly. He believed with the Stoic philosophers that no man is so like unto himself as each is like to all. For him the democratic faith was not, however, simply dogma. Partly it was parental inheritance from the Pilgrims of '48; but above all it was confirmed by the rich experience of life. Convinced as he was that ordinary men have great capacity for moral and intellectual growth through the sharing of responsibility, and that the limits of capacity in even the best of men are soon reached, the democratic faith was for him grounded in urgent necessity no less than in moral duty.

This faith transformed his tireless mastery of detail into the pursuit of an ideal. At the Bar, he brought his great gifts of analysis, of painstaking study, and of constructive statesmanship to the service of his belief in the common man. In the field of labor relations, he devised a plan of industrial peace which called for continuous

collaboration between employer and labor, a continuous sharing in the responsibilities of management. In the field of finance, he insisted on the limitations of mortal understanding in endeavoring from the vantage point of the exchanges to direct giant industrial enterprises. Perhaps his proudest achievement while at the Bar was the establishment of the system of savings bank industrial life insurance in Massachusetts. This system, as he envisaged it, would not simply give added security and so additional freedom to the workers; more than that, it would be a demonstration of what could be accomplished in an undertaking of modest size by ordinary men working without the prestige of position that has come to those who manage large aggregations of other people's money.

All his views were grounded in the same distrust of bigness, the same sense of urgency that the energies of all men should be released and utilized. He was profoundly attached to the principle of Federalism. He lost no opportunity to advise young lawyers that the United States was not Wall Street or even Washington; that if one went there on a tour of duty one should not overstay his time; that talents and training should be taken back to the home community.

On the bench his sense of the fallibility of judgment did not leave him. It remained as a guiding canon in the decision of constitutional cases. He would not be seduced by the attractions of opportunism. His own integrity, and his faith in the integrity of traditions, were too strong. When the Court was prepared, as in the first Tennessee Valley Authority case, to announce constitutional doctrine which had his full approval, he none the less raised his voice in protest at what he regarded as an unwarranted anticipation of the constitutional question. No inconsiderable part of his labors on the Court went into the exacting art of staying the judicial hand lest it decide more than was required by the case at bar. In the one or two instances in which it may be suggested that he departed from his canon of judicial parsimony—instances where he took occasion to cast constitutional doubt on declaratory

judgments and on a general federal common law—it is worth observing that the departures were in the interest of confining the powers of the federal courts. No one was more sensitive than he to the limitations on the function of the Court; and yet no one succeeded more notably than he in combining the role of judge and teacher. One remembers the preparation of the first opinion of a Term, which had finally passed what seemed to be the ultimate revision, and the Justice's disquieting observation: "The opinion is now convincing, but what can we do"—he was always excessively generous in the use of the plural—"but what can we do to make it more instructive?"

His conception of the office to which he had been called is revealed by glimpses into what only seem to be the small incidents of his character, for in the perfect harmony of his life nothing that became a part of it could be trivial. He could never quite reconcile himself to the grandeur of the Court's new edifice, lest the power of the Court might in some measure come to rest on the majesty of office rather than on the inward strength of the appeal to reason. So dominant was his devotion to reason, that his opinions attempted even to satisfy unsuccessful counsel. No relevant argument was to pass unnoticed, and if a petition for rehearing was filed, the Justice felt a sense of failure,—though I never quite understood why the intransigence of the advocate should be a fault attributed to the judge. No one who ever heard the Justice deliver a major opinion from the bench could fail to understand the symbolism, and more than symbolism, of the occasion: the patient earnestness with which he explained to the small assemblage the facts of the case and the reasons for the decision, as if in acknowledgment that the Court is a lawgiver only as its decrees find rational acceptance, as if in the hope that none might go away unpersuaded.

Those who had an opportunity to observe his judicial labors would wish to speak, I am sure, of his method of work. Every case that fell to him for opinion gave fresh occasion for the application of his principle that knowledge must precede understanding, and understanding

should precede judging. Unremitting toil was taken as a matter of course, some of it performed in those dim hours of which his secretaries—the frailty of youthful nature being what it is—could speak, I suspect, only circumstantially. It is no secret that his opinions went through dozens, even scores, of painstaking revisions. If they have a quality that is monumental and massive, it is only because they were granite-hewn and sculptured with infinite care. Those who shared in some small way in this undertaking were given an unforgettable experience of wholesouled devotion to a great calling.

"All can grow the flower now,
For all have got the seed."

Those who knew him would say these things, but they would speak finally and above all of his moral intensity, his spiritual greatness. His was the quality that by a word could lift the heart, by a nod enkindle the spirit. His moral judgments were stern, and they probed deep. To him unemployment was "the most sinful waste." The persecution of helpless people brought him not only the common sense of grief, but even more strongly a sense of shame at the slowness with which the nations of the earth made protest. He was not a sentimentalist. He could not be swayed from a course he believed morally right by being told that it would involve unfortunate hardships. He realized that victories cannot be won without a struggle and that a price must be paid for every advance.

In a life fraught with more than one man's share of sharp encounters, his faith in the understanding and morality of the multitude gave him serenity. He never yielded to despair, and to gloom only when he found too many men complacent. Moral obtuseness and faintness of heart were the enemies to be dreaded. So it was that when he was asked, in the dark days of 1933, whether he believed the worst was over, he could answer almost cheerfully that the worst had happened before 1929. He had

his own formula for success: brains, rectitude, singleness of purpose, and time. To flagging spirits he would hold these up as a banner that could never be struck.

It is fitting that we pause at this moment in the world's history to contemplate his life and draw strength from his spirit. For was it not of such a spirit that the poet of another war has spoken: "The pride of the United States leaves the wealth and finesse of the cities and all returns of commerce and agriculture and all the magnitude of geography or shows of exterior victory to enjoy the breed of fullsized men or one fullsized man unconquerable and simple."

Address of
Senator Norris

The life of Justice Louis D. Brandeis will always be a shining star in the broad firmament of American jurisprudence. He left his mark upon the history of our country. The work he did, and the life he lived, will be an inspiration to those who have never seen his face nor heard his voice. His love for his fellowmen distinctly marks him as one whose heart and great soul went out to alleviate the suffering of the unfortunate, to defend the rights of the downtrodden and the oppressed, and to bring happiness and joy to firesides that had been barred from the benefit of human rights. His dissenting opinions have become the law of the land.

Because he defended the weak and the unfortunate and because he gave his great energies and abilities in the behalf of those who had suffered injustice at the hands of powerful influences, he was marked for destruction by men who cared more for the almighty dollar than they did for human justice. He was assailed as but few men in his day were assailed—he was condemned—he was ridiculed—he was charged with irregularities and misconduct little short of crime. So powerful was this opposition that, at the beginning of his career as a jurist, many honest and conscientious men were convinced that Justice Brandeis was dishonest, unprofessional, and unworthy to

sit as a justice upon the highest court of the land. His nomination by President Wilson to become a Justice of the Supreme Court was a signal for special interests, politically and financially powerful, to do everything within their power to injure this man in an effort to convince the country that he was unfit for this position of honor, and to break down one of the noblest souls that ever lived. It was commonly said of him that he did more as a lawyer to help the poor to secure their rights than any other living man. He did more professional work for nothing than he did for pay; and yet, notwithstanding this, and notwithstanding hands that were clean, lips that were pure, and a soul that was righteous, he was condemned by some of the most powerful influences—political and financial—which ever existed in our country.

When his nomination for Justice of the Supreme Court came up for confirmation in the Senate, one of the bitterest fights that was ever waged in that body took place. In those days, action of the Senate on confirmation was held in executive session; but some of the leading statesmen of the day, some of the ablest men in that great parliamentary body, made a bitter, unreasonable, and unconscionable attack upon this man. Some of these men were moved into action because of Justice Brandeis' religion; but I have always thought the great bulk of this opposition, that which was the most powerful and made the greatest effort to defeat his confirmation, came from a combination of financial interests which wanted to punish an able man who had often thwarted them in their evil ways, and who feared, if he were given this great place of honor, he might still frustrate their efforts to acquire, by questionable means, greater financial power.

Many years after Justice Brandeis went on the Supreme Court, I had a visit with a Senator who had retired from the Senate and was on the federal Court of Appeals. He was then more familiar with Justice Brandeis' work—he had seen the workings of his mind, his heart, and his soul in defense of the downtrodden and the oppressed—he had

become convinced of the ignoble fight that had been made to prevent his confirmation, and he told me in that conversation that one of the great sorrows of his life, one of the sad things connected with his Senatorial career, was that he had voted against the confirmation of Mr. Brandeis to become an Associate Justice of the Supreme Court. That blot upon his otherwise excellent record remained upon his conscience, and daily reminded him of what he thought was the greatest mistake he had made in his public life.

One of the charges against Justice Brandeis was that in his professional career he had taken the side of an exploited public in utility cases—that he had fought great transportation companies, and that he had been particularly active in insurance controversies—always in defense of the common man. He had been active in behalf of social and labor legislation, and it was argued that one who had been thus engaged would not be a safe member of the Supreme Court. He was fought also by members of his own profession—six Presidents of the American Bar Association, and a former President of the United States asked the Judiciary Committee of the Senate to reject this nomination. His reputation and his character were assailed, and his professional career was condemned, by these men. Leaders from all over the country were induced in one way or another to condemn him and ask that confirmation be denied. Newspapers of great reputation participated in the attack upon him. The Senators from his own home state of Massachusetts were bitterly opposed to him and lent their great influence to aid in the fight against him.

One great newspaper said there was "only one redeeming feature in the nomination—that it will assist to bury Mr. Wilson at the next Presidential election." They charged that the appointment was brought about by a desire on the part of the President to obtain the Jewish vote. One great newspaper in New York City said that the appointment was "an insult to the court." Leading business and banking firms united in opposing his confirmation. Mr. Brandeis was charged with being a radi-

cal, a dreamer, and one who was impractical in his ideas and had socialistic tendencies. Above all, he was charged with not having the necessary "judicial temperament."

A short time before the vote was taken in the Senate, the Chairman of the Judiciary Committee invited the President to state the reasons which had actuated him in nominating Mr. Brandeis. The reply of the President was a remarkable document. The President said one reason for his appointment was that he knew him personally and that he knew of his great work in behalf of oppressed people. He said he was moved by Mr. Brandeis' learning and ability and by the conduct of his life in favor of righteousness, of justice, and of humanity. He stated that the charges made against Mr. Brandeis were unfounded and unworthy of consideration. He said these charges threw more light upon the character and motives of those with whom they originated than they did upon the qualifications of Mr. Brandeis. He claimed that he had personally investigated and found that they were brought about by hatred against Mr. Brandeis because he had refused to be subservient to them in the promotion of their own selfish interests. The President stated that Mr. Brandeis "is a friend of all just men and a lover of the right; and he knows more than how to talk about the right—he knows how to set it forward in the face of its enemies. I knew from direct personal knowledge of the man what I was doing when I named him for the highest and most responsible tribunal of the nation.

"Of his extraordinary ability as a lawyer, no man who is competent to judge can speak with anything but the highest admiration. You will remember that in the opinion of the late Chief Justice Fuller, he was the ablest man who ever appeared before the Supreme Court of the United States. 'He is also,' the Chief Justice added, 'absolutely fearless in the discharge of his duties.'

"Those who have resorted to him for assistance in settling great industrial disputes can testify to his fairness and love of justice. In the troublesome controversies

between the garment workers and manufacturers of New York City, for example, he gave a truly remarkable proof of his judicial temperament and had what must have been the great satisfaction of rendering decisions which both sides were willing to accept as disinterested and even-handed."

Farther on in this letter, President Wilson said:

"It was chiefly under his [Brandeis'] guidance and through his efforts that legislation was secured in Massachusetts which authorized savings banks to issue insurance policies for small sums at much reduced rates. And some gentlemen who tried very hard to obtain control by the Boston Elevated Railway Co. of the subways of the city for a period of 99 years can probably testify as to his ability as the people's advocate when public interests call for an effective champion. He rendered those services without compensation and earned, whether he got it or not, the gratitude of every citizen of the State and city he served."

Justice Brandeis was confirmed by almost a strict party vote. He obtained only one vote from New England. All but three of the Republicans present in the Senate voted against his confirmation. It is difficult to understand how many of these able and eminent Senators were induced to vote against Mr. Brandeis' confirmation. It is almost impossible to comprehend how a member of the United States Senate could be influenced by the methods which were pursued in that fight; and yet the fact remains that this great fight was very powerful and that in some way, difficult to understand and perhaps impossible to comprehend, men of otherwise broad stature, with broad ideas and great ability, were induced to cast their votes and use their powerful influences against this confirmation. It is difficult to comprehend how such men could be moved officially by such a narrow-minded partisan view of the question.

Notwithstanding this bitterness, Justice Brandeis remained silent and, to all outward appearances, unmoved.

It is a great tribute to his judicial temperament that he could remain silent, but Justice Brandeis did remain silent—to all appearances he was unmoved and he kept on in his usual method of living, doing his duty as he saw it, without fear and with a courage that is remarkable in American history. His great abilities as a jurist began to shine. He began to write many dissenting opinions, and his reasoning, courageous and unflinching, was convincing. At no time in his public career is there any indication that he held in his heart revenge or hatred against those who had so mercilessly attacked him on his professional and private life. Gradually the reasoning of his dissenting opinions began to sink deeper and deeper into the minds of lawyers, philosophers, and students of government, and, when he left the bench 23 years later, he took with him the loving respect of nearly all men whose good opinion would be highly cherished by anyone. He retired from the bench with tumults of applause from practically all his countrymen, including many who had fought him so bitterly when he was first appointed.

At his death, when the Supreme Court met on October 6, 1941, the Chief Justice, after announcing the death of Justice Brandeis, said:

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

The retired Chief Justice issued a statement in which he said:

"He [Brandeis] brought his wide experience and his extraordinary acumen to the service of the public interest and, in a judicial career of the highest distinc-

tion, left his permanent impression upon our national jurisprudence."

The President of the United States, Franklin D. Roosevelt, in writing to Mrs. Brandeis, used this language:

"The whole nation will bow in reverence to the memory of one whose life in the law, both as advocate and Judge, was guided by the finest attributes of mind and heart and soul.

"In his passing American jurisprudence has lost one whose years, whose wisdom and whose broad spirit of humanism made him a tower of strength."

From all over the country, the death of Justice Brandeis brought comments from men in high official positions. One United States Senator said:

"Louis D. Brandeis spoke for the inarticulate masses in the United States. His advocacy of liberal economic policy won the esteem, gratitude, and the affection of the masses. He has written in immortal words a record of achievement."

How in the light of history these words ring out, as it were, in answer to the bitter criticism made twenty-three years before. These words, now acquiesced in by unanimous opinion, pay a just and deserved tribute to the memory of Justice Brandeis, because everyone knows they are absolutely true.

Similar comments came from the press all over the country. Everyone, rich and poor, conservative and liberal, men of all religions, seemed to realize that humanity had lost a friend. The poor knew that the great advocate of human liberty who had defended them for many years, and had administered justice to them for nearly twenty-three years, had passed into eternal slumber.

The life of Justice Brandeis has been a guiding star and an inspiration to untold numbers of his countrymen, who are happier and who are better citizens, better fathers and husbands, because Justice Brandeis lived. His words of cheer for the downtrodden, and his words of hope for

the afflicted, will continue to bring new courage to all struggling mortals. Millions of honest and upright men and women all over our land will live better lives—will be better citizens and do a greater part in the struggle to upbuild humanity and make their lives better and purer because of the inspiration which has come to them from the life and work of Justice Brandeis. His life shines as a beacon light in the world of hope. His name is the embodiment of a philosophy which uplifts and guides struggling mortals along the pathway of life towards an ideal where justice, tempered with mercy, reigns supreme.

A motion that a copy of the Resolutions be transmitted to the family of Mr. Justice Brandeis was adopted.

The meeting was adjourned.

SUPREME COURT OF THE UNITED STATES.

MONDAY, DECEMBER 21, 1942.

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

The HONORABLE CALVERT MAGRUDER, United States Circuit Judge, addressed the Court as follows:

May it please the Court:

The members of the Bar of the Supreme Court met earlier this morning to do honor to the memory of Mr. Justice Brandeis. Fitting addresses were made by Judge Learned Hand, Mr. Paul Freund and Senator Norris, after which the meeting voted certain resolutions which I am directed to present to the Court.

"RESOLUTIONS.

"Mr. Justice Brandeis, having retired on February 13, 1939, from regular active service on the bench, died in Washington, D. C., on October 5, 1941, shortly before his eighty-fifth birthday. Thus, in the fullness of time, ended an august career. The members of the Bar have met in the Supreme Court Building on December 21, 1942, to commemorate him as one of the great figures of our profession and of the country's history, to survey his accomplishment, and, in the contemplation of a dedicated life, to fortify our courage and faith in the task of achieving the gracious civilization for which he so mightily strove.

"Louis Dembitz Brandeis was born in Louisville, Ky., on November 13, 1856. His parents, Adolph and Fredericka Dembitz Brandeis, cultivated Bohemian Jews, and his scholarly uncle, Lewis Dembitz, had come to this

country a few years before, in quest of liberty. The son from his early youth was thus imbued with an active devotion to free institutions and to the processes of democracy as a means of enhancing the dignity and releasing the potentialities of the common man. After studying in the public schools of Louisville, he went abroad, and for two years attended the Annen Realschule in Dresden. During this period, there was some suggestion that he prepare for a medical or academic career in Europe, but he held to his resolve to return to America and to study law.

"Without a college degree he entered the Harvard Law School in 1875, at the age of eighteen. His father's fortune having been lost in the panic of 1873, Brandeis earned his way by tutoring fellow students. He made a preëminent scholastic record at the law school. Though not yet of the required age of twenty-one, he was given his LL. B. degree in 1877 by special vote of the Harvard Corporation. His intellectual distinction and prepossessing manner opened to him all gates in Boston and Cambridge. At this time he met Oliver Wendell Holmes. The acquaintanceship was destined to grow into an intimate and tender friendship, through a long period of distinguished service of the two as colleagues on the Supreme Court of the United States.

"After a further year of graduate study in Cambridge, Brandeis was admitted to the bar and practiced for some months in St. Louis, Mo. In 1879 he returned to Boston and entered into partnership with his classmate Samuel D. Warren under the firm name of Warren & Brandeis. Warren retired from practice in 1893, other partners were taken in, and in 1897 the name was changed to Brandeis, Dunbar & Nutter. Brandeis remained in this firm until 1916, when he was appointed to the bench.

"In his early years of practice in Boston, perhaps his major outside interest was in the growth and development of the Harvard Law School. He helped James Bradley Thayer collect materials for his notable course on consti-

tutional law, and procured funds which enabled the School to appoint Holmes to the faculty. In 1882–83 Brandeis taught the course on evidence, but he declined an assistant professorship. In 1886 he was the prime mover in the formation of the Harvard Law School Association, and for many years thereafter he served as its secretary. He rendered valuable assistance, financial and other, in the founding of the Harvard Law Review in 1886–87, the first of the academic periodicals which have become so lively and significant a part of legal education, not only for law students, but also for the bench and bar. His pioneering article on 'The Right to Privacy' (as co-author with his partner Warren) appeared in an early issue of the Review. In recognition of his services, Harvard University awarded him the honorary degree of Master of Arts in 1891.

"Though not in chronological order, it is appropriate at this point to mention another educational interest with which he was much preoccupied in later years. In 1924 he formulated, and in succeeding years gave wise guidance to, a broad-visioned program for the upbuilding of the law school and the general library of the University of Louisville, in the city of his birth. His thesis was that to become great 'a university must express the people whom it serves, and must express the people and the community at their best.' His generous gifts of money constituted the least important part of his contribution. He gave painstaking thought to the educational problems involved, laid the broad foundations, and sketched the lines of sound development. In the pamphlet 'Mr. Justice Brandeis and the University of Louisville,' Bernard Flexner tells the story of this great enterprise, which the Justice initiated and followed through with characteristic idealism, imagination, and scrupulous attention to detail. This project was all of a piece with one of his firmest convictions: that the strength of America lies in diversity, not uniformity; that local cultures and traditions should be preserved and fostered, a sense of local responsibility quickened, local leadership evoked and encouraged.

"By 1890, Brandeis had built up a varied and lucrative practice and had established himself as one of the leaders of the Boston bar. He steadfastly maintained the independent standing of the profession and never hesitated to impress upon his clients the obligations that go with power. It was characteristic of him that, whatever problem he dealt with, his concern went beyond the winning of a victory for his client. With intense concentration he mastered the facts, however intricate; then shrewdly appraised their social significance; and finally, with technical skill, inventiveness, and imagination, and with objective consideration of diverse conflicting interests, he devised the means of long-range adjustment or solution.

"In conscientious performance of his duty as a citizen, he found time more and more to devote his talents, without retainer, to various public causes. Thus he played a major part in the fight to preserve the Boston municipal subway system, in devising and establishing the Boston sliding-scale gas system, and in opposing the New Haven Railroad's monopoly of transportation in New England. His investigation of the abuses and tragic inadequacies of so-called industrial insurance led him to draft and procure the adoption by the Massachusetts Legislature of the savings bank life insurance plan, which, under his watchful guidance, became established on a firm foundation. In these provocative activities, he did not escape the shafts of criticism and personal abuse; notwithstanding this, he calmly held his ground, confident of ultimate vindication. He was sometimes called a crusader, and so he was. But he had qualities too often lacking in the crusader—a sure grasp of concrete fact, a constructive mind and, also, patience. He never tired of urging the steady improvement of society by 'small reforms'—steps forward which were of intrinsic importance, but which did not alter the basic pattern of our institutions, nor overtax the capacities and imagination of men.

"The country is vastly indebted to him for his creative work in the field of labor relations, in dispelling misunder-

standings between management and labor, and in making collective bargaining an effective instrument for industrial peace. He successfully arbitrated or conciliated many labor disputes. In 1910 he was arbiter of a serious strike in the New York City garment trade. Not content with settling the immediate dispute, he devised the famous 'protocol' for the permanent government of labor relations in the industry, with provision for the preferential union shop, for a Joint Board of Sanitary Control, and for a continuing Board of Arbitration composed of representatives of the public as well as of the employers and the union. The procedures thus developed and successfully tested served as a model in other industries. For several years he served as impartial chairman of this board of arbitration.

"Recognizing his grasp of intricate economic problems, the Interstate Commerce Commission engaged him in 1913 as special counsel to develop the facts relevant to the application of the Eastern railroads for permission to put into effect a horizontal 5-percent increase of freight rates.

"In a series of papers and public addresses, he challenged the abuses of financial manipulation, and pointed out the dangers and diminishing efficiency of undue concentration of financial power. These, collected in the book 'Other People's Money,' exemplify extraordinary powers of analysis and lucid exposition, and state forcefully some of the dominant ideas of his life—ideas which, as intellectual working tools of great power, have had profound influence on thinking and on events. They are among the major contributions to American thought of the last half century, and have grown into our culture as the statement and fulfillment of some of its richest and most characteristic themes.

"One of the most significant activities of his career at the bar was his advocacy of the constitutionality of state minimum wage and maximum hour legislation. With in-

telligent utilization of the doctrine of judicial notice, his unconventional type of legal brief went beyond the citation of legal precedent and set forth the social and economic background out of which the need for the legislation arose, together with all relevant scientific material, expert opinion, and experience in other states and lands in dealing with comparable problems. Thus the 'Brandeis brief,' as it came to be called, lifted the issue of due process of law under the Fifth and Fourteenth Amendments out of the realm of the abstract and placed it in its proper setting of contemporary fact.

"In 1914–16 Brandeis was chairman of the Provisional Committee for General Zionist Affairs, and thereafter remained in the forefront of the movement to develop the Jewish National Home in Palestine. In this great creative activity, he saw the fulfillment of a prophetic vision, the building of a haven of refuge against storms of intolerance and oppression, and the opportunity to realize his most cherished ideals of democracy and social justice. In the document known as the Zeeland Memorandum, drafted by him in 1920 as a statement of proposed Zionist policy, there is exhibited in striking fashion his insight, his humanity, his practical idealism, his grasp of detail, his insistence upon sound financial management and efficient organization.

"By appointment of President Wilson, Brandeis took his seat as Associate Justice of the Supreme Court on June 5, 1916. Its fortunate outcome is all that will be remembered of the long and bitter fight over his confirmation by the Senate. Though he was one of the few men who came to the Court without having previously held judicial or other public office, his career at the bar and experience in large affairs constituted a magnificent preparation for the tasks of judicial statecraft. In 528 opinions during twenty-three years of service, he found occasion to deal with all the issues, large and small, which come before the Court—problems of federalism, jurisdiction and venue,

administrative law, patents and copyrights, bankruptcy, finance, public utilities, monopoly and restraint of trade, labor relations, civil rights, and the law of the public domain. The solid stuff of his opinions is set forth to advantage by a simple, straightforward, lucid style, without rhetorical flourish. Noteworthy illustration of his judicial work may be found in his opinions on the economic and constitutional problems of public utility valuation, and in his opinions on the rights of free speech and other civil liberties, in peace and in war, which have won high place among the best of our Anglo-American legal literature. To borrow the words of Chief Justice Hughes, Mr. Justice Brandeis was 'the master of both microscope and telescope. Nothing of importance, however minute, escapes his microscopic examination of every problem, and, through his powerful telescopic lens, his mental vision embraces distant scenes ranging far beyond the familiar worlds of conventional thinking.' How the future will regard his judicial work it is not for us to say, but this much is certain: from our contemporary viewpoint, Mr. Justice Brandeis stands with the half dozen giants of our law, wise, strong, and good.

"In his own person, with the ready coöperation of his wife and children, Mr. Justice Brandeis practiced his austere preachment to others of 'simple living, high thinking, and hard work.' His marriage in 1891 to Alice Goldmark gave him warm intellectual comradeship and a happy home, which sustained and fortified him throughout a long and vigorous career. The serenity of spirit which he achieved, and retained to the last, was the due reward of his dedication of great gifts to great purposes. His personal influence on young people was remarkable; in an age of cynicism and materialism, they learned from him that life had not lost its spiritual meaning. Countless men and women, of all ages and walks of life, came to him as to a sage and counsellor and went away with lifted hearts and a new insight.

"Wherefore, it is

"*Resolved,* That we, the Bar of the Supreme Court of the United States, express our grievous sense of loss upon the death of Mr. Justice Brandeis, that we acknowledge our professional debt to him for his exemplification in word and deed of so lofty a conception of the lawyer's calling, and that we give grateful recognition to the enduring contributions made by him to the enrichment of our national life: It is further

"*Resolved,* That the Chairman of our Committee on Resolutions be directed to present these resolutions to the Court, with the prayer that they be embodied in its permanent records."

That, continued Judge Magruder, concludes the reading of the resolutions. As directed by the Bar, I now move that these resolutions be received by the Court and made a part of its permanent records.

Mr. Attorney General Biddle addressed the Court, as follows:

Mr. Chief Justice and Members of the Court:

We are gathered today to honor the memory of a great American—Louis D. Brandeis. In paying our tribute to that memory, we speak for the Bar and the Bench. Yet we speak too not only as lawyers, gathered to record his extraordinary contribution to the profession in which we have spent our lives, but as Americans, joined now for a moment that we may try to express what he did for our country. It is timely that at this moment we should think of Mr. Justice Brandeis in this broader sense; for those inherent values that he held dear are being desperately defended throughout the world. As we fight today we are redefining among ourselves, and among those with whom we are allied, the meaning and the reality of those values. If this war touches us more deeply than any war, it is to the extent that we feel the essentials of our freedom beyond the sounds of words that we and others have spoken. To

ourselves we must, day by bitter day, rediscover and reaffirm what constitutes our old American faith.

Brandeis spent his life in such a continued reaffirmation. I suggest, Mr. Chief Justice, that here is a very rare and very moving thing to remember; to remember again in the years that will come after this war, terrible years, or years of hope and growth, according as we shape them. Today, again, men are dying for the faith they cherish; Brandeis lived for that same faith, quietly dedicated his life to the service of his country. To be sure, he was too fundamentally simple to think of anything he did as a dedication. But, as much as anyone I have ever known, he was innately selfless. Nor was it the selflessness of a man who held off the world. Brandeis lived intensely in his world—a world where the economic struggle for power, the wretched inequalities between comfort and suffering, the failure of the accepted democratic processes to give scope to the needs of a new industrial era, enlisted his heart as well as his mind.

His preparation for his twenty-three years on this Court thus transcended his wide and varied experience in practice, which had brought him to the front of his profession. But in the practice the same qualities stood forth: there was the battle for cheap insurance, which led to the adoption of the savings banks insurance legislation in Massachusetts; the successful campaign for lower gas rates in Boston; the Ballinger-Pinchot investigation, which resulted in centering public attention on the vital need of immediate and effective conservation programs; his chairmanship of the board of arbitration in the needle trades; his representation of the interests of consumers and workmen in many fields.

Although he was frugal and ascetic, living a life of steady concentration and immense work on the problems before him, his singleness of purpose never limited the friendly sympathy of his nature, or the curiosity of his mind. He was without prejudices, as he was without clichés. The asceticism and his fundamentally moral

outlook gave him, in the eyes of many of his friends, the quality of a saint. Mr. Justice Holmes felt this reverence for his younger associate. "Whenever he left my house," Holmes wrote of him in 1932, "I was likely to say to my wife, 'There goes a really good man . . .' In the moments of discouragement that we all pass through, he always has had the happy word that lifts up one's heart. It came from knowledge, experience, courage, and the high way in which he always has taken life."

Yet, Justice Brandeis had none of the mystic essence which we associate with sainthood. He was practical, realistic, patient, persistent. He brought the mind of a trained social scientist to the analysis of legal opinion and decision, a method which is beautifully illustrated in his brief in support of the Oregon law fixing a ten-hour day for women wage earners. Three pages argue the law; the other ninety-seven diagnose factory conditions and their effect on individual workers and the public health. This approach has had a profound influence on the method of presenting arguments in cases involving social legislation, and, I suggest, on the outlook of courts to social problems. That judges today are more realistic, less given to the assumption of accepted dogmas, more mature and more curious-minded, is largely due to the influences of Brandeis. "What we must do in America," he once said, a few years before he was made a judge, "is not to attack our judges but to educate them. All judges should be made to feel, as many judges already do, that the things needed to protect liberty are radically different from what they were fifty years back . . . In the past the courts have reached their conclusions largely deductively from preconceived notions and precedents. The method I have tried to employ in arguing cases before them has been inductive, reasoning from the facts."

I hesitate to suggest that Brandeis had a philosophy of life, for I do not think of him primarily as a philosopher. Do not philosophers deal with generalities that take shapes of the universal and glitter above and below the

realm of the restless particular? Unlike Mr. Justice Holmes, who, distrustful though he was of the essences, yet felt that the nature of man was to indulge in their formulation, Brandeis, clear in his first principles, was truly empirical in his preoccupations. While Holmes' doubts were philosophic, Brandeis' were scientific. "I have no general philosophy," he said. "All my life I have thought only in connection with the facts that came before me . . . We need, not so much reason, as to see and understand facts and conditions." He believed profoundly that behind every argument is someone's ignorance, and that disputes generally arise from misunderstanding. President Wilson knew this when, after the hearings on the Justice's appointment which had lasted for three months, he wrote Senator Culbertson, the chairman of the Judiciary Committee: "I cannot speak too highly of his impartial, impersonal, orderly, and constructive mind, his rare analytical powers, his deep human sympathy, his profound acquaintance with the historical roots of our institutions . . . his knowledge of economic conditions and the way they bear upon the masses of the people."

Mr. Justice Brandeis' fundamental thought, running through the whole frame and direction of his efforts, was always of man—"Man (to quote Alfred Lief) struggling with oppressive forces in society. Man's right to full development. The infinite possibilities in human creativeness. Man's limitations, too. But especially the breadth of national achievement which can come when energies are released." He voiced this approach many times, never more profoundly than in his testimony before the Commission on Industrial Relations, in 1914, more remarkable for having been delivered extemporaneously. "We must," he told the Committee, "bear in mind all the time that, however much we may desire material improvement and must desire it for the comfort of the individual, the United States is a democracy and that we must have, above all things, men. It is the development of man-

hood to which any industrial and social system should be directed."

That, I believe, was the chief reason why he was so deeply concerned with the growth of huge corporations as presenting a grave danger to American Democracy by what he called "capitalizing free Americans." In his dissenting opinion in *Liggett* v. *Lee,* he spoke of the "widespread belief . . . that by the control which the few have exerted through giant corporations, individual initiative and effort are being paralyzed, creative power impaired, and human happiness lessened; that the true prosperity of our past came not from big business, but through the courage, the energy, and the resourcefulness of small men . . ."

His belief, therefore, in preserving our fundamental rights protected by the Constitution, was no matter of individual preference, however strongly felt; a free climate of thought is indispensable for the development of individual men. "Those who won our independence," he wrote in a concurring opinion in *Whitney* v. *California,* "believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness, and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly, discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government."

He believed in seeking "for betterment within the broad lines of existing institutions," as he once wrote Robert W. Bruère; for progress is necessarily slow, and remedies nec-

essarily tentative. "The development of the individual is," he added, "both a necessary means and the end sought. For our objective is the making of men and women who shall be free, self-respecting members of a democracy—and who shall be worthy of respect . . . The great developer is responsibility."

He believed, never doubting, in democracy. But he knew it to be a serious undertaking which "substitutes self-restraint for external restraint." He knew also that democracy "demands continuous sacrifice by the individual and more exigent obedience to the moral law than any other form of government." Its success may proceed from the individual, and "his development is attained mainly in the process of common living."

And so Brandeis believed that every man in this country should have an actual opportunity, and not only what he termed "a paper opportunity." He was convinced that industrial unrest would not be removed until the worker was given, through some method, a share in the management and responsibility of the business. The social justice for which we are striving was, for him, not the end but a necessary incident of our democracy. The end is the development of the people by self-government in the fullest sense, which involves industrial as well as political democracy.

Thus holding that democracy was based on the theory that men were entitled to the pursuit of life and of happiness, and that equal opportunity advances civilization, he saw the threat to this way of life from the opposing view that one race was superior to the other. Less than a year after the first World War had begun, he expressed this fundamental difference of conception, speaking before the New Century Club in Boston, twenty-seven years ago: "America," he said, "dedicated to liberty and the brotherhood of man, rejected heretofore the arrogant claim that one European race is superior to another. America has believed that each race had something of peculiar value which it could contribute to the attainment of those

high ideals for which it is striving. America has believed that in differentiation, not in uniformity, lies the path of progress. Acting on this belief, it has advanced human happiness and it has prospered."

Today Brandeis takes his place in the moving stream of history as a great American, whose life work brought nearer to fulfillment the essentially American belief in equality of opportunity and individual freedom—the dream that Jefferson, whom Brandeis once referred to as the "first civilized American," had cherished, and Lincoln, sprung from such different roots. Brandeis is in their tradition, the American tradition of those who affirm the integrity of men and women.

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

Response of the CHIEF JUSTICE:

Mr. Attorney General, you are right in speaking of Justice Brandeis as a great American. It is because he was a great American, devoted to the law, using the lawyer's learning with skill, resourcefulness and, above all, with wisdom, that he was a great lawyer and lawgiver. We think of him as a great American because of his abiding faith in the principles of liberty, justice, and equality of opportunity which were proclaimed by those characteristically American documents, the first Virginia Bill of Rights, the Declaration of Independence, and the Constitution. His Americanism contemplated a society in which our continued adherence to those principles of government should, in all the vicissitudes of our history, bring to every man the opportunity to live the good and efficient life.

For him those principles were not concerned alone with the tyrannies of eighteenth century government which gave them birth. They were equally to be taken as

guaranties that the social and economic injustices which attend the development of a dynamic and increasingly complex society should not prevail. In his mind the phrase "law and order" meant more than the suppression of lawless violence by government. It signified a state of society to be achieved by a new and better understanding of social values, and by just laws which should check those social forces that in a changing order tend to withhold from men freedom and equality of opportunity. Only as we are aware of his passion for freedom and justice for all men, and of the means by which he translated it into action through a profound understanding of both the function of law in a changing world and the techniques by which law may be adapted to the needs of a free society, do we gain insight into the true sources of his power and influence as a judge.

Most progress in the law has been won by those who have had the vision to perceive the necessity for bringing under its protection or suitable control the forces which, for good or evil, affect the good order and freedom of society, and who, seeing, have possessed the craftsmanship with which to make the necessary adjustment of old laws to new needs. Progress in the law has never been easy or swift. Apart from the legitimate demand for continuity in a system of law founded on precedent, we have sometimes been slow to perceive those resemblances which call for the extension of old precedents to new facts and events, and those differences of the new from the old which make necessary the qualification of precedent or the development of new doctrine.

Some centuries passed before judges and legislators were persuaded that the law should take notice of fraud or deceit as well as robbery and larceny, and before they recognized that if the law compels men to perform contracts it should equally impose an obligation to repay money procured through fraud or mistake. When Lord Mansfield was engaged in his great work of adapting a feudal common law to the requirements of a commercial

England, his studies of the practices of merchants as a basis for an enlightened expansion of the law were regarded as a daring judicial innovation. The innovation was, in truth, no more and no less than the application of all the resources of the creative mind to the perpetual problem of attuning the law to the world in which it is to function. It was such a mind that Justice Brandeis brought to the service of the country and of this Court, when he took his seat on the Bench in 1916. The twentieth century had already brought to the courts new problems which had been as little envisaged by the law as had been the customs and practices of merchants before Mansfield's day. The demands for the protection of the interests of workingmen and for the creation of new administrative agencies, the growing inequalities in bargaining power of different classes in the community, and the recognized need for repressing monopoly and for regulating public utilities and large aggregations of capital, all called for the adaptation of the principles of the common law and of constitutional interpretation to new subjects, which often bore but a superficial resemblance to those with which lawyers and judges had been traditionally concerned.

These were problems to tax the technical skill and training of lawyers and judges, but their solution demanded also sympathetic understanding of their nature and of the part which the legal traditions of yesterday can appropriately play in securing the ordered society of today. In the long history of the law, few judges have been so richly endowed for such an undertaking as was Justice Brandeis. His career at the Bar had revealed his constant interest in finding ways by which the existing machinery of the law could continue to serve the good order of society, notwithstanding the new stresses to which it was being subjected.

Despite the demands of a busy practice, he had had the inclination and had found the time to give freely of his professional services for the protection of the public from

the abuses of monopoly and the misuse of financial power, from the injury suffered where labor disputes are not adjusted by peaceable means, and from the wrongs inflicted by the misconduct of recreant public officials. In all this, his aims were persistently constructive. Aware that permanent gain in social progress, because of its very nature, must be slow, he was content with small reforms, with few steps at a time and short ones, so long as they were forward. He was convinced that progress would not ultimately be attained by resort to methods which required any surrender of his ideal of freedom and justice for all; that our constitutional system, administered with wisdom and good will, had within it all the potentialities for realization of that ideal without altering the essential character of our institutions. Social conscience and vision, infinite patience, an extraordinary capacity for sustained intellectual effort, and serene confidence that truth revealed will ultimately prevail, were the special gifts of character and personality which he devoted to his judicial service. These are gifts seldom united in any one person, but they would have been inadequate for the task without his insight into the true significance of a system of law which is the product of some 700 years of Anglo-American legal history.

Justice Brandeis knew that throughout the development of the common law the judge's decision of today, which is also the precedent for tomorrow, has drawn its inspiration—and the law itself has derived its vitality and capacity for growth—from the very facts which, in every case, frame the issue for decision. And so, as the first step to decision, he sought complete acquaintance with the facts as the generative source of the law. By exhaustive research to discover the social and economic need and consequences of regulation of wages and hours of labor, of rate-making for public utilities, of the sources and evils of monopoly, and in many another field, he laid the firm foundation of those judicial decisions which for nearly a quarter of a century were to point the way for

the development of law adapted to the industrial civilization of the twentieth century. For what availed it that judges and lawyers knew all the laws in the ancient books, if they were unaware of the significance of the new experience to which those laws were now to be applied? In the facts, quite as much as in the legal principles set down in the lawbooks, he found the materials for the synthesis of judicial decision. In that synthesis the law itself was but the means to a social end—the protection and control of those interests in society which are the special concern of government and hence of law.

This end was to be attained within the limits set by the command of Constitution and statutes, and the restraints of precedent and of doctrines by common consent regarded as binding, through the reasonable accommodation of the law to changing social and economic needs. In such a process the law itself was on trial. The need for its continuity was to be weighed against the pressing demands of new facts, and in the light of the teachings of experience, out of which our legal system has grown. These were the guideposts marking the way to decision for Justice Brandeis, as they had been for other judges. What gave his judicial career its high distinction was his clear recognition that these are boundaries within which the judge has scope for freedom of choice of the rule of law which he is to apply, and that his choice within those limits may rightly depend upon social and economic considerations whose weight may turn the scales of judgment in favor of one rule rather than another.

It is the fate of those who tread unfamiliar paths to be misunderstood. There were many, when Justice Brandeis came to this Court, who had forgotten or never knew, and some perhaps who were not interested in knowing, that this was the judicial process which, throughout the history of the law, has in varying degree served to renew its vitality and to continue its capacity for growth. It was the method of the great judges of the past, who had consciously or unconsciously practiced the creative art by

which familiar legal doctrines have been moulded to the needs of a later day. This is better understood today than it was twenty-five years ago. In the fullness of time we have seen the shafts of criticism which were directed at Brandeis the lawyer and Judge turned harmlessly aside by the general recognition of his integrity of mind and purpose and of his judicial wisdom.

He was emphatic in placing the principles of constitutional decision in a different category from those which are guides to decision in cases where the law may readily be altered by legislative action. He never lost sight of the fact that the Constitution is primarily a great charter of government, and often repeated Marshall's words: "it is *a constitution* we are expounding" "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." Hence, its provisions were to be read not with the narrow literalism of a municipal code or a penal statute, but so that its high purposes should illumine every sentence and phrase of the document and be given effect as a part of a harmonious framework of government. Notwithstanding the doctrine of *stare decisis,* judicial interpretations of the Constitution, since they were beyond legislative correction, could not be taken as the final word. They were open to reconsideration, in the light of new experience and greater knowledge and wisdom. Emphasis of the purposes of the Constitution as a charter of government, and the generality of its restraints under the Due Process Clause, precluded the notion that it had adopted any particular set of social and economic ideas, to the exclusion of others which fair-minded men might hold, however much he might disagree with them. He was the stalwart defender of civil liberty and the rights of minorities. In the specific constitutional guaranties of individual liberty and of freedom of speech and religion, and in the adherence by all who wield the power of government to the principles of the Constitution, he saw the great safeguards of a free and progressive society.

Justice Brandeis revered this Court as an institution which he held to be the indispensable implement for the maintenance of our federal system. He believed that the Court's continued strength and influence depend more than all else upon the thoroughness, integrity and disinterestedness with which its justices do its work. Because of that belief, he withdrew from every other activity; the work of the Court was the absorbing interest of his life. Intelligent and disinterested study and the force of reason at the conference table he held to be the only dependable guaranties of the adequate performance of its great task. Although often in the minority, he never sought or desired any other assurance that the Court would meet its responsibilities.

Justice Brandeis' active judicial service covered a period of twenty-three years, from 1916 to 1939. His opinions, appearing in Volumes 242 to 305 of our reports, cover every phase of the wide range of questions which came before the Court in this transition period. They bear internal evidence of the prodigious labor and painstaking care with which they were prepared. In cases involving the validity of legislation or the application of statute or common law to new fact situations, his opinions, like his briefs at the Bar, give us the results of his extensive researches into the social and economic backgrounds of the questions presented, buttressed by expert opinion and accounts of the experience in other states and countries. His statements of fact and law were simple, direct, orderly, powerful, proceeding to their conclusion with convincing logic. In their discussions of the principles of constitutional government and of civil liberty they rise to heights of dignity and power which place them among the great examples of legal literature. He was never willing to sacrifice clarity to the turn of a phrase, for he wished above all to be understood. For laymen as well as lawyers his opinions are a compendium of the legal aspects of the social and economic phenomena of our times. Together

they constitute one of the most important chapters of the history of this Court.

Apart from the work of the Court, his life was centered in his home and in the intimate associations with family and friends. His substantial means were devoted largely to charity, and by choice his home life was austere in its simplicity. He exercised a unique personal influence over the lives of men and women, young and old, who came to him from every walk of life to seek guidance and inspiration in his counsel. He revived their faith that—in a world troubled by declining standards—right, justice, and truth must remain the guiding principles of human conduct. Despite his great intellectual vigor and activity, his life was singularly placid, unruffled by the misunderstandings or criticism of others, however unmerited. This was the outer manifestation of an inner life, untroubled and serene, because given to great ends, with truth as the ultimate goal.

The time has not yet come to bring into its proper perspective a career so unusual and so far reaching in its influence, but we can appraise now the great service which he rendered by his devotion and loyalty to the Court as an institution and by the scholarship, integrity, and independence with which he performed his judicial labors. We know that because he sat as a judge on this Court the course of constitutional interpretation has been altered and that courts, in the process of adjudication, must henceforth, far more than in the past, look for light beyond the lawbooks to the experience of the world in which we live.

We see him now as one of the influential men of his time—in the words of the Resolution of the Bar, wise, strong, and good—taking his rightful place among that small group of great figures of the law who have given to it new strength, and to us renewed assurance of its adequacy and hence that it will endure.

503873—43——4

TABLE OF CASES REPORTED

503873—43——5

503873—43——6

TABLE OF CASES

Cited in Opinions

TABLE OF STATUTES
Cited in Opinions

(A) STATUTES OF THE UNITED STATES.

(B) Statutes of the States and Territories.

(C) Foreign Statutes.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

JULY SPECIAL TERM, 1942.

EX PARTE QUIRIN ET AL.[1]

NOS. ——, ORIGINAL. MOTIONS FOR LEAVE TO FILE PETITIONS FOR WRITS OF HABEAS CORPUS

AND

UNITED STATES EX REL. QUIRIN ET AL. *v.* COX, PROVOST MARSHAL.[2]

NOS. 1–7. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Argued July 29–30, 1942.—Decided July 31, 1942.

Per Curiam decision filed, July 31, 1942.[3] Full Opinion filed, October 29, 1942.[4]

1. A federal court may refuse to issue a writ of habeas corpus where the facts alleged in the petition, if proved, would not warrant discharge of the prisoner. P. 24.

---

[1] No. —, Original, *Ex parte Richard Quirin;* No. —, Original, *Ex parte Herbert Hans Haupt;* No. —, Original, *Ex parte Edward John Kerling;* No. ——, Original, *Ex parte Ernest Peter Burger;* No. ——, Original, *Ex parte Heinrich Harm Heinck;* No. ——, Original, *Ex parte Werner Thiel;* and No. —, Original, *Ex parte Hermann Otto Neubauer.*

[2] No. 1, *United States ex rel. Quirin* v. *Cox, Provost Marshal;* No. 2, *United States ex rel. Haupt* v. *Cox, Provost Marshal;* No. 3, *United States ex rel. Kerling* v. *Cox, Provost Marshal;* No. 4, *United States ex rel. Burger* v. *Cox, Provost Marshal;* No. 5, *United States ex rel. Heinck* v. *Cox, Provost Marshal;* No. 6, *United States ex rel. Thiel* v. *Cox, Provost Marshal;* and No. 7, *United States ex rel. Neubauer* v. *Cox, Provost Marshal.*

[3] See footnote, *post,* p. 18.

[4] *Post,* p. 18.

503873—43——8

2. Presentation to the District Court of the United States for the District of Columbia of a petition for habeas corpus was the institution of a suit; and denial by that court of leave to file the petition was a judicial determination of a case or controversy reviewable by appeal to the U. S. Court of Appeals for the District of Columbia and in this Court by certiorari. P. 24.
3. The President's Proclamation of July 2, 1942, declaring that all persons who are citizens or subjects of, or who act under the direction of, any nation at war with the United States, and who during time of war enter the United States through coastal or boundary defenses, and are charged with committing or attempting to commit sabotage, espionage, hostile acts, or violations of the law of war, "shall be subject to the law of war and to the jurisdiction of military tribunals," does not bar accused persons from access to the civil courts for the purpose of determining the applicability of the Proclamation to the particular case; nor does the Proclamation, which in terms denied to such persons access to the courts, nor the enemy alienage of the accused, foreclose consideration by the civil courts of the contention that the Constitution and laws of the United States forbid their trial by military commission. P. 24.
4. In time of war between the United States and Germany, petitioners, wearing German military uniforms and carrying explosives, fuses, and incendiary and time devices, were landed from German submarines in the hours of darkness, at places on the Eastern seaboard of the United States. Thereupon they buried the uniforms and supplies, and proceeded, in civilian dress, to various places in the United States. All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government. They also had been paid by the German Government during their course of training at a sabotage school, and had with them, when arrested, substantial amounts of United States currency, which had been handed to them by an officer of the German High Command, who had instructed them to wear their German uniforms while landing in the United States. Specification 1 of the charges on which they were placed on trial before a military commission charged that they, "being enemies of the United States and acting for . . . the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United

1 Syllabus.

States . . . and went behind such lines, contrary to the law of war, in civilian dress . . . for the purpose of committing . . . hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States." *Held:*

(1) That the specification sufficiently charged an offense against the law of war which the President was authorized to order tried by a military commission; notwithstanding the fact that, ever since their arrest, the courts in the jurisdictions where they entered the country and where they were arrested and held for trial were open and functioning normally. *Ex parte Milligan,* 4 Wall. 2, distinguished. Pp. 21, 23, 36, 48.

(2) The President's Order of July 2, 1942, so far as it lays down the procedure to be followed on the trial before the Commission and on the review of its findings and sentence, and the procedure in fact followed by the Commission, were not in conflict with Articles of War 38, 43, 46, 50½ and 70. P. 46.

(3) The petitioners were in lawful custody for trial by a military commission; and, upon petitions for writs of habeas corpus, did not show cause for their discharge. P. 47.

5. Articles 15, 38 and 46 of the Articles of War, enacted by Congress, recognize the "military commission" as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by courts-martial. And by the Articles of War, especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenses against the law of war in appropriate cases. Pp. 26–28.

6. Congress, in addition to making rules for the government of our Armed Forces, by the Articles of War has exercised its authority under Art. I, § 8, cl. 10 of the Constitution to define and punish offenses against the law of nations, of which the law of war is a part, by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And by Article of War 15, Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war and which may constitutionally be included within that jurisdiction. Pp. 28, 30.

7. This Court has always recognized and applied the law of war as including that part of the law of nations which prescribes, for the

conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. P. 27.

8. The offense charged in this case was an offense against the law of war, the trial of which by military commission had been authorized by Congress, and which the Constitution does not require to be tried by jury. *Ex parte Milligan*, 4 Wall. 2, distinguished. P. 45.

9. By the law of war, lawful combatants are subject to capture and detention as prisoners of war; unlawful combatants, in addition, are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. P. 30.

10. It has long been accepted practice by our military authorities to treat those who, during time of war, pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, as unlawful combatants punishable as such by military commission. This practice, accepted and followed by other governments, must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War. P. 35.

11. Citizens of the United States who associate themselves with the military arm of an enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war. P. 37.

12. Even when committed by a citizen, the offense here charged is distinct from the crime of treason defined in Article III, § 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other. P. 38.

13. Article III, § 2, and the Fifth and Sixth Amendments of the Constitution did not extend the right to demand a jury to trials by military commission or require that offenses against the law of war, not triable by jury at common law, be tried only in civil courts. P. 38.

14. Section 2 of the Act of Congress of April 10, 1806, derived from the Resolution of the Continental Congress of August 21, 1776, and which imposed the death penalty on alien spies "according to the law and usage of nations, by sentence of a general court martial," was a contemporary construction of Article III, § 2 of the Constitution and of the Fifth and Sixth Amendments, as not foreclosing trial by military tribunals, without a jury, for offenses against the law of war

1 Statement of the Case.

committed by enemies not in or associated with our Armed Forces. It is a construction which has been followed since the founding of our government, and is now continued in the 82nd Article of War. Such a construction is entitled to great respect. P. 41.

15. Since violation of the law of war is adequately alleged in this case, the Court finds no occasion to consider the validity of other specifications based on the 81st and 82nd Articles of War, or to construe those articles or decide upon their constitutionality as so construed. P. 46.

Leave to file petitions for habeas corpus in this Court denied.

Orders of District Court (47 F. Supp. 431), affirmed.

The Court met in Special Term, on Wednesday, July 29, 1942, pursuant to a call by the Chief Justice having the approval of all the Associate Justices.

The Chief Justice announced that the Court had convened in Special Term in order that certain applications might be presented to it and argument be heard in respect thereto.

In response to an inquiry by the Chief Justice, the Attorney General stated that the Chief Justice's son, Major Lauson H. Stone, U. S. A., had, under orders, assisted defense counsel before the Military Commission, in the case relative to which the Special Term of the Court was called; but that Major Stone had had no connection with this proceeding before this Court. Therefore, said the Attorney General, counsel for all the respective parties in this proceeding joined in urging the Chief Justice to participate in the consideration and decision of the matters to be presented. Colonel Kenneth C. Royall, of counsel for the petitioners, concurred in the statement and request of the Attorney General.

The applications, seven in number (*ante*, p. 1, n. 1), first took the form of petitions to this Court for leave to file petitions for writs of habeas corpus to secure the release of the petitioners from the custody of Brigadier General

Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington, who, pursuant to orders, was holding them in that District for and during a trial before a Military Commission constituted by an Order of the President of the United States. During the course of the argument, the petitioners were permitted to file petitions for writs of certiorari, directed to the United States Court of Appeals for the District of Columbia, to review, before judgment by that Court, orders then before it by appeal by which the District Court for the District of Columbia had denied applications for leave to file petitions for writs of habeas corpus.

After the argument, this Court delivered a Per Curiam Opinion, disposing of the cases (footnote, p. 18). A full opinion, which is the basis of this Report, was filed with the Clerk of the Court on October 29, 1942, *post,* p. 18.

Colonel Kenneth C. Royall and *Colonel Cassius M. Dowell* had been assigned as defense counsel by the President in his Order appointing the Military Commission. Colonel Royall argued the case and Colonel Dowell was with him on the brief.

Enemy aliens may resort to habeas corpus. *Ex parte Milligan,* 4 Wall. 2, at pp. 115–121; *Kaufman* v. *Eisenberg,* 32 N. Y. S. 2d 450; *Ex parte Orozco,* 201 F. 106; *Ex parte Risse,* 257 F. 102; 55 Harvard L. Rev. 1058; 31 Ops. Atty. Gen. 361.

50 U. S. C. § 21 relates only to internment and does not authorize a proclamation denying to alien enemies the right to apply for writ of habeas corpus.

The 82nd Article of War, which provides for trial and punishment of spies by courts-martial *or* by military commission, must be construed as applying only to offenses committed in connection with actual military operations, or on or near military fortifications, encampments, or installations.

Mere proof that persons in uniform landed on the American coast from a submarine, or otherwise, does not supply any of the elements of spying. None of the petitioners committed any acts on, near, or in connection with any fortifications, posts, quarters, or encampments of the Army; or on, near, or in connection with any other military installations; or at any location within the zone of operations. 2 Wheaton, Int. L., 6th Ed., 766; 2 Oppenheim, Int. L., 1905 Ed., 161; Halleck, Int. L., 3d Ed., 573. In the absence of evidence of any acts within this zone, there is no authority for a military commission under Article of War 82.

That the acts alleged to have been committed by the petitioners in violation of the 81st Article were not in the zone of military operations would also preclude the jurisdiction of a military commission to try this offense. See 18 U. S. C. § 1; 50 U. S. C. §§ 31–42, 101–106. The petitioners were arrested by the civil authorities, waived arraignment before a civil court, and also waived removal to another federal judicial district. The civil courts thereby acquired jurisdiction; and there was no authority for the military authorities to oust these courts of this jurisdiction.

The Rules of Land Warfare describe no such offense as that set forth in the specifications of the first charge. These Rules were prepared in 1940 under the direction of the Judge Advocate General, and purport to include all offenses against the law of war.

The so-called law of war is a species of international law analogous to common law. There is no common law crime against the United States.

The first charge sets out no more than the offenses of sabotage and espionage, which are specifically covered by 50 U. S. C., §§ 31–42, 101–106, and which are triable by the civil courts.

The charge of conspiracy can not stand if the other charges fall. Furthermore, 18 U. S. C. 88 deals expressly with the offense of conspiracy, and this charge is not triable by a military commission.

The conduct of the petitioners was nothing more than preparation to commit the crime of sabotage. The objects of sabotage had never been specifically selected and the plan did not contemplate any act of sabotage within a period of three months. These facts are not even sufficient to constitute an attempt to commit sabotage.

The civil courts were functioning both in the localities in which the offenses were charged to have been committed and in the District of Columbia where the alleged offenses were being tried. In these localities there was no martial law and no other circumstances which would justify action by a military tribunal.

The only way in which the petitioners as a practical matter could raise the jurisdictional question was by petition for writ of habeas corpus.

The military commission had no jurisdiction over petitioners. Article of War 2 defines the persons who are subject to military law, and includes members of the armed forces and other designated persons. Military courts-martial and other military tribunals have no jurisdiction to try any other person for offenses in violation of the Articles of War, except in the cases of Articles 81 and 82. The same is true of any alleged violations of the law of war. *Ex parte Milligan, supra;* 31 Ops. Atty. Gen. 356.

Civil persons who commit acts in other localities than the zone of active military operations are triable only in the civil courts and under the criminal statutes. While it is true that the territory along the coast was patrolled by the Coast Guard, the patrol was unarmed. It would be a strained use of language to say that this patrol made the beach a military line or part of the zone of active operations.

Nor is the situation changed by the fact that on the Long Island beach, some distance away, was located a Signal Corps platoon engaged in operating a radio locator station. The evidence shows that this platoon did not patrol the beach and was not engaged in any military offensive or defensive operation at the time the petitioners landed. The whole United States is divided into defense areas or sectors and the orders therefor are substantially similar to those providing for the southern and eastern defense sectors. If the prosecution were correct in its contention that the issuance of orders for these sectors creates a zone of active military operations, then the entire United States is a zone of active military operations, and persons located therein are subject to the jurisdiction of military tribunals. The Florida and Long Island seacoasts were not and are not in any true sense zones of active military operations, but are instead parts of the Zone of the Interior as defined in the Field Service Regulations.

Martial law is a matter of fact and not a matter of proclamation; and a proclamation assuming to declare martial law is invalid unless the facts themselves support it. See *Sterling* v. *Constantin,* 287 U. S. 378.

The President's Order and Proclamation did not create a state of martial law in the entire eastern part of the United States. In view of the facts, there was no adequate reason, either of military necessity or otherwise, for depriving any persons in that area of the benefit of constitutional provisions guaranteeing an ordinary and proper trial before a civil court. *Ex parte Milligan, supra.*

The President had no authority, in absence of statute, to issue the Proclamation. In England, the practice has been to obtain authority of Parliament for similar action. 4 and 5 Geo. V, c. 29; 5 and 6 Geo. V, c. 8; 10 and 11 Geo. V, c. 55; 2 and 3 Geo. VI, (1939) c. 62. Congress alone can suspend the writ of habeas corpus, and then only in cases of rebellion or invasion. Const., Art. I, § 9, cl. 2;

Ex parte Merryman, 17 Fed. Cas. 114; *Ex parte Bollman,* 4 Cranch 101; *McCall* v. *McDowell,* Fed. Cas. No. 8673; *Ex parte Benedict,* 3 Fed. Cas. No. 1292; Willoughby, Const. L., § 1057.

The Proclamation was issued after the commission of the acts which are charged as crimes and is *ex post facto.* Congress itself could not have passed valid legislation increasing the penalty for acts already committed. Const., Art. I, § 9, cl. 3; *Thompson* v. *Utah,* 170 U. S. 343; *Burgess* v. *Salmon,* 97 U. S. 384.

The Proclamation is violative of the Fifth and Sixth Amendments, of Art. III, § 2, cl. 3, and of Art. I, § 9, cl. 2, of the Constitution.

The Order is invalid because it violates express provisions of Article of War 38 respecting rules of evidence; and is inconsistent with provisions of Article 43 requiring concurrence of three-fourths of the Commission's members for conviction or sentence.

Article 70 requires a preliminary hearing like one before a committing magistrate, with liberty of the accused to cross-examine. This is ignored by the Order.

Whereas Article 50½ requires action by the Board of Review and the recommendation of the Judge Advocate General before the case is submitted to the President, the Order requires that the Commission transmit the record of the trial, including any judgment or sentence, *directly* to the President for his action thereon.

The Order has made it impossible to comply with the statutory provisions, by directing the Judge Advocate General (and the Attorney General) to conduct the prosecution, thereby disqualifying the Judge Advocate General and his subordinates from acting as a reviewing authority. The proceedings disclose that the Judge Advocate General has in fact assisted in the conduct of the prosecution.

This is a material violation of the statutory rights afforded accused persons by the Articles of War. The

provisions of Articles 46 and 50½ are the methods of appeal by a person tried before a military commission. The Order deprives them of this method of appeal.

A cardinal purpose of Article 38 was to provide a procedure for military commissions, with the proviso that nothing in the procedure shall be "contrary to or inconsistent with" the Articles of War.

The President had no authority to delegate the rule-making power under Art. 38 to the Commission. In violation of Articles 38 and 18 the petitioners were denied the right to challenge a member of the Commission peremptorily. Confessions of the defendants were improperly admitted against each other.

If it be suggested that these are matters which do not affect the jurisdiction of the Commission or the validity of the proceedings, but are merely questions which may be raised on appeal or review, the answer is that the Order deprived the petitioners of such appeal or review.

Citing *Ex parte Milligan,* 4 Wall. 2; *Sterling* v. *Constantin,* 287 U. S. 378; *Caldwell* v. *Parker,* 252 U. S. 376; *Kahn* v. *Anderson,* 255 U. S. 1; *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398; *Carter* v. *Carter Coal Co.,* 298 U. S. 330; 55 Harvard L. Rev. 1295; 31 Ops. A. G. 363.

Attorney General Biddle, with whom *Judge Advocate General Myron C. Cramer, Assistant Solicitor General Cox, and Col. Erwin M. Treusch* were on the brief, for respondent.

Enemies who invade the country in time of war have no privilege to question their detention by habeas corpus. Halsbury's Laws of England, 2d Ed., Vol. IX, p. 701, par. 1200; p. 710, par. 1212; Blackstone, 21 Ed., Vol. 1, c. 10, p. 372; *Sylvester's Case,* 7 Mod. 150 (1703); *Rex* v. *Knockaloe Camp Commandant,* 87 L. J. K. B. N. S. 43 (1917); *Rex* v. *Schiever,* 2 Burr. 765 (1759); *Furly* v. *Newnham,* 2 Doug. K. B. 419 (1780); *Three Spanish Sailors,* 2 W. B.

1324 (1779); *Rex* v. *Superintendent of Vine Street Police Station,* [1916] 1 K. B. 268; *Schaffenius* v. *Goldberg,* [1916] 1 K. B. 284; *Rules of Land Warfare,* pars. 9, 70, 351, 352, 356.

If prisoners of war are denied the privilege of the writ of habeas corpus, it is inescapable that petitioners are not entitled to it. By removal of their uniforms before their capture, they lost the possible advantages of being prisoners of war. Surely, they did not thus acquire a privilege even prisoners of war do not have.

Whatever privilege may be accorded to such enemies is accorded by sufferance, and may be taken away by the President. Alien enemies—even those lawfully resident within the country—have no privilege of habeas corpus to inquire into the cause of their detention as dangerous persons. *Ex parte Graber,* 247 F. 882; *Minotto* v. *Bradley,* 252 F. 600. See also *Ex parte Weber,* [1916] 1 K. B. 280, affirmed [1916] 1 A. C. 421; *Rex* v. *Superintendent of Vine Street Police Station,* [1916] 1 K. B. 268; *Rex* v. *Knockaloe Camp Commandant,* 87 L. J. K. B. N. S. 43; *Re Chamryk,* 25 Man. L. Rep. 50; *Re Beranek,* 33 Ont. L. Rep. 139; *Re Gottesman,* 41 Ont. L. Rep. 547; *Gusetu* v. *Date,* 17 Quebec Pr. 95; Act of July 6, 1798, 50 U. S. C. § 21; *De Lacey* v. *United States,* 249 F. 625.

The fact is that ordinary constitutional doctrines do not impede the Federal Government in its dealings with enemies. *Brown* v. *United States,* 8 Cranch 110, 121–123; *Miller* v. *United States,* 11 Wall. 268; *Juragua Iron Co.* v. *United States,* 212 U. S. 297; *De Lacey* v. *United States,* 249 F. 625.

The President's power over enemies who enter this country in time of war, as armed invaders intending to commit hostile acts, must be absolute.

In his Proclamation, the President took the action he deemed necessary to deal with persons he and the armed forces under his command reasonably believed to be enemy

invaders. He declared that all such persons should be subject to the law of war and triable by military tribunals. He removed whatever privilege such persons might otherwise have had to seek any remedy or maintain any proceeding in the courts of the United States.

These acts were clearly within his power as Commander in Chief and Chief Executive, and were lawful acts of the sovereign—the Government of the United States—in time of war.

The prisoners are enemies who fall squarely within the terms of the President's proclamation. Cf. Trading with the Enemy Act of 1917, §§ 2, 7 (b).

To whatever extent the President has power to bar enemies from seeking writs of habeas corpus, he clearly has power to define "enemy" as including a class as broad as that described in the Trading with the Enemy Act.

Even if it be assumed that Burger and Haupt are citizens of the United States, this does not change their status as "enemies" of the United States. Hall, Int. L. (1909) 490–497; 2 Oppenheim, Int. L. (1940) 216–218. This rule applies to all persons living in enemy territory, even if they are technically United States citizens. *Miller* v. *United States,* 11 Wall. 268; *Juragua Iron Co.* v. *United States,* 212 U. S. 297, 308. The return of Burger and Haupt to the United States can not by any possibility be construed as an attempt to divest themselves of their enemy character by reassuming their duties as citizens.

The offenses charged against these prisoners are within the jurisdiction of this military commission. Articles of War 81 and 82 (10 U. S. C., §§ 1553–4).

The law of war, like civil law, has a great *lex non scripta,* its own common law. This "common law of war" (*Ex parte Vallandigham,* 1 Wall. 243, 249) is a centuries-old body of largely unwritten rules and principles of international law which governs the behavior of both soldiers

and civilians during time of war. Winthrop, *Military Law and Precedents* (1920), 17, 41, 42, 773 ff.

The law of war has always been applied in this country. The offense for which Major André was convicted—passing through our lines in civilian dress, with hostile purpose—is one of the most dangerous offenses known to the law of war. The other offenses here charged—appearing behind the lines in civilian guise, spying, relieving the enemy, and conspiracy—are equally serious and also demand severe punishment. See *Digest of Opinions of Judge Advocate General,* Howland (1912), pp. 1070–1071. Cf. *Instruction for the Government of Armies of the United States in the Field* (G. O. 100, A. G. O. 1863) § I, par. 13; Davis, *Military Law of the United States* (1913), p. 310; Rules of Land Warfare, §§ 348, 351, 352; Article of War 15.

The definition of *lawful* belligerents appearing in the Rules of Land Warfare (Rule 9) was adopted by the signatories to the Hague Convention in Article I, Annex to Hague Convention No. IV of Oct. 18, 1907, Treaty Series No. 539, and was ratified by the Senate of the United States. 36 Stat. 2295. Our Government has thus recognized the existence of a class of *unlawful* belligerents. These unlawful belligerents, under Article of War 15, are punishable under the common law of war. See text writers, *supra; Ex parte Vallandigham,* 1 Wall. 243, 249.

Military commissions in the United States derive their authority from the Constitution as well as statutes, military usage, and the common law of war. Const., Art. I; Art. II, § 2 (1). In Congress and the President together is lodged the power to wage war successfully. *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 426.

Military commissions have been acknowledged by Congressional statutes which have recognized them as courts of military law. Articles of War 15, 38, 81, 82; 10 U. S. C.

§§ 1486, 1509, 1553, 1554. Their authority has also been recognized in presidential proclamations and orders, rulings of the courts, and opinions of the Attorneys General.

The offenses charged here are unquestionably within the jurisdiction of military commissions. The prisoners are charged with violating Articles of War 81 and 82 (10 U. S. C., §§ 1553–4) which specifically provide for trial by military commission. They are also charged with violating the common law of war in crossing our military lines and appearing behind our lines in civilian dress, with hostile purpose, and with conspiring to commit all the above violations, which in itself constitutes an additional violation of the law of war. The jurisdiction of military commissions over these offenses under the law of war (in addition to the specific offenses codified in the Articles of War) is expressly recognized by Article of War 15 (10 U. S. C. § 1486).

The military commission has jurisdiction over the persons of these prisoners. *Ex parte Milligan,* 4 Wall. 2, 123, 138–139. The offenses charged here arise in the land or naval forces. The law of war embraces citizens as well as aliens (enemy or not); and civilians as well as soldiers are all within their scope. Indeed it was for the very purpose of trying civilians for war crimes that military commissions first came into use. Winthrop, *Military Law and Precedents* (1920) 831–841.

This broad comprehension of persons is well within the limits of the excepting clause of the Fifth Amendment. That clause has been almost universally construed to include civilians. Wiener, *Manual of Martial Law* (1940), 137; Morgan, *Court-Martial Jurisdiction over Nonmilitary Persons under the Articles of War,* 4 Minn. L. Rev. 79, 107; Winthrop, *Military Law and Precedents* (1920 ed.) 48, 767; Fletcher, *The Civilian and the War Power,* 2 Minn. L. Rev. 110, 126; 16 Op. Atty. Gen. 292; *Ex parte Wildman,* 29 Fed. Cas. 1232. Such construction

is founded in common sense: of all hostile acts, those by civilians are most dangerous and should be punished most severely.

By the law of war, war crimes can be committed anywhere "within the lines of a belligerent." Oppenheim's Int. L. (Lauterpacht's 6th ed. 1940) 457. Having violated the law of war in an area where it obviously applies, offenders are subject to trial by military tribunals wherever they may be apprehended. Congress may grant jurisdiction to try civilians for offenses which "occur in the theatre of war, in the theatre of operations, or in any place over which the military forces have actual control and jurisdiction." Cf. Morgan, *supra,* at 107; Wiener, *supra,* at 137. Neither the Bill of Rights nor *Ex parte Milligan* grants to such persons constitutional guarantees which the Fifth Amendment expressly denies to our own soldiers. Cf. 2 Warren, *The Supreme Court in United States History* (1937) 418; Corwin, *The President: Office and Powers* (2d ed. 1941) 165; *United States* v. *McDonald,* 265 F. 754. The test of whether or not the civil courts are open to punish civil crimes is too unrealistic a test to be applied blindly to all exercises of military jurisdiction.

The judgment of the President as to what constitutes necessity for trial by military tribunal should not lightly be disregarded. *Prize Cases,* 2 Black 635. The English courts have not only long since rejected the doctrine of *Ex parte Milligan,* which they once accepted, but also have recently sustained a wide discretion granted to the Executive for the detention of persons suspected of hostile associations. *Liversidge* v. *Anderson,* [1942] 1 A. C. 206; *Greene* v. *Secretary of State for Home Affairs,* [1942] 1 A. C. 284.

Courts do not inquire into the Executive's determination on matters of the type here involved. *Martin* v. *Mott,* 12 Wheat. 19. Cf. *United States* v. *George S. Bush*

& Co., 310 U. S. 371; *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 320; *Dakota Central Tel. Co.* v. *South Dakota*, 250 U. S. 163. Even if it be assumed that the President's nomination of a military commission to try war criminals, as specified by Congress, must be tested by the "actual and present necessity" criterion of the majority opinion in the *Milligan* case, this Court will not review the President's judgment save in a case of grave and obvious abuse. *Moyer* v. *Peabody*, 212 U. S. 78; *Sterling* v. *Constantin*, 287 U. S. 378.

The Commission was legally convened and constituted. *Kurtz* v. *Moffitt*, 115 U. S. 487, 500; *Keyes* v. *United States*, 109 U. S. 336.

The procedure and regulations prescribed by the President are proper. Article of War 43, requiring unanimity for a death sentence, refers to courts-martial. It has no application to charges referred to a military commission. The President's order did not make improper provision for review, Articles of War 46, 48, 50½ and 51 considered. There was no improper delegation of rule-making power.

The doctrine of unconstitutional delegation of powers relates only to the improper transfer of powers from one of the three branches of the government to another. It has nothing to do with delegations by the Chief Executive to his military subordinates within the executive branch. Military courts "form no part of the judicial system of the United States." *Kurtz* v. *Moffitt*, 115 U. S. 487, 500.

Objections to the actions of the Commission on a variety of grounds, ranging from its refusal to permit peremptory challenges to its rulings on the admissibility and sufficiency of evidence, are not cognizable by this Court. The writ of habeas corpus can only be used to question the jurisdiction of a military tribunal. It cannot be converted into a device for civil court review.

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

These cases are brought here by petitioners' several applications for leave to file petitions for habeas corpus in this Court, and by their petitions for certiorari to review orders of the District Court for the District of Columbia, which denied their applications for leave to file petitions for habeas corpus in that court.

The question for decision is whether the detention of petitioners by respondent for trial by Military Commission, appointed by Order of the President of July 2, 1942,

---

The following is the *per curiam* opinion filed July 31, 1942:

PER CURIAM.

In these causes motions for leave to file petitions for habeas corpus were presented to the United States District Court for the District of Columbia, which entered orders denying the motions. Motions for leave to file petitions for habeas corpus were then presented to this Court, and the merits of the applications were fully argued at the Special Term of Court convened on July 29, 1942. Counsel for petitioners subsequently filed a notice of appeal from the order of the District Court to the United States Court of Appeals for the District of Columbia, and they have perfected their appeals to that court. They have presented to this Court petitions for writs of certiorari before judgment of the United States Court of Appeals for the District of Columbia, pursuant to 28 U. S. C. § 347 (a). The petitions are granted. In accordance with the stipulation between counsel for petitioners and for the respondent, the papers filed and argument had in connection with the applications for leave to file petitions for habeas corpus are made applicable to the certiorari proceedings.

The Court has fully considered the questions raised in these cases and thoroughly argued at the bar, and has reached its conclusion upon them. It now announces its decision and enters its judgment in each case, in advance of the preparation of a full opinion which necessarily will require a considerable period of time for its preparation and which, when prepared, will be filed with the Clerk.

The Court holds:

(1) That the charges preferred against petitioners on which they are being tried by military commission appointed by the order of the

on charges preferred against them purporting to set out their violations of the law of war and of the Articles of War, is in conformity to the laws and Constitution of the United States.

After denial of their applications by the District Court, 47 F. Supp. 431, petitioners asked leave to file petitions for habeas corpus in this Court. In view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay, we directed that petitioners' applications be set down for full oral argument at a special term of this Court, convened on July 29, 1942. The applications for leave to file the petitions were presented in open court on that day and were heard on the petitions, the answers to them of respondent, a stipulation of facts by counsel, and the record of the testimony given before the Commission.

While the argument was proceeding before us, petitioners perfected their appeals from the orders of the District Court to the United States Court of Appeals for the District of Columbia and thereupon filed with this

---

President of July 2, 1942, allege an offense or offenses which the President is authorized to order tried before a military commission.

(2) That the military commission was lawfully constituted.

(3) That petitioners are held in lawful custody for trial before the military commission, and have not shown cause for being discharged by writ of habeas corpus.

The motions for leave to file petitions for writs of habeas corpus are denied.

The orders of the District Court are affirmed. The mandates are directed to issue forthwith.

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

Court petitions for certiorari to the Court of Appeals before judgment, pursuant to § 240 (a) of the Judicial Code, 28 U. S. C. § 347 (a). We granted certiorari before judgment for the reasons which moved us to convene the special term of Court. In accordance with the stipulation of counsel we treat the record, briefs and arguments in the habeas corpus proceedings in this Court as the record, briefs and arguments upon the writs of certiorari.

On July 31, 1942, after hearing argument of counsel and after full consideration of all questions raised, this Court affirmed the orders of the District Court and denied petitioners' applications for leave to file petitions for habeas corpus. By per curiam opinion we announced the decision of the Court, and that the full opinion in the causes would be prepared and filed with the Clerk.

The following facts appear from the petitions or are stipulated. Except as noted they are undisputed.

All the petitioners were born in Germany; all have lived in the United States. All returned to Germany between 1933 and 1941. All except petitioner Haupt are admittedly citizens of the German Reich, with which the United States is at war. Haupt came to this country with his parents when he was five years old; it is contended that he became a citizen of the United States by virtue of the naturalization of his parents during his minority and that he has not since lost his citizenship. The Government, however, takes the position that on attaining his majority he elected to maintain German allegiance and citizenship, or in any case that he has by his conduct renounced or abandoned his United States citizenship. See *Perkins* v. *Elg,* 307 U. S. 325, 334; *United States ex rel. Rojak* v. *Marshall,* 34 F. 2d 219; *United States ex rel. Scimeca* v. *Husband,* 6 F. 2d 957, 958; 8 U. S. C. § 801, and compare 8 U. S. C. § 808. For reasons presently to be stated we do not find it necessary to resolve these contentions.

After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing. Thereafter petitioners, with a German citizen, Dasch, proceeded from Germany to a seaport in Occupied France, where petitioners Burger, Heinck and Quirin, together with Dasch, boarded a German submarine which proceeded across the Atlantic to Amagansett Beach on Long Island, New York. The four were there landed from the submarine in the hours of darkness, on or about June 13, 1942, carrying with them a supply of explosives, fuses, and incendiary and timing devices. While landing they wore German Marine Infantry uniforms or parts of uniforms. Immediately after landing they buried their uniforms and the other articles mentioned, and proceeded in civilian dress to New York City.

The remaining four petitioners at the same French port boarded another German submarine, which carried them across the Atlantic to Ponte Vedra Beach, Florida. On or about June 17, 1942, they came ashore during the hours of darkness, wearing caps of the German Marine Infantry and carrying with them a supply of explosives, fuses, and incendiary and timing devices. They immediately buried their caps and the other articles mentioned, and proceeded in civilian dress to Jacksonville, Florida, and thence to various points in the United States. All were taken into custody in New York or Chicago by agents of the Federal Bureau of Investigation. All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government. They also had been paid by the German Government during their course of training at the sabotage school and had received substantial sums in

United States currency, which were in their possession when arrested. The currency had been handed to them by an officer of the German High Command, who had instructed them to wear their German uniforms while landing in the United States.[1]

The President, as President and Commander in Chief of the Army and Navy, by Order of July 2, 1942,[2] appointed a Military Commission and directed it to try petitioners for offenses against the law of war and the Articles of War, and prescribed regulations for the procedure on the trial and for review of the record of the trial and of any judgment or sentence of the Commission. On the same day, by Proclamation,[3] the President declared that "all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation,

---

[1] From June 12 to June 18, 1942, Amagansett Beach, New York, and Ponte Vedra Beach, Florida, were within the area designated as the Eastern Defense Command of the United States Army, and subject to the provisions of a proclamation dated May 16, 1942, issued by Lieutenant General Hugh A. Drum, United States Army, Commanding General, Eastern Defense Command (see 7 Federal Register 3830). On the night of June 12–13, 1942, the waters around Amagansett Beach, Long Island, were within the area comprising the Eastern Sea Frontier, pursuant to the orders issued by Admiral Ernest J. King, Commander in Chief of the United States Fleet and Chief of Naval Operations. On the night of June 16–17, 1942, the waters around Ponte Vedra Beach, Florida, were within the area comprising the Gulf Sea Frontier, pursuant to similar orders.

On the night of June 12–13, 1942, members of the United States Coast Guard, unarmed, maintained a beach patrol along the beaches surrounding Amagansett, Long Island, under written orders mentioning the purpose of detecting landings. On the night of June 17–18, 1942, the United States Army maintained a patrol of the beaches surrounding and including Ponte Vedra Beach, Florida, under written orders mentioning the purpose of detecting the landing of enemy agents from submarines.

[2] 7 Federal Register 5103.

[3] 7 Federal Register 5101.

and who during time of war enter or attempt to enter the United States . . . through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals."

The Proclamation also stated in terms that all such persons were denied access to the courts.

Pursuant to direction of the Attorney General, the Federal Bureau of Investigation surrendered custody of petitioners to respondent, Provost Marshal of the Military District of Washington, who was directed by the Secretary of War to receive and keep them in custody, and who thereafter held petitioners for trial before the Commission.

On July 3, 1942, the Judge Advocate General's Department of the Army prepared and lodged with the Commission the following charges against petitioners, supported by specifications:

1. Violation of the law of war.

2. Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy.

3. Violation of Article 82, defining the offense of spying.

4. Conspiracy to commit the offenses alleged in charges 1, 2 and 3.

The Commission met on July 8, 1942, and proceeded with the trial, which continued in progress while the causes were pending in this Court. On July 27th, before petitioners' applications to the District Court, all the evidence for the prosecution and the defense had been taken by the Commission and the case had been closed except for arguments of counsel. It is conceded that ever since petitioners' arrest the state and federal courts in Florida, New York, and the District of Columbia, and in

the states in which each of the petitioners was arrested or detained, have been open and functioning normally.

While it is the usual procedure on an application for a writ of habeas corpus in the federal courts for the court to issue the writ and on the return to hear and dispose of the case, it may without issuing the writ consider and determine whether the facts alleged by the petition, if proved, would warrant discharge of the prisoner. *Walker* v. *Johnston,* 312 U. S. 275, 284. Presentation of the petition for judicial action is the institution of a suit. Hence denial by the district court of leave to file the petitions in these causes was the judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals and reviewable here by certiorari. See *Ex parte Milligan,* 4 Wall. 2, 110–13; *Betts* v. *Brady,* 316 U. S. 455, 458–461.

Petitioners' main contention is that the President is without any statutory or constitutional authority to order the petitioners to be tried by military tribunal for offenses with which they are charged; that in consequence they are entitled to be tried in the civil courts with the safeguards, including trial by jury, which the Fifth and Sixth Amendments guarantee to all persons charged in such courts with criminal offenses. In any case it is urged that the President's Order, in prescribing the procedure of the Commission and the method for review of its findings and sentence, and the proceedings of the Commission under the Order, conflict with Articles of War adopted by Congress—particularly Articles 38, 43, 46, 50½ and 70—and are illegal and void.

The Government challenges each of these propositions. But regardless of their merits, it also insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our territory as enemy belligerents, and because the President's Proclamation undertakes in terms to deny such access to the class of

persons defined by the Proclamation, which aptly describes the character and conduct of petitioners. It is urged that if they are enemy aliens or if the Proclamation has force, no court may afford the petitioners a hearing. But there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission. As announced in our per curiam opinion, we have resolved those questions by our conclusion that the Commission has jurisdiction to try the charge preferred against petitioners. There is therefore no occasion to decide contentions of the parties unrelated to this issue. We pass at once to the consideration of the basis of the Commission's authority.

We are not here concerned with any question of the guilt or innocence of petitioners.[4] Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty. *Ex parte Milligan, supra,* 119, 132; *Tumey* v. *Ohio,* 273 U. S. 510, 535; *Hill* v. *Texas,* 316 U. S. 400, 406. But the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.

Congress and the President, like the courts, possess no power not derived from the Constitution. But one of

[4] As appears from the stipulation, a defense offered before the Military Commission was that petitioners had had no intention to obey the orders given them by the officer of the German High Command.

the objects of the Constitution, as declared by its preamble, is to "provide for the common defence." As a means to that end, the Constitution gives to Congress the power to "provide for the common Defence," Art. I, § 8, cl. 1; "To raise and support Armies," "To provide and maintain a Navy," Art. I, § 8, cl. 12, 13; and "To make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14. Congress is given authority "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," Art. I, § 8, cl. 11; and "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," Art. I, § 8, cl. 10. And finally, the Constitution authorizes Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 18.

The Constitution confers on the President the "executive Power," Art. II, § 1, cl. 1, and imposes on him the duty to "take Care that the Laws be faithfully executed." Art. II, § 3. It makes him the Commander in Chief of the Army and Navy, Art. II, § 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, § 3, cl. 1.

The Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.

By the Articles of War, 10 U. S. C. §§ 1471–1593, Congress has provided rules for the government of the Army. It has provided for the trial and punishment, by courts

martial, of violations of the Articles by members of the armed forces and by specified classes of persons associated or serving with the Army. Arts. 1, 2. But the Articles also recognize the "military commission" appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial. See Arts. 12, 15. Articles 38 and 46 authorize the President, with certain limitations, to prescribe the procedure for military commissions. Articles 81 and 82 authorize trial, either by court martial or military commission, of those charged with relieving, harboring or corresponding with the enemy and those charged with spying. And Article 15 declares that "the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals." Article 2 includes among those persons subject to military law the personnel of our own military establishment. But this, as Article 12 provides, does not exclude from that class "any other person who by the law of war is subject to trial by military tribunals" and who under Article 12 may be tried by court martial or under Article 15 by military commission.

Similarly the Espionage Act of 1917, which authorizes trial in the district courts of certain offenses that tend to interfere with the prosecution of war, provides that nothing contained in the act "shall be deemed to limit the jurisdiction of the general courts-martial, military commissions, or naval courts-martial." 50 U. S. C. § 38.

From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct

of war, the status, rights and duties of enemy nations as well as of enemy individuals.[5] By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law

[5] *Talbot* v. *Janson*, 3 Dall. 133, 153, 159–61; *Talbot* v. *Seeman*, 1 Cranch 1, 40–41; *Maley* v. *Shattuck*, 3 Cranch 458, 488; *Fitzsimmons* v. *Newport Ins. Co.*, 4 Cranch 185, 199; *The Rapid*, 8 Cranch 155, 159–64; *The St. Lawrence*, 9 Cranch 120, 122; *Thirty Hogsheads of Sugar* v. *Boyle*, 9 Cranch 191, 197–98; *The Anne*, 3 Wheat. 435, 447–48; *United States* v. *Reading*, 18 How. 1, 10; *Prize Cases*, 2 Black 635, 666–67, 687; *The Venice*, 2 Wall. 258, 274; *The William Bagaley*, 5 Wall. 377; *Miller* v. *United States*, 11 Wall. 268; *Coleman* v. *Tennessee*, 97 U. S. 509, 517; *United States* v. *Pacific Railroad*, 120 U. S. 227, 233; *Juragua Iron Co.* v. *United States*, 212 U. S. 297.

of war. It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions. We are concerned only with the question whether it is within the constitutional power of the National Government to place petitioners upon trial before a military commission for the offenses with which they are charged. We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial. We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury. It was upon such grounds that the Court denied the right to proceed by military tribunal in *Ex parte Milligan, supra.* But as we shall show, these petitioners were charged with an offense against the law of war which the Constitution does not require to be tried by jury.

It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns. An Act of Congress punishing "the crime of piracy, as defined by the law of nations" is an appropriate exercise of its constitutional authority, Art. I, § 8, cl. 10, "to define and punish" the offense, since it has adopted by reference the sufficiently precise definition of international law. *United States* v. *Smith,* 5 Wheat. 153; see *The Marianna Flora,* 11 Wheat. 1, 40–41;

United States v. *Brig Malek Adhel,* 2 How. 210, 232; *The Ambrose Light,* 25 F. 408, 423–28; 18 U. S. C. § 481.[6] Similarly, by the reference in the 15th Article of War to "offenders or offenses that . . . by the law of war may be triable by such military commissions," Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war (compare *Dynes* v. *Hoover,* 20 How. 65, 82), and which may constitutionally be included within that jurisdiction. Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations[7] and also be-

[6] Compare 28 U. S. C. § 41 (17), conferring on the federal courts jurisdiction over suits brought by an alien for a tort "in violation of the laws of nations"; 28 U. S. C. § 341, conferring upon the Supreme Court such jurisdiction of suits against ambassadors as a court of law can have "consistently with the law of nations"; 28 U. S. C. § 462, regulating the issuance of habeas corpus where the prisoner claims some right, privilege or exemption under the order of a foreign state, "the validity and effect whereof depend upon the law of nations"; 15 U. S. C. §§ 606 (b) and 713 (b), authorizing certain loans to foreign governments, provided that "no such loans shall be made in violation of international law as interpreted by the Department of State."

[7] Hague Convention No. IV of October 18, 1907, 36 Stat. 2295, Article I of the Annex to which defines the persons to whom belligerent rights and duties attach, was signed by 44 nations. See also Great Britain, War Office, Manual of Military Law (1929) ch. xiv, §§ 17–19; German General Staff, Kriegsbrauch im Landkriege (1902) ch. 1; 7 Moore, Digest of International Law, § 1109; 2 Hyde, International Law (1922) § 653–54; 2 Oppenheim, International Law (6th ed. 1940) § 107; Bluntschli, Droit International (5th ed. tr. Lardy) §§ 531–32; 4 Calvo, Le Droit International Theorique et Pratique (5th ed. 1896) §§ 2034–35.

tween those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[8] The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals. See Winthrop, Military Law, 2d ed., pp. 1196–97, 1219–21; Instructions for the Government of Armies of the United States in the Field, approved by the President, General Order No. 100, April 24, 1863, §§ IV and V.

Such was the practice of our own military authorities before the adoption of the Constitution,[9] and during the Mexican and Civil Wars.[10]

[8] Great Britain, War Office, Manual of Military Law, ch. xiv, §§ 445–451; Regolamento di Servizio in Guerra, § 133, 3 Leggi e Decreti del Regno d'Italia (1896) 3184; 7 Moore, Digest of International Law, § 1109; 2 Hyde, International Law, §§ 654, 652; 2 Halleck, International Law (4th ed. 1908) § 4; 2 Oppenheim, International Law, § 254; Hall, International Law, §§ 127, 135; Baty & Morgan, War, Its Conduct and Legal Results (1915) 172; Bluntschli, Droit International, §§ 570 bis.

[9] On September 29, 1780, Major John Andre, Adjutant-General to the British Army, was tried by a "Board of General Officers" appointed by General Washington, on a charge that he had come within the lines for an interview with General Benedict Arnold and had been captured while in disguise and travelling under an assumed name. The Board found that the facts charged were true, and that when captured Major Andre had in his possession papers containing in-

Paragraph 83 of General Order No. 100 of April 24, 1863, directed that: "Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death." And Paragraph

---

telligence for the enemy, and reported their conclusion that "Major Andre . . . ought to be considered as a Spy from the enemy, and that agreeably to the law and usage of nations . . . he ought to suffer death." Major Andre was hanged on October 2, 1780. Proceedings of a Board of General Officers Respecting Major John Andre, Sept. 29, 1780, printed at Philadelphia in 1780.

[10] During the Mexican War military commissions were created in a large number of instances for the trial of various offenses. See General Orders cited in 2 Winthrop, Military Law (2d ed. 1896) p. 1298, note 1.

During the Civil War the military commission was extensively used for the trial of offenses against the law of war. Among the more significant cases for present purposes are the following:

On May 22, 1865, T. E. Hogg and others were tried by a military commission, for "violations of the laws and usages of civilized war," the specifications charging that the accused "being commissioned, enrolled, enlisted or engaged" by the Confederate Government, came on board a United States merchant steamer in the port of Panama "in the guise of peaceful passengers" with the purpose of capturing the vessel and converting her into a Confederate cruiser. The Commission found the accused guilty and sentenced them to be hanged. The reviewing authority affirmed the judgments, writing an extensive opinion on the question whether violations of the law of war were alleged, but modified the sentences to imprisonment for life and for various periods of years. Dept. of the Pacific, G. O. No. 52, June 27, 1865.

On January 17, 1865, John Y. Beall was tried by a military commission for "violation of the laws of war." The opinion by the reviewing authority reveals that Beall, holding a commission in the Confederate Navy, came on board a merchant vessel at a Canadian port in civilian dress and, with associates, took possession of the vessel in Lake Erie; that, also in disguise, he unsuccessfully attempted to derail a train in New York State, and to obtain military information. His conviction by the Commission was affirmed on the ground that he was both a spy

84, that "Armed prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army, for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war."[11] These and related provisions have

and a "guerrilla," and he was sentenced to be hanged. Dept. of the East, G. O. No. 14, Feb. 14, 1865.

On January 17, 1865, Robert C. Kennedy, a Captain of the Confederate Army, who was shown to have attempted, while in disguise, to set fire to the City of New York, and to have been seen in disguise in various parts of New York State, was convicted on charges of acting as a spy and violation of the law of war "in undertaking to carry on irregular and unlawful warfare." He was sentenced to be hanged, and the sentence was confirmed by the reviewing authority. Dept. of the East, G. O. No. 24, March 20, 1865.

On September 19, 1865, William Murphy, "a rebel emissary in the employ of and colleagued with rebel enemies," was convicted by a military commission of "violation of the laws and customs of war" for coming within the lines and burning a United States steamboat and other property. G. C. M. O. No. 107, April 18, 1866.

Soldiers and officers "now or late of the Confederate Army," were tried and convicted by military commission for "being secretly within the lines of the United States forces," James Hamilton, Dept. of the Ohio, G. O. No. 153, Sept. 18, 1863; for "recruiting men within the lines," Daniel Davis, G. O. No. 397, Dec. 18, 1863, and William F. Corbin and T. G. McGraw, G. O. No. 114, May 4, 1863; and for "lurking about the posts, quarters, fortifications and encampments of the armies of the United States," although not "as a spy," Augustus A. Williams, Middle Dept., G. O. No. 34, May 5, 1864. For other cases of violations of the law of war punished by military commissions during the Civil War, see 2 Winthrop, Military Laws and Precedents (2d ed. 1896) 1310–11.

[11] See also Paragraph 100: "A messenger or agent who attempts to steal through the territory occupied by the enemy, to further, in any manner, the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case."

Compare Paragraph 101.

been continued in substance by the Rules of Land Warfare promulgated by the War Department for the guidance of the Army. Rules of 1914, Par. 369–77; Rules of 1940, Par. 345–57. Paragraph 357 of the 1940 Rules provides that "All war crimes are subject to the death penalty, although a lesser penalty may be imposed." Paragraph 8 (1940) divides the enemy population into "armed forces" and "peaceful population," and Paragraph 9 names as distinguishing characteristics of lawful belligerents that they "carry arms openly" and "have a fixed distinctive emblem." Paragraph 348 declares that "persons who take up arms and commit hostilities" without having the means of identification prescribed for belligerents are punishable as "war criminals." Paragraph 351 provides that "men and bodies of men, who, without being lawful belligerents" "nevertheless commit hostile acts of any kind" are not entitled to the privileges of prisoners of war if captured and may be tried by military commission and punished by death or lesser punishment. And paragraph 352 provides that "armed prowlers . . . or persons of the enemy territory who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to be treated as prisoners of war." As is evident from reading these and related Paragraphs 345–347, the specified violations are intended to be only illustrative of the applicable principles of the common law of war, and not an exclusive enumeration of the punishable acts recognized as such by that law. The definition of lawful belligerents by Paragraph 9 is that adopted by Article 1, Annex to Hague Convention No. IV of October 18, 1907, to which the United States was a signatory and which was ratified by the Senate in 1909. 36 Stat. 2295. The preamble to the Convention declares:

"Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who, though combatants, do not wear "fixed and distinctive emblems." And by Article 15 of the Articles of War Congress has made provision for their trial and punishment by military commission, according to "the law of war."

By a long course of practical administrative construction by its military authorities, our Government has likewise recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law [12] that we think it must be regarded as

[12] Great Britain, War Office, Manual of Military Law (1929) § 445, lists a large number of acts which, when committed within enemy lines by persons in civilian dress associated with or acting under the direction of enemy armed forces, are "war crimes." The list includes: "damage to railways, war material, telegraph, or other means of communication, in the interest of the enemy. . . ." Section 449 states that all "war crimes" are punishable by death.

Authorities on International Law have regarded as war criminals such persons who pass through the lines for the purpose of (a) destroy-

a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.

Specification 1 of the first charge is sufficient to charge all the petitioners with the offense of unlawful belligerency, trial of which is within the jurisdiction of the Commission, and the admitted facts affirmatively show that the charge is not merely colorable or without foundation.

Specification 1 states that petitioners, "being enemies of the United States and acting for . . . the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States . . . and went behind such lines, contrary to the law of war, in civilian dress . . . for the purpose of committing . . . hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States."

This specification so plainly alleges violation of the law of war as to require but brief discussion of petitioners' contentions. As we have seen, entry upon our territory

---

ing bridges, war materials, communication facilities, etc.: 2 Oppenheim, International Law (6th ed. 1940) § 255; Spaight, Air Power and War Rights (1924) 283; Spaight, War Rights on Land (1911) 110; Phillipson, International Law and the Great War (1915) 208; Liszt, Das Völkerrecht (12 ed. 1925), § 58 (B) 4; (b) carrying messages secretly: Hall, International Law (8th ed. 1924) § 188; Spaight, War Rights on Land 215; 3 Merignhac, Droit Public International (1912) 296–97; Bluntschli, Droit International Codifié (5th ed. tr. Lardy) § 639; 4 Calvo, Le Droit International Theorique et Pratique (5th ed. 1896) § 2119; (c) any hostile act: 2 Winthrop, Military Law and Precedents, (2nd ed. 1896) 1224. Cf. Lieber, Guerrilla Parties (1862), 2 Miscellaneous Writings (1881) 288.

These authorities are unanimous in stating that a soldier in uniform who commits the acts mentioned would be entitled to treatment as a prisoner of war; it is the absence of uniform that renders the offender liable to trial for violation of the laws of war.

in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property used or useful in prosecuting the war, is a hostile and warlike act. It subjects those who participate in it without uniform to the punishment prescribed by the law of war for unlawful belligerents. It is without significance that petitioners were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States. Paragraphs 351 and 352 of the Rules of Land Warfare, already referred to, plainly contemplate that the hostile acts and purposes for which unlawful belligerents may be punished are not limited to assaults on the Armed Forces of the United States. Modern warfare is directed at the destruction of enemy war supplies and the implements of their production and transportation, quite as much as at the armed forces. Every consideration which makes the unlawful belligerent punishable is equally applicable whether his objective is the one or the other. The law of war cannot rightly treat those agents of enemy armies who enter our territory, armed with explosives intended for the destruction of war industries and supplies, as any the less belligerent enemies than are agents similarly entering for the purpose of destroying fortified places or our Armed Forces. By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment.

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid,

guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war. Cf. *Gates* v. *Goodloe,* 101 U. S. 612, 615, 617–18. It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused.

Nor are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations. The argument leaves out of account the nature of the offense which the Government charges and which the Act of Congress, by incorporating the law of war, punishes. It is that each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose. The offense was complete when with that purpose they entered—or, having so entered, they remained upon—our territory in time of war without uniform or other appropriate means of identification. For that reason, even when committed by a citizen, the offense is distinct from the crime of treason defined in Article III, § 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other. Cf. *Morgan* v. *Devine,* 237 U. S. 632; *Albrecht* v. *United States,* 273 U. S. 1, 11–12.

But petitioners insist that, even if the offenses with which they are charged are offenses against the law of war, their trial is subject to the requirement of the Fifth Amendment that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, and that such trials by Article III, § 2, and the Sixth Amendment must be by jury in a civil court. Before the Amendments, § 2 of Arti-

cle III, the Judiciary Article, had provided, "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," and had directed that "such Trial shall be held in the State where the said Crimes shall have been committed."

Presentment by a grand jury and trial by a jury of the vicinage where the crime was committed were at the time of the adoption of the Constitution familiar parts of the machinery for criminal trials in the civil courts. But they were procedures unknown to military tribunals, which are not courts in the sense of the Judiciary Article, *Ex parte Vallandigham,* 1 Wall. 243; *In re Vidal,* 179 U. S. 126; cf. *Williams* v. *United States,* 289 U. S. 553, and which in the natural course of events are usually called upon to function under conditions precluding resort to such procedures. As this Court has often recognized, it was not the purpose or effect of § 2 of Article III, read in the light of the common law, to enlarge the then existing right to a jury trial. The object was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future, *District of Columbia* v. *Colts,* 282 U. S. 63, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right.

The Fifth and Sixth Amendments, while guaranteeing the continuance of certain incidents of trial by jury which Article III, § 2 had left unmentioned, did not enlarge the right to jury trial as it had been established by that Article. *Callan* v. *Wilson,* 127 U. S. 540, 549. Hence petty offenses triable at common law without a jury may be tried without a jury in the federal courts, notwithstanding Article III, § 2, and the Fifth and Sixth Amendments. *Schick* v. *United States,* 195 U. S. 65; *District of Colum-*

bia v. *Clawans,* 300 U. S. 617. Trial by jury of criminal contempts may constitutionally be dispensed with in the federal courts in those cases in which they could be tried without a jury at common law. *Ex parte Terry,* 128 U. S. 289, 302–04; *Savin, Petitioner,* 131 U. S. 267, 277; *In re Debs,* 158 U. S. 564, 594–96; *United States* v. *Shipp,* 203 U. S. 563, 572; *Blackmer* v. *United States,* 284 U. S. 421, 440; *Nye* v. *United States,* 313 U. S. 33, 48; see *United States* v. *Hudson and Goodwin,* 7 Cranch 32, 34. Similarly, an action for debt to enforce a penalty inflicted by Congress is not subject to the constitutional restrictions upon criminal prosecutions. *United States* v. *Zucker,* 161 U. S. 475; *United States* v. *Regan,* 232 U. S. 37, and cases cited.

All these are instances of offenses committed against the United States, for which a penalty is imposed, but they are not deemed to be within Article III, § 2, or the provisions of the Fifth and Sixth Amendments relating to "crimes" and "criminal prosecutions." In the light of this long-continued and consistent interpretation we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.

The fact that "cases arising in the land or naval forces" are excepted from the operation of the Amendments does not militate against this conclusion. Such cases are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth. *Ex parte Milligan, supra,* 123, 138–39. It is argued that the exception, which excludes from the Amendment cases arising in the armed forces, has also by implication extended its guaranty to all other cases; that since petitioners, not being members of the Armed Forces of the United States, are not within the exception, the Amendment operates to

give to them the right to a jury trial. But we think this argument misconceives both the scope of the Amendment and the purpose of the exception.

We may assume, without deciding, that a trial prosecuted before a military commission created by military authority is not one "arising in the land . . . forces," when the accused is not a member of or associated with those forces. But even so, the exception cannot be taken to affect those trials before military commissions which are neither within the exception nor within the provisions of Article III, § 2, whose guaranty the Amendments did not enlarge. No exception is necessary to exclude from the operation of these provisions cases never deemed to be within their terms. An express exception from Article III, § 2, and from the Fifth and Sixth Amendments, of trials of petty offenses and of criminal contempts has not been found necessary in order to preserve the traditional practice of trying those offenses without a jury. It is no more so in order to continue the practice of trying, before military tribunals without a jury, offenses committed by enemy belligerents against the law of war.

Section 2 of the Act of Congress of April 10, 1806, 2 Stat. 371, derived from the Resolution of the Continental Congress of August 21, 1776,[13] imposed the death penalty on alien spies "according to the law and usage of nations, by sentence of a general court martial." This enactment must be regarded as a contemporary construction of both Article III, § 2, and the Amendments as not foreclosing trial by military tribunals, without a jury, of offenses against the law of war committed by enemies not in or associated with our Armed Forces. It is a construction of the Constitution which has been followed since the founding of our Government, and is now continued in the 82nd Article of War. Such a construction is entitled to

[13] See Morgan, Court-Martial Jurisdiction over Non-Military Persons under the Articles of War, 4 Minnesota L. Rev. 79, 107–09.

the greatest respect. *Stuart* v. *Laird*, 1 Cranch 299, 309; *Field* v. *Clark*, 143 U. S. 649, 691; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 328. It has not hitherto been challenged, and, so far as we are advised, it has never been suggested in the very extensive literature of the subject that an alien spy, in time of war, could not be tried by military tribunal without a jury.[14]

[14] In a number of cases during the Revolutionary War enemy spies were tried and convicted by military tribunals: (1) Major John Andre, Sept. 29, 1780, see note 9 *supra*. (2) Thomas Shanks was convicted by a "Board of General Officers" at Valley Forge on June 3, 1778, for "being a Spy in the Service of the Enemy," and sentenced to be hanged. 12 Writings of Washington (Bicentennial Comm'n ed.) 14. (3) Matthias Colbhart was convicted of "holding a Correspondence with the Enemy" and "living as a Spy among the Continental Troops" by a General Court Martial convened by order of Major General Putnam on Jan. 13, 1778; General Washington, the Commander in Chief, ordered the sentence of death to be executed, 12 *Id.* 449–50. (4) John Clawson, Ludwick Lasick, and William Hutchinson were convicted of "lurking as spies in the Vicinity of the Army of the United States" by a General Court Martial held on June 18, 1780. The death sentence was confirmed by the Commander in Chief. 19 *Id.* 23. (5) David Farnsworth and John Blair were convicted of "being found about the Encampment of the United States as Spies" by a Division General Court Martial held on Oct. 8, 1778 by order of Major General Gates. The death sentence was confirmed by the Commander in Chief. 13 *Id.* 139–40. (6) Joseph Bettys was convicted of being "a Spy for General Burgoyne" by coming secretly within the American lines, by a General Court Martial held on April 6, 1778 by order of Major General McDougall. The death sentence was confirmed by the Commander in Chief. 15 *Id.* 364. (7) Stephen Smith was convicted of "being a Spy" by a General Court Martial held on Jan. 6, 1778. The death sentence was confirmed by Major General McDougall. *Ibid.* (8) Nathaniel Aherly and Reuben Weeks, Loyalist soldiers, were sentenced to be hanged as spies. Proceedings of a General Court Martial Convened at West Point According to a General Order of Major General Arnold, Aug. 20–21, 1780 (National Archives, War Dept., Revolutionary War Records, MS No. 31521). (9) Jonathan Loveberry, a Loyalist soldier, was sentenced to be hanged as a spy. Proceedings of a General Court Martial Convened at the Request of Major General

The exception from the Amendments of "cases arising in the land or naval forces" was not aimed at trials by military tribunals, without a jury, of such offenses against the law of war. Its objective was quite different—to authorize the trial by court martial of the members of our Armed Forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts. The cases mentioned in the exception are not restricted to those involving offenses against the law of war alone, but extend to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law. *Ex parte Mason,* 105 U. S. 696; *Kahn* v. *Anderson,* 255 U. S. 1, 8–9; *cf. Caldwell* v. *Parker,* 252 U. S. 376.

Arnold at the Township of Bedford, Aug. 30–31, 1780 (*Id.* MS No. 31523). He later escaped, 20 Writings of Washington 253n. (10) Daniel Taylor, a lieutenant in the British Army, was convicted as a spy by a general court martial convened on Oct. 14, 1777, by order of Brigadier General George Clinton, and was hanged. 2 Public Papers of George Clinton (1900) 443. (11) James Molesworth was convicted as a spy and sentenced to death by a general court martial held at Philadelphia, March 29, 1777; Congress confirmed the order of Major General Gates for the execution of the sentence. 7 Journals of the Continental Congress 210. See also cases of "M. A." and "D. C.," G. O. Headquarters of General Sullivan, Providence, R. I., July 24, 1778, reprinted in Niles, Principles and Acts of the Revolution (1822) 369; of Lieutenant Palmer, 9 Writings of Washington, 56n; of Daniel Strang, 6 *Id.* 497n; of Edward Hicks, 14 *Id.* 357; of John Mason and James Ogden, executed as spies near Trenton, N. J., on Jan. 10, 1781, mentioned in Hatch, Administration of the American Revolutionary Army (1904) 135 and Van Doren, Secret History of the American Revolution (1941) 410.

During the War of 1812, William Baker was convicted as a spy and sentenced to be hanged, by a general court martial presided over by Brigadier General Thomas A. Smith at Plattsburg, N. Y., on March 25, 1814. National Archives, War Dept., Judge Advocate General's Office, Records of Courts Martial, MS No. O–13. William Utley, tried as a spy by a court martial held at Plattsburg, March 3–5, 1814, was acquitted. *Id.,* MS No. X–161. Elijah Clark was convicted as

Since the Amendments, like § 2 of Article III, do not preclude all trials of offenses against the law of war by military commission without a jury when the offenders are aliens not members of our Armed Forces, it is plain that they present no greater obstacle to the trial in like manner of citizen enemies who have violated the law of war applicable to enemies. Under the original statute authorizing trial of alien spies by military tribunals, the offenders were outside the constitutional guaranty of trial by jury, not because they were aliens but only because they had violated the law of war by committing offenses constitutionally triable by military tribunal.

We cannot say that Congress in preparing the Fifth and Sixth Amendments intended to extend trial by jury to the cases of alien or citizen offenders against the law of war otherwise triable by military commission, while withholding it from members of our own armed forces charged with infractions of the Articles of War punishable by death. It is equally inadmissible to construe the Amendments—

---

a spy, and sentenced to be hanged, by a general court martial held at Buffalo, N. Y., Aug. 5–8, 1812. He was ordered released by President Madison on the ground that he was an American citizen. Military Monitor, Vol. I, No. 23, Feb. 1, 1813, pp. 121–122; Maltby, Treatise on Courts Martial and Military Law (1813) 35–36.

In 1862 Congress amended the spy statute to include "all persons" instead of only aliens. 12 Stat. 339, 340; see also 12 Stat. 731, 737. For the legislative history, see Morgan, Court-Martial Jurisdiction over Non-Military Persons under the Articles of War, 4 Minnesota L. Rev. 79, 109–11. During the Civil War a number of Confederate officers and soldiers, found within the Union lines in disguise, were tried and convicted by military commission for being spies. Charles H. Clifford, G. O. No. 135, May 18, 1863; William S. Waller, G. O. No. 269, Aug. 4, 1863; Alfred Yates and George W. Casey, G. O. No. 382, Nov. 28, 1863; James R. Holton and James Taylor, G. C. M. O. No. 93, May 13, 1864; James McGregory, G. C. M. O. No. 152, June 4, 1864; E. S. Dodd, Dept. of Ohio, G. O. No. 3, Jan. 5, 1864. For other cases of spies tried by military commission, see 2 Winthrop, Military Law and Precedents, 1193 *et seq.*

whose primary purpose was to continue unimpaired presentment by grand jury and trial by petit jury in all those cases in which they had been customary—as either abolishing all trials by military tribunals, save those of the personnel of our own armed forces, or, what in effect comes to the same thing, as imposing on all such tribunals the necessity of proceeding against unlawful enemy belligerents only on presentment and trial by jury. We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury.

Petitioners, and especially petitioner Haupt, stress the pronouncement of this Court in the *Milligan* case, *supra*, p. 121, that the law of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed." Elsewhere in its opinion, at pp. 118, 121–22 and 131, the Court was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present, and not involved here—martial law might be constitutionally established.

The Court's opinion is inapplicable to the case presented by the present record. We have no occasion now to define

with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in, our territory without uniform—an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.

Since the first specification of Charge I sets forth a violation of the law of war, we have no occasion to pass on the adequacy of the second specification of Charge I, or to construe the 81st and 82nd Articles of War for the purpose of ascertaining whether the specifications under Charges II and III allege violations of those Articles or whether if so construed they are constitutional. *McNally* v. *Hill,* 293 U. S. 131.

There remains the contention that the President's Order of July 2, 1942, so far as it lays down the procedure to be followed on the trial before the Commission and on the review of its findings and sentence, and the procedure in fact followed by the Commission, are in conflict with Articles of War 38, 43, 46, 50½ and 70. Petitioners argue that their trial by the Commission, for offenses against the law of war and the 81st and 82nd Articles of War, by a procedure which Congress has prohibited would invalidate any conviction which could be obtained against them and renders their detention for trial likewise unlawful (see *McClaughry* v. *Deming,* 186 U. S. 49; *United States* v. *Brown,* 206 U. S. 240, 244; *Runkle* v. *United States,* 122 U. S. 543, 555–56; *Dynes* v. *Hoover,* 20 How. 65, 80–81); that the President's Order prescribes such an unlawful

procedure; and that the secrecy surrounding the trial and all proceedings before the Commission, as well as any review of its decision, will preclude a later opportunity to test the lawfulness of the detention.

Petitioners do not argue and we do not consider the question whether the President is compelled by the Articles of War to afford unlawful enemy belligerents a trial before subjecting them to disciplinary measures. Their contention is that, if Congress has authorized their trial by military commission upon the charges preferred—violations of the law of war and the 81st and 82nd Articles of War—it has by the Articles of War prescribed the procedure by which the trial is to be conducted; and that, since the President has ordered their trial for such offenses by military commission, they are entitled to claim the protection of the procedure which Congress has commanded shall be controlling.

We need not inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents. For the Court is unanimous in its conclusion that the Articles in question could not at any stage of the proceedings afford any basis for issuing the writ. But a majority of the full Court are not agreed on the appropriate grounds for decision. Some members of the Court are of opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders, and that the context of the Articles makes clear that they should not be construed to apply in that class of cases. Others are of the view that—even though this trial is subject to whatever provisions of the Articles of War Congress has in terms made applicable to "commissions"—the particular Articles in question, rightly construed, do not foreclose the procedure prescribed by the President or that shown to have been em-

ployed by the Commission, in a trial of offenses against the law of war and the 81st and 82nd Articles of War, by a military commission appointed by the President.

Accordingly, we conclude that Charge I, on which petitioners were detained for trial by the Military Commission, alleged an offense which the President is authorized to order tried by military commission; that his Order convening the Commission was a lawful order and that the Commission was lawfully constituted; that the petitioners were held in lawful custody and did not show cause for their discharge. It follows that the orders of the District Court should be affirmed, and that leave to file petitions for habeas corpus in this Court should be denied.

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

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1942.

BRAVERMAN *v.* UNITED STATES.*

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

No. 43. Argued October 21, 1942.—Decided November 9, 1942.

1. A conviction upon several counts of an indictment, each charging conspiracy to violate a different penal provision of the Internal Revenue laws, where the jury's verdict is supported by evidence of but a single conspiracy to commit those offenses, will not sustain a sentence of more than two years' imprisonment, the maximum penalty for a single violation of the conspiracy statute. P. 52.
2. The limitation applicable to a prosecution for violation of § 37 of the Criminal Code, where the object of the conspiracy is to evade or defeat the payment of a federal tax, is not the three-year period applicable generally to criminal offenses, but the six-year period specifically prescribed by § 3748 (a) of the Internal Revenue Code. P. 54.
3. A contention of the petitioner that his plea of former jeopardy should have been sustained is not passed upon here, since the earlier indictment to which he pleaded guilty, and which he argues charged the same offense as that of which he was convicted in this case, is not a part of the record. P. 55.

125 F. 2d 283, reversed.

---

* Together with No. 44, *Wainer* v. *United States*, also on writ of certiorari, 316 U. S. 653, to the Circuit Court of Appeals for the Sixth Circuit.

503873—43——11

CERTIORARI, 316 U. S. 653, to review the affirmance of sentences upon convictions of conspiracy.

Mr. James J. Magner for petitioner in No. 43. *Mr. John E. Dougherty* for petitioner in No. 44.

Mr. W. Marvin Smith, with whom *Solicitor General Fahy* was on the brief, for the United States.

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

The questions for decision are: (1) Whether a conviction upon the several counts of an indictment, each charging conspiracy to violate a different provision of the Internal Revenue laws, where the jury's verdict is supported by evidence of but a single conspiracy, will sustain a sentence of more than two years' imprisonment, the maximum penalty for a single violation of the conspiracy statute, and (2) whether the six-year period of limitation prescribed by § 3748 (a) of the Internal Revenue Code is applicable to offenses arising under § 37 of the Criminal Code, 18 U. S. C. 88 (the conspiracy statute), where the object of the conspiracy is to evade or defeat the payment of a federal tax.

Petitioners were indicted, with others, on seven counts, each charging a conspiracy to violate a separate and distinct internal revenue law of the United States.[1] On the trial there was evidence from which the jury could have found that, for a considerable period of time, petitioners, with others, collaborated in the illicit manufacture, trans-

[1] The seven counts respectively charged them with conspiracy, in violation of § 37 of the Criminal Code, unlawfully (1) to carry on the business of wholesale and retail liquor dealers without having the special occupational tax stamps required by statute, 26 U. S. C. § 3253; (2) to possess distilled spirits, the immediate containers of which did not have stamps affixed denoting the quantity of the distilled spirits which they contained and evidencing payment of all Internal Revenue

portation, and distribution of distilled spirits, involving the violations of statute mentioned in the several counts of the indictment. At the close of the trial, petitioners renewed a motion which they had made at its beginning to require the Government to elect one of the seven counts of the indictment upon which to proceed, contending that the proof could not and did not establish more than one agreement. In response the Government's attorney took the position that the seven counts of the indictment charged as distinct offenses the several illegal objects of one continuing conspiracy, that if the jury found such a conspiracy it might find the defendants guilty of as many offenses as it had illegal objects, and that for each such offense the two-year statutory penalty could be imposed.

The trial judge submitted the case to the jury on that theory. The jury returned a general verdict finding petitioners "guilty as charged," and the court sentenced each to eight years' imprisonment. On appeal the Court of Appeals for the Sixth Circuit affirmed, 125 F. 2d 283, on the authority of its earlier decisions in *Fleisher* v. *United States,* 91 F. 2d 404 and *Meyers* v. *United States,* 94 F. 2d 433. It found that "From the evidence may be readily deduced a common design of appellants and others, followed by concerted action," to commit the several unlawful acts specified in the several counts of the indictment. It concluded that the fact that the conspiracy was "a general one to violate all laws repressive of its consumma-

taxes imposed on such spirits, 26 U. S. C. § 2803; (3) to transport quantities of distilled spirits, the immediate containers of which did not have affixed the required stamps, 26 U. S. C. § 2803; (4) to carry on the business of distillers without having given bond as required by law, 26 U. S. C. § 2833; (5) to remove, deposit and conceal distilled spirits in respect whereof a tax is imposed by law, with intent to defraud the United States of such tax, 26 U. S. C. § 3321; (6) to possess unregistered stills and distilling apparatus, 26 U. S. C. § 2810; and (7) to make and ferment mash, fit for distillation, on unauthorized premises, 26 U. S. C. § 2834.

tion does not gainsay the separate identity of each of the several conspiracies." We granted certiorari, 316 U. S. 653, to resolve an asserted conflict of decisions.[2] The Government, in its argument here, submitted the case for our decision with the suggestion that the decision below is erroneous.

Both courts below recognized that a single agreement to commit an offense does not become several conspiracies because it continues over a period of time, see *United States* v. *Kissel*, 218 U. S. 601, 607; cf. *In re Snow*, 120 U. S. 274, 281–3, and that there may be such a single continuing agreement to commit several offenses. But they thought that, in the latter case, each contemplated offense renders the agreement punishable as a separate conspiracy.

The question whether a single agreement to commit acts in violation of several penal statutes is to be punished as one or several conspiracies is raised on the present record, not by the construction of the indictment, but by the Government's concession at the trial and here, reflected in the charge to the jury, that only a single agreement to commit the offenses alleged was proven. Where each of the counts of an indictment alleges a conspiracy to violate a different penal statute, it may be proper to conclude, in the absence of a bill of exceptions bringing up the evidence, that several conspiracies are charged rather than one, and that the conviction is for each. See *Fleisher* v. *United States, supra; Shultz* v. *Hudspeth*, 123 F. 2d 729, 730. But it is a different matter to hold, as the court below appears to have done in this case and in *Meyers* v.

[2] Compare the decision below and those in *Beddow* v. *United States*, 70 F. 2d 674, 676 (C. C. A. 8th); *Yenkichi Ito* v. *United States*, 64 F. 2d 73, 77 (C. C. A. 9th); and *Olmstead* v. *United States*, 19 F. 2d 842, 847 (C. C. A. 9th), with those in *United States* v. *Mazzochi*, 75 F. 2d 497, 498 (C. C. A. 2nd); *Short* v. *United States*, 91 F. 2d 614, 622 (C. C. A. 4th); *Powe* v. *United States*, 11 F. 2d 598, 599 (C. C. A. 5th); and *United States* v. *Anderson*, 101 F. 2d 325, 333 (C. C. A. 7th).

United States, supra, that even though a single agreement is entered into, the conspirators are guilty of as many offenses as the agreement has criminal objects.

The gist of the crime of conspiracy as defined by the statute is the agreement or confederation of the conspirators to commit one or more unlawful acts "where one or more of such parties do any act to effect the object of the conspiracy." The overt act, without proof of which a charge of conspiracy cannot be submitted to the jury, may be that of only a single one of the conspirators and need not be itself a crime. *Bannon* v. *United States,* 156 U. S. 464, 468–9; *Joplin Mercantile Co.* v. *United States,* 236 U. S. 531, 535, 536; *United States* v. *Rabinowich,* 238 U. S. 78, 86; *Pierce* v. *United States,* 252 U. S. 239, 244. But it is unimportant, for present purposes, whether we regard the overt act as a part of the crime which the statute defines and makes punishable, see *Hyde* v. *United States,* 225 U. S. 347, 357–9, or as something apart from it, either an indispensable mode of corroborating the existence of the conspiracy or a device for affording a *locus poenitentiae,* see *United States* v. *Britton,* 108 U. S. 193, 204, 205; *Dealy* v. *United States,* 152 U. S. 539, 543, 547; *Bannon* v. *United States, supra,* 469; *Hyde* v. *Shine,* 199 U. S. 62, 76; *Hyde* v. *United States, supra,* 388; *Joplin Mercantile Co.* v. *United States, supra.*

For when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.

The allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for "The conspiracy is the crime, and that is one, however diverse its objects." *Frohwerk* v. *United States,* 249 U. S. 204, 210; *Ford* v. *United States,* 273 U. S. 593, 602; *United States* v. *Manton,* 107 F. 2d 834, 838. A conspiracy is not the commission of the crime which it contemplates, and neither violates nor "arises under" the statute whose violation is its object. *United States* v. *Rabinowich, supra,* 87–9; *United States* v. *McElvain,* 272 U. S. 633, 638; see *United States* v. *Hirsch,* 100 U. S. 33, 34, 35. Since the single continuing agreement, which is the conspiracy here, thus embraces its criminal objects, it differs from successive acts which violate a single penal statute and from a single act which violates two statutes. See *Blockburger* v. *United States,* 284 U. S. 299, 301–4; *Albrecht* v. *United States,* 273 U. S. 1, 11–12. The single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute, § 37 of the Criminal Code. For such a violation, only the single penalty prescribed by the statute can be imposed.

Petitioner Wainer contends that his prosecution was barred by the three-year statute of limitations, 18 U. S. C. § 582, since he withdrew from the conspiracy more than three, although not more than six, years before his indictment. This Court, in *United States* v. *McElvain,* 272 U. S. 633, 638, and *United States* v. *Scharton,* 285 U. S. 518, held that the three-year statute of limitations applicable generally to criminal offenses barred prosecution for a conspiracy to violate the Revenue Acts, since it was not within the exception created by the Act of November 17, 1921, 42 Stat. 220, now § 3748 (a) (1) of the Internal Revenue Code, which provided a six-year statute of limitations "for offenses involving the defrauding or attempting to defraud the United States or any agency thereof,

whether by conspiracy or not." To overcome the effect of these decisions, that Act was amended, Revenue Act of 1932, 47 Stat. 169, 288, by the addition of a second exception, which provided a six-year statute of limitations "for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof," and by the addition of a new paragraph, reading as follows:

"For offenses arising under section 37 of the Criminal Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof, the period of limitation shall also be six years."

To be within this last paragraph it is not necessary that the conspiracy have as its object the commission of an offense in which defrauding or attempting to defraud the United States is an element. It is enough that the conspiracy involves an attempt to evade or defeat the payment of federal taxes, which was among the objects of the conspiracy of which petitioner was convicted. Enlargement, to six years, of the time for prosecution of such conspiracies was the expressed purpose of the amendment. See H. R. Rep. No. 1492, 72d Cong., 1st Sess., 29.

We do not pass upon petitioner Wainer's argument that his plea of former jeopardy should have been sustained, since the earlier indictment to which he pleaded guilty and which he insists charged the same offense as that of which he has now been convicted, is not a part of the record.

The judgment of conviction will be reversed and the cause remanded to the District Court, where the petitioners will be resentenced in conformity to this opinion.

Reversed.

UNITED STATES *v.* CALLAHAN WALKER CONSTRUCTION CO.

CERTIORARI TO THE COURT OF CLAIMS.

No. 65. Argued October 23, 1942.—Decided November 9, 1942.

Under the Government construction contract here involved, an "equitable adjustment" for the extra work performed by the contractor required merely the ascertainment of the cost of digging, moving, and placing earth, and of a reasonable allowance for profit. These were questions of fact; and, if they were erroneously determined by the contracting officer, the contractor's remedy was by appeal to the head of the department concerned, as provided by Article 15 of the contract. P. 61.

95 Ct. Cls. 314, reversed.

CERTIORARI, 316 U. S. 656, to review a judgment against the United States in a suit by a contractor upon a construction contract.

Mr. Richard S. Salant, with whom *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Oscar H. Davis* were on the brief, for the United States.

Mr. Robert A. Littleton for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case involves the meaning and application of the terms of a standard form of Government construction contract.

The findings of the Court of Claims may be summarized. In 1931 the War Department asked bids for the construction of a levee on the east side of the Mississippi River. The respondent bid 14.43¢ a cubic yard on a section of the work involving approximately 3,881,600 cubic yards of earthwork. A paragraph of the specifications reserved the right to make such changes in the work contemplated as might be necessary or expedient to carry out the intent

of the contract or to meet unanticipated conditions, but added that no such modification would be the basis for a claim for extra compensation except as provided in the regular form of contract to be entered into between the parties.

The respondent began construction at the south end of the project and proceeded northward. The length of the proposed levee was divided by stations one hundred feet apart and numbered from north to south. Sixty-eight per cent. of the construction between Station 5123 and Station 5113 had been completed when portions of the levee already constructed south of Station 5123 were found to have a tendency to subside. For this reason the Government contracting officer, on October 7, 1932, ordered the work stopped between the two stations while he sought to determine the cause of the subsidence. He concluded that the placing of an enlarged false berm, not called for in the original specifications, would prevent subsidence in the sector between the two stations. On October 18th he gave respondent a written order to construct such a berm; the order stated that respondent would be given one hundred per cent. credit for the earth placed south of Station 5123 where the subsidence had occurred, and that payment for additional yardage required by the false berm would be made at the contract price per cubic yard. The additional yardage involved was about 64,000 cubic yards. The work covered by the change order was necessary for the completion of the project. The order was issued against the respondent's protest that an extra price should be allowed as the additional work would cost the respondent more than 14.43¢ per cubic yard, and that the order was not within the terms of the contract. The respondent asserted it would later present a claim for extra cost occasioned it by the additional work.

Article 3 of the standard form of construction contract signed by the parties provides:

"Article 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. . . . Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed."

Article 15 provides:

"Article 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed."

The respondent did not appeal from the order of the contracting officer to the head of the department concerned. After completion of the work, the acceptance of the Government's final payment was under protest. Thereafter respondent brought this action for its additional costs over the price of 14.43¢ paid it for the extra work, and was awarded a recovery by the court below.

The Government's defense was that, under the terms of the contract, the contracting officer's decision as to what

was an equitable adjustment involved only a question of fact, and that, if the respondent was dissatisfied with the officer's judgment, the contract limited further recourse to an appeal to the department head. The court below overruled the contention by a vote of 3 to 2, one of the judges in the majority writing a separate opinion.[1] Two of the judges were of opinion that the contracting officer paid no attention to Art. 3 of the contract, made no adjustment, and, without considering the possibility of extra costs involved in the extra work, simply ruled that the contract price applied to it.

We cannot accept this view for several reasons. In the first place, there are no findings to support it. The findings show that the officer gave the matter consideration, reached a decision about it, and issued the order which gave respondent a credit to which it might not have been entitled under the contract, and fixed the rate of 14.43¢ per cubic yard for the extra yardage required by the change in the specifications. There are no findings that the contracting officer failed to ascertain the probable cost of the new work or that he did not honestly decide that the contract price would be a fair allowance for the extra work. If the conflict between the opinion and the findings were sufficient to require a remand for clarification, this is obviated in the present instance by certification of the evidence, which supports the following conclusions. Between October 7th, the date of the stop order, and October 18th, the date of the change order, the respondent's officials were in touch with the area engineer and the contracting officer, represented that there was not sufficient earth in the borrow pit opposite the sector in question but that the earth would have to be brought from other points, and that the contract price of 14.43¢ would be insufficient to compensate for the additional expense involved. The Government's representatives dis-

[1] 95 Ct. Cls. 314.

agreed with the contentions. Prior to October 18th, however, after talking with the contracting officer, respondent's officials signified that they would proceed with the work as ordered, keep a careful record of the work done and its cost, and would later insist on payment of any cost greater than that specified by the change order.

All three judges who were in the majority below agreed, as an alternative ground of decision, that if what the contracting officer did constituted his notion of an equitable adjustment, he was wrong; and the respondent was right in its claim that the adjustment made was unfair and inequitable. To the Government's insistence that the question was one of fact and, therefore, to be settled finally by appeal to the department head, in accordance with Art. 15 of the contract, the court below replied that this court, in *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, and *Securities Commission* v. *United States Realty Co.*, 310 U. S. 434, held that what constitutes an equitable adjustment is not a question of fact but a question of law. In this view they held that Art. 15 was inapplicable; that the contracting officer having erred in his construction of the contract had thereby breached its terms, and the respondents were entitled to sue for the amount of damage incurred by that breach.

The decisions cited are not authority for the principle that what is fair and equitable is always a question of law. Quite the contrary. In § 77B of the Bankruptcy Act it was provided that the court should confirm a plan of reorganization if satisfied "it is fair and equitable" and does not discriminate unfairly in favor of any class of creditors or stockholders. We held that, in this connection, the phrase "fair and equitable" had become a term of art, that Congress used it in the sense in which it had been used by the courts in reorganization cases, and that whether a plan met the test of fairness and equity long established by judicial decision was not a question to be answered by

the creditors and stockholders but by the court as a matter of law.

An "equitable adjustment" of the respondent's additional payment for extra work involved merely the ascertainment of the cost of digging, moving, and placing earth, and the addition to that cost of a reasonable and customary allowance for profit. These were inquiries of fact. If the contracting officer erroneously answered them, Article 15 of the contract provided the only avenue for relief.

The judgment is

Reversed.

UNITED STATES *v.* RICE ET AL., RECEIVERS FOR D. C. ENGINEERING COMPANY, INC.

CERTIORARI TO THE COURT OF CLAIMS.

No. 31. Argued October 22, 1942.—Decided November 9, 1942.

Under a Government contract for the installation of equipment in a building, the contractor agreed to complete the work within the time allowed under another contract, with another contractor, for the construction of the building. The building contract provided for completion within 250 days after notice, but permitted changes in the specifications to be made in the event of discovery of subsurface conditions materially different from those shown in the drawings or indicated in the specifications. Shortly after notice to begin had been given, work under the building contract was suspended pending the making of such a permitted change. *Held:*

1. A delay resulting from such a permitted change did not constitute a breach by the Government of the equipment contract. P. 64.

The Government was not bound to have the building ready for the work of the equipment contractor at a particular time.

2. The equipment contractor was not entitled to recover consequential damages for delay thus resulting; for such a delay, extension of the time for completion was an "equitable adjustment" under the contract. P. 66.

95 Ct. Cls. 84, reversed.

CERTIORARI, 316 U. S. 653, to review a judgment against the United States in a suit upon a contract. The engineering company, in charge of the receivers, is referred to in the following opinion as the respondent.

Mr. Valentine Brookes argued the cause, and *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Melvin H. Siegel, Morton Liftin,* and *Robert L. Stern* were on the brief, for the United States.

Mr. R. Aubrey Bogley, with whom *Messrs. Frederic D. McKenney, John S. Flannery,* and *G. Bowdoin Craighill* were on the brief, for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

We granted certiorari to review a judgment against the United States by the Court of Claims, 95 Ct. Cls. 84, interpreting a widely used standard form construction contract in a manner alleged to be in conflict with this Court's interpretation of an analogous contract in *Crook Co.* v. *United States,* 270 U. S. 4.

Respondent agreed to install plumbing, heating, and electrical equipment in a Veterans' Home to be erected at Togus, Maine, while another contractor was to do the general work of preparing the site and constructing the building. Respondent agreed, for a stipulated price, to begin work upon notice to proceed and to finish by the time the work had been completed by the principal contractor. If respondent failed to complete the work within the time thus set, the Government was entitled to terminate the contract or to require the payment of liquidated damages. The length of time allowed the principal contractor under his contract, subject to certain qualifications discussed below, was 250 days, and it was into this schedule that respondent was to coördinate its own activity.

The Government gave notice to the general contractor to begin work on May 9, 1932. On May 12, respondent was notified to begin; and early in June its superintendent arrived in Maine with tools and equipment. Upon his arrival he found that the general contractor had been stopped by the Government because of the unexpected discovery of an unsuitable soil condition. It became necessary to change the site of the building and to alter the specifications, and, because of the delay attendant upon preparing a new foundation, respondent was unable to begin work until October. As a consequence, overhead expenses accumulated during the period of delay, and much of the work which respondent's employees otherwise would have done either during warm weather or after the building was enclosed, was done outside in cold weather.

Because of the delay and pursuant to the adjustment clauses of the contract, the Government extended the time of performance by respondent; and, because of structural changes, it re-adjusted the amount due. It increased payments to the principal contractor, reduced the payment to respondent by about $1,000 because of construction economies under the new plans, and waived any claim to liquidated damages for the period of the extension. The hospital was completed some months after it would have been finished had it not been for the change of plan.

The respondent was paid the full amount agreed on for the work it did. It then sued for about $26,000 for damages alleged to have been suffered due to delay for which the Government was responsible. The Court of Claims held the Government was liable for damages resulting solely from delay, but found that $13,600 of the alleged loss was due to respondent's own faulty estimate and financial conditions, and that $3,000 of it was caused by respondent's and the principal contractor's delays. Respondent sought no review of denial of this part of its

claim. However, the court concluded that the balance claimed, $9,349, arose from overhead costs during the summer of 1932 when the new foundation was being prepared, and from a decrease in labor effectiveness resulting because much of the work had to be done outside in cold weather. The judgment rendered under this conclusion is what we have before us.

The chief issues of the case are whether the delay in commencing the construction was a breach of contract by the Government; whether, regardless of the answer to that question, respondent was entitled to an equitable adjustment for damages resulting from the delay, in addition to the extension of time already granted; and whether respondent is barred from any recovery because it failed to appeal certain decisions affecting its contract to the chief officer of the department. Under the view we take of the first two of these questions, it is unnecessary to answer the third.

I. The Government contends, as it did in the *Crook* case, *supra,* that the change in specifications resulting in delay was not a breach of the contract, but in accordance with its terms; that the extent of its obligation for permitted changes was fixed by the contract; and that for delay the Government was required to do no more than grant an extension of time. Put another way, the Government concedes that, if an alteration of plan required respondent to use an extra 50 tons of steel, the Government would be liable for the value of the steel and the cost of installation; but it argues that under the terms of this contract an extension of time should be accepted as full equitable adjustment for all damages caused by the fact that the work was done at the later period made necessary by the permitted change. Essentially it repeats the doctrine of *Chouteau* v. *United States,* 95 U. S. 61, 68: "For the reasonable cost and expenses of the changes made in the construction, payment was to be made; but for any in-

crease in the cost of the work not changed, no provision was made."

We agree with this view. We do not think the terms of the contract bound the Government to have the contemplated structure ready for respondent at a fixed time. Provisions of the contract showed that the dates were tentative and subject to modification by the Government. The contractor was absolved from payment of prescribed liquidated damages for delay, if it resulted from a number of causes, including "acts of Government" and "unusually severe weather." The Government reserved the right to make changes which might interrupt the work, and even to suspend any portion of the construction if it were deemed necessary. Respondent was required to adjust its work to that of the general contractor, so that delay by the general contractor would necessarily delay respondent's work. Under these circumstances it seems appropriate to repeat what was said in the *Crook* case, that "When such a situation was displayed by the contract it was not to be expected that the Government should bind itself to a fixed time for the work to come to an end, and there is not a word in the instrument by which it did so, unless an undertaking contrary to what seems to us the implication is implied." *Crook Co.* v. *United States, supra,* 6. Decisions of this Court prior to the *Crook* case also make it clear that contracts such as this do not bind the Government to have the property ready for work by a contractor at a particular time. *Wells Bros. Co.* v. *United States,* 254 U. S. 83, 86; *Chouteau* v. *United States, supra;* cf. *United States* v. *Smith,* 94 U. S. 214, 217.

As pointed out, the delay here resulted from a change in specifications made necessary by discovery of soil unsuitable for foundation purposes. The Government having reserved the right to make such changes upon discovery of "subsurface and (or) latent conditions at the

site materially differing from those shown on the drawings or indicated in the specifications," delays incident to the permitted changes cannot amount to a breach of contract. If there are rights to recover damages where the Government exercises its reserved power to delay, they must be found in the particular provisions fixing the rights of the parties.

II. Two of the Judges of the Court of Claims thought consequential damages resulting from delay were recoverable under paragraphs 4 and 3 of the contract. These paragraphs [1] deal with closely related problems. Article 3, entitled "Changes," governs the procedure under which the Government may alter the specifications of the contract for general causes. Article 4, entitled "Changed Conditions," governs the procedure under which the Government may alter the contract to meet unanticipated physical conditions. Article 4 incorporates by reference

[1] "Article 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. . . .

"Article 4. Changed conditions.—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract."

the same machinery of adjustment as that specified in article 3. Both clauses essentially provide that, if changes are made affecting an increase or decrease of cost or affecting the length of time of performance, an equitable adjustment shall be made.

Clearly, questions of interpretation in clauses so similar should, if possible, be resolved in the same fashion in each of them. Clause 4 was added to the standard form contract since clause 3, and we therefore turn first to decisions interpreting the latter clause. The Court of Claims, relying on principles announced in the *Chouteau, Wells,* and *Crook* cases, *supra,* has uniformly held that the "increase or decrease of cost" language in Art. 3, and in similar clauses, is not broad enough to include damages for delay; that "It was never contemplated . . . that delays incident to changes would subject the Government to damage beyond that involved in the changes themselves." *Moran Bros. Co.* v. *United States,* 61 Ct. Cls. 73, 102; and for the same view, see *McCord* v. *United States,* 9 Ct. Cls. 155, 169; *Swift* v. *United States,* 14 Ct. Cls. 208, 231; *Griffiths* v. *United States,* 74 Ct. Cls. 245, 255.

Were this a matter of first impression, we would again come to the same conclusion regarding this clause. It seems wholly reasonable that "an increase or decrease in the amount due" should be met with an alteration of price, and that "an increase or decrease . . . in the time required" should be met with alteration of the time allowed; for "increase or decrease of cost" plainly applies to the changes in cost due to the structural changes required by the altered specification and not to consequential damages which might flow from delay taken care of in the "difference in time" provision. The provision as to time serves the large purpose of removing from persons in the position of respondent liability for "delay" beyond the stipulated date for which they might otherwise have

their contract terminated or might be required to pay liquidated damages without fault.

Despite the similarity of the two clauses, a minority of the court below has in this instance concluded that they may be distinguished and that respondent is entitled to damages for delay under clause 4. In supporting this view, respondents here rely primarily on *Rust Engineering Co.* v. *United States,* 86 Ct. Cls. 461, 475, where the court below distinguishes the two clauses by saying that the type of change contemplated in clause 4 is more basic than that under clause 3, and that therefore different liabilities should attach:

"The changes made necessary by reason of the conditions encountered in excavating for the foundation of the building were not reasonable changes within the scope of the drawings and specifications as contemplated in Art. 3 of the contract, but represented important changes based upon changed conditions which were unknown and materially different from those shown on the drawings or indicated in the specifications. Such changes were, therefore, clearly not within the contemplation of either party to the contract at the time it was made. . . ."

And see *Sobel* v. *United States,* 88 Ct. Cls. 149, 165.

No such strained distinction between paragraphs 3 and 4 can stand. It does not help to argue that the changes made under clause 4 "are not within the contemplation of either party," since the changes made under clause 3 are also not contemplated in advance. Both clauses deal with changes made necessary by new plans or new discoveries made subsequent to the signing of the contract. For delays incident to such unanticipated changes, the contractor was, under either section, to be granted a "compensating extension of time." *Wells Bros. Co.* v. *United States, supra,* 86.

61 Syllabus.

In this case there were two consequences of the discovery that the Home could not be built as originally planned. One was an alteration of specifications, which resulted in a slight cut in respondent's outlay and in its compensation. The other was the delay itself, and for this the time necessary to perform the contract was equitably adjusted by extension, thereby relieving respondent of liquidated damages which could otherwise have been imposed. Under the terms of the contract, it is entitled to no more.

Reversed.

EX PARTE KUMEZO KAWATO.

ON PETITION FOR WRIT OF MANDAMUS.

No. 10, Original. Argued October 12, 1942.—Decided November 9, 1942.

1. In an original proceeding in this Court upon a petition for a writ of mandamus to compel the District Court to proceed with the trial of a suit in admiralty, a contention that the writ should be denied because the District Court, although it had ordered the abatement of the suit for the duration of the war solely on the ground of the libelant's status as an alien enemy, could have dismissed the libel on other grounds, particularly for claimed defects in the allegations of the libel, is irrelevant; since, if the suit was erroneously abated on the ground assigned, the libelant is entitled to have the District Court proceed with the action and pass upon the sufficiency of his allegations in an orderly way. P. 71.
2. Mandamus is the appropriate remedy where the District Court has erroneously ordered the abatement, for the duration of the war, of a suit in admiralty by a resident alien enemy. P. 71.
3. The ancient rule of the common law barring suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper the war effort or give aid to the enemy. P. 72.
4. The President not having made, under the Trading with the Enemy Act, any declaration as to "alien enemies," a resident alien enemy—

claiming wages and an allowance for maintenance and cure, arising out of his lawful employment as a seaman—is not barred from the courts by § 7 of that Act. P. 75.

This conclusion is in accord with the legislative and administrative policy. P. 77.

5. The Trading with the Enemy Act was not intended, without Presidential proclamation, to affect resident aliens. P. 76.

Writ issued.

On petition for a writ of mandamus (leave to file granted, 316 U. S. 650) to compel the District Court to proceed with the trial of a suit in admiralty by a resident alien enemy.

Kumezo Kawato submitted *pro se.*

Mr. Lasher B. Gallagher argued the cause for Leon R. Yankwich, Judge.

Solicitor General Fahy and *Mr. Robert L. Stern* filed a brief on behalf of the United States, as *amicus curiae,* in support of petitioner.

Mr. Justice Black delivered the opinion of the Court.

The petitioner, born in Japan, became a resident of the United States in 1905. April 15, 1941, he filed a libel in admiralty against the vessel Rally in the District Court for the Southern District of California. He claimed wages were due him for services as a seaman and fisherman on the Rally, and sought an allowance for maintenance and cure on allegations that he had sustained severe injuries while engaged in the performance of his duties. Claimants of the vessel appeared and filed an answer on grounds not here material, but later, on January 20, 1942, moved to abate the action on the ground that petitioner, by reason of the state of war then existing between Japan and the United States, had become an enemy alien and therefore had no "right to prosecute any action in any

court of the United States during the pendency of said war." The District Judge granted the motion. Petitioner sought mandamus in the Circuit Court of Appeals for the Ninth Circuit to compel the District Court to vacate its judgment and proceed to trial of his action, but his motion for leave to file was denied without opinion. We granted leave to file in this Court, 316 U. S. 650, and the cause was submitted on answer, briefs and oral argument.

Although the court's order of abatement for the duration of the war rested solely on the ground of petitioner's status as an alien enemy, it has been argued here that the writ should be denied because the court could have dismissed the bill on other grounds, particularly claimed defects in the allegations of the libel. These contentions are irrelevant here. Unless the action was properly abated for the reasons set out in the motion and the court's order, the petitioner is entitled to have the District Court proceed with his action and pass upon the sufficiency of his allegations. This is an essential step in an orderly trial leading to a final judgment from which an appeal will lie to correct errors. If the court's order of abatement was erroneous, mandamus is the appropriate remedy. 28 U. S. C. 377; *McClellan* v. *Carland,* 217 U. S. 268, 279–282; *Ex parte Metropolitan Water Co.,* 220 U. S. 539, 546.

"Alien enemy" as applied to petitioner is at present but the legal definition of his status because he was born in Japan, with which we are at war. Nothing in this record indicates, and we cannot assume, that he came to America for any purpose different from that which prompted millions of others to seek our shores—a chance to make his home and work in a free country, governed by just laws, which promise equal protection to all who abide by them. His suit invokes the protection of those laws through our courts both to obtain payment of wages alleged to have been promised him by American citizens for lawful work

and reimbursement on account of damages suffered while working for those citizens.

Petitioner contends that he has the right under the common law and treaties to proceed with his action, and that this right is not limited by the statutes. In our view the possibility of treaty rights, which has not been argued extensively, need not be considered. Applicable treaties are ambiguous and should not be interpreted without more care than is necessary in this case.[1]

There doubtless was a time when the common law of England would have supported dismissal of petitioner's action, but that time has long since passed. A number of early English decisions, based on a group concept which made little difference between friends and enemies barred all aliens from the courts. This rule was gradually relaxed as to friendly aliens[2] until finally, in *Wells* v. *Williams,* 1 Ld. Raym. 282 (1698), the court put the necessities of trade ahead of whatever advantages had been

[1] Petitioner argues that his case is covered by article 23 h of the Annex to the IVth Hague Convention of 1907: "It is especially prohibited . . . to declare abolished, suspended, or inadmissible in a Court of law the rights and action of the nationals of the hostile party." This clause, which was added to the convention of 1899 without substantial discussion either by the Delegates in General Assembly or by the committee and sub-committee which dealt with it, III Proceedings of the Hague Convention of 1907, 12, 107, 136, 240; and I *ibid.* 83, was construed by an English Court to apply solely in enemy areas occupied by a belligerent. *Porter* v. *Freudenberg,* [1915] 1 K. B. 857. The question has not been raised in the courts in this country, but the English interpretation was repeated with approval by Representative Montague of the Interstate Commerce Committee in his address to the House when he presented to it the Trading with the Enemy Act. 55 Cong. Rec. 4842 (1917).

[2] According to Littleton, an alien might not sue in either a real or personal action; but this rule was modified by Coke to bar such actions only by alien enemies and to permit personal actions by alien friends. See Coke on Littleton 129 b. Pollock and Maitland suggest that this modification by Coke was "a bold treatment of a carefully worded

imagined to exist in the old rule, and held that enemy aliens in England under license from the Crown might proceed in the courts. As applied ever since, alien enemies residing in England have been permitted to maintain actions, while those in the land of the enemy were not; and this modern, humane principle has been applied even when the alien was interned, as is petitioner here.[3] *Schaffenius* v. *Goldberg,* [1916] 1 K. B. 284.

The original English common law rule, long ago abandoned there, was, from the beginning, objectionable here. The policy of severity toward alien enemies was clearly impossible for a country whose lifeblood came from an immigrant stream. In the war of 1812, for example, many persons born in England fought on the American side.[4] Harshness toward immigrants was inconsistent with that national knowledge, present then as now, of the contributions made in peace and war by the millions of immigrants who have learned to love the country of their adoption more than the country of their birth. Hence in 1813

---

text." 1 History of English Law, 2d ed., 459. The early law treated all aliens as a group. See the sub-titles of Pollock and Maitland's chapter, "The Sorts and Conditions of Men," some of which are: The Knights, The Unfree, The Clergy, Aliens, The Jews, Women, etc. *Ibid.,* Chap. II. For a summary of English views now largely obsolete on alien standing in court, see Hansard, Law Relating to Aliens, chap. 7 (1844). For a survey of the common law on inheritance of land by aliens, see *Techt* v. *Hughes,* 229 N. Y. 222, 128 N. E. 185 (Cardozo, J.).

[3] Petitioner was interned some months after the court had abated his action. The Government has filed a supplemental brief stating that it does not consider that this circumstance alters the position of petitioner in respect to his privilege of access to the courts.

[4] One writer estimates that half of the 400 men on board the Constitution when it captured the Guerriere were seamen who had deserted the British, and the ship United States was reported by its captain to have no men on board who had not served with British warships. Bradley, The United Empire Loyalists, 192; and see 3 McMaster, History of the United States, 242.

Chief Justice Kent, in *Clarke* v. *Morey,* 10 Johns. 69, 72, set the legal pattern which, with sporadic exceptions, has since been followed.[5] The core of that decision he put in these words: "A lawful residence implies protection, and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy, no less than to justice and humanity."[6] Thus the courts aligned their policy with that enjoined upon the President by Congress in 1812, when it directed him to administer the laws controlling aliens in a manner that would be "consistent with the public safety, and according to the dictates of humanity and national hospitality." 50 U. S. C. § 22.

In asking that the rights of resident aliens be abrogated in their behalf, private litigants in effect seek to stand in the position of government. But only the Government, and not the private individual, is vested with the power to protect all the people, including loyal aliens, from possible injury by disloyal aliens. If the public welfare demands that this alien shall not receive compensation for his work or payment for his injuries received in the course of his employment, the Government can make the decision without allowing a windfall to these claimants. Even if petitioner were a non-resident enemy alien, it might be more appropriate to release the amount of his claim to the

[5] For collection of cases, see 30 Georgetown L. J. 421; 28 Virginia L. R. 429; 27 Yale L. J. 105; Huberich, Trading With The Enemy, 188 *et seq.; Daimler Co.* v. *Continental Tyre Co.,* Anno. Cas. 1917 C, 170, 204; *Petition of Bernheimer,* 130 F. 2d 396; and for English cases, McNair, Legal Effects of War.

[6] Story was one of the few commentators to approve any part of the early common law rule. He accepted so much of that doctrine as required enemy aliens entitled to relief in the courts to have entered the country under safe conduct or license. Story on Civil Pleadings, p. 10; Story's Equity Pleadings, § 51–54, and particularly § 724. This requirement was reduced to legal fiction in *Clarke* v. *Morey, supra,* at 72, when Chief Justice Kent held that "The license is implied by law and the usage of nations."

Alien Property Custodian rather than to the claimants; and this is precisely what was done in *Birge-Forbes Co.* v. *Heye,* 251 U. S. 317, 323, in which this Court said that the sole objection to giving judgment for an alien enemy "goes only so far as it would give aid and comfort to the other side." The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy. This may be taken as the sound principle of the common law today.

It is argued that the petitioner is barred from the courts by the Trading with the Enemy Act, 50 U. S. C. Appendix. The particular clause relied on is § 7: "Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in Section 10 hereof [which relates to patents]; . . ." Analysis of its terms makes clear that this section was not meant to apply to petitioner, and an examination of its legislative history makes this doubly certain. Section 7 bars from the courts only an "enemy or ally of enemy." Section 2 of the Act defines the "alien enemy" to which the Act applies as those residing within the territory owned or occupied by the enemy; the enemy government or its officers; [7] or citizens

[7] Some possible confusion on the part of the court below and of other courts may have developed from our per curiam opinion in *Ex parte Colonna,* 314 U. S. 510, in which leave to file a petition for writs of prohibition and mandamus in connection with a proceeding brought in behalf of the Italian government was denied on the basis of the Trading with the Enemy Act. That opinion emphasized that an enemy government was included within the definition of the classification "enemy" as used in that act, and that such enemy plaintiffs had no right to prosecute actions in our courts. The decision has no bearing on the rights of resident enemy aliens. The Colonna decision was momen-

of an enemy nation, wherever residing, as the President by proclamation may include within the definition. Since the President has not under this Act [8] made any declaration as to enemy aliens, the Act does not bar petitioner from maintaining his suit.

This interpretation, compelled by the words of the Act, is wholly in accord with its general scope, for the Trading with the Enemy Act was never intended, without Presidential proclamation, to affect resident aliens at all. Prior to the passage of the Act, the courts had consistently held that, during a state of war, commercial intercourse between our nationals and non-resident alien enemies, unless specifically authorized by Congress and the Executive, was absolutely prohibited, and that contracts made in such intercourse were void and unenforceable.[9] This strict barrier could be relaxed only by Congressional direction, and therefore the Act was passed with its declared purpose "to mitigate the rules of law which prohibit all intercourse between the citizens of warring nations, and to permit, under careful safeguards and restrictions, certain kinds of business to be carried on." [10] Thus Congress expressly recognized by the passage of the Act that "the more enlightened views of the present day as to treat-

---

tarily misapplied in *Kaufman* v. *Eisenberg,* 177 N. Y. Misc. 939, 32 N. Y. S. 2d 450, but the trial judge corrected a stay in proceedings he had previously allowed, upon his further consideration of the fact that the plaintiff was a resident alien.

[8] The President has issued a Proclamation taking certain steps with reference to alien enemies under the Alien Enemy Act of 1798 as amended, 50 U. S. C. § 21, but this Proclamation has no bearing on the power of the President under the Trading with the Enemy Act.

[9] Report of the Senate Committee on Commerce, Report No. 111, 65th Cong., 1st Sess., pages 15–22. *Coppell* v. *Hall,* 7 Wall. 542, 554, 557, 558.

[10] Report of the Senate Committee on Commerce, Report No. 111, 65th Cong., 1st Sess., 1.

ment of enemies makes possible certain relaxations in the old law." [11]

Since the purpose of the bill was to permit certain relations with non-resident alien enemies, there is no frustration of its purpose in permitting resident aliens to sue in our courts. Statements made on the floor of the House of Representatives by the sponsor of the bill make this interpretation conclusive.[12]

Not only has the President not seen fit to use the authority possessed by him under the Trading with the Enemy Act to exclude resident aliens from the courts, but his administration has adopted precisely the opposite program. The Attorney General is primarily responsible for the administration of alien affairs. He has construed the existing statutes and proclamations as not barring this petitioner from our courts,[13] and this stand is em-

[11] Report of the Senate Committee on Commerce, Report No. 111, 65th Cong., 1st Sess., 2.

[12] "Mr. Montague: A German resident in the United States is not an enemy under the terms of the bill, unless he should be so declared subsequently by the proclamation of the President, in which case he would have no standing in court." . . .

"Mr. Stafford: Do I understand that this bill confers upon the President any authority to grant to an alien subject doing business in this country the right to sue in the courts to enforce his contract?

"Mr. Montague: If he is a resident of this country, he has that right under this bill without the proclamation of the President.

"Mr. Stafford: If so, where is that authority?

"Mr. Montague: In the very terms of the bill defining an enemy, whereby German residents in the United States have all rights in this respect of native-born citizens, unless these rights be recalled by the proclamation of the President for hostile conduct on the part of the Germans resident in the United States." 55 Cong. Rec. 4842, 4843 (1917).

[13] "No native, citizen, or subject of any nation with which the United States is at war and who is resident in the United States is prevented by federal statute or regulation from suing in federal or state courts." Dept. of Justice press release, Jan. 31, 1942.

phasized by the Government's appearance in behalf of petitioner in this case.[14]

The consequence of this legislative and administrative policy is a clear authorization to resident enemy aliens to proceed in all courts until administrative or legislative action is taken to exclude them. Were this not true, contractual promises made to them by individuals, as well as promises held out to them under our laws, would become no more than teasing illusions. The doors of our courts have not been shut to peaceable law-abiding aliens seeking to enforce rights growing out of legal occupations. Let the writ issue.

MARINE HARBOR PROPERTIES, INC. *v.* MANUFACTURERS TRUST CO., TRUSTEE, ET AL.

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

No. 24. Argued October 16, 19, 1942.—Decided November 9, 1942.

1. In exercise of the federal bankruptcy power, Congress may exclude every competing or conflicting proceeding in state or federal tribunals. P. 83.
2. Although the pendency of a prior proceeding in a state or federal court does not bar the filing of a petition under Chapter X of the

---

[14] The determination by Congress and the Executive not to interfere with the rights of resident enemy aliens to proceed in the courts marks a choice of remedies rather than a waiver of protection. The Government has an elaborate protective program. Under the Alien Enemy Act, 50 U. S. C. § 21, the President has ordered the internment of aliens, has instituted a system of identification, and has regulated travel. Under the First War Powers Act, 50 U. S. C. Supp. I, 1940 ed. Appendix, § 5 (b), and various executive orders he has controlled the funds of resident enemy aliens. Many other statutes make a composite pattern which Congress has apparently thought adequate for the control of this problem. See, e. g., the controls on alien ownership of land in the territories, 8 U. S. C. Chap. 5.

Bankruptcy Act, the bankruptcy court may not in such case approve the petition unless it appears that the interests of creditors and stockholders would not be best subserved in the prior proceeding. P. 83.

3. The party filing a petition under Ch. X while a prior proceeding is pending in a state or federal court has the burden of showing that the interests of creditors and stockholders would not be best subserved in the prior proceeding. P. 83.
4. When a prior proceeding is pending, a petitioner's showing of "need for relief" under Ch. X, which § 130 (7) requires that every petition contain, must demonstrate that at least in some substantial particular the benefits, advantages, or protection which Ch. X affords to creditors or stockholders are unavailable in the prior proceeding. P. 84.
5. That a debtor was seeking to escape the jurisdiction of a state court to which it had theretofore voluntarily submitted, is immaterial in the determination of whether its petition under Ch. X was filed in "good faith" within the meaning of § 146 (4). P. 84.
6. The issue as to the adequacy of the prior proceedings as compared with Ch. X is the same whether the petition is filed by the debtor or by creditors. P. 85.
7. Whether filed by the debtor or by others, all petitions under Ch. X must show the "need for relief" (§§ 130–131); and the bankruptcy court must be satisfied in every case that the petition has been filed in "good faith" (§§ 141–144). P. 85.
8. In this case, wherein prior proceedings were pending in a state court, and the value of the property of the debtor was less than the amount of a first mortgage indebtedness thereon, *held* that the debtor, petitioning under Ch. X, had not sustained the burden which was upon it of showing that the interests of creditors and stockholders would not be best subserved in the prior proceedings in the state court. P. 85.

   (a) The rule of full priority of creditors over stockholders, applied in § 77B proceedings, obtains also in proceedings under Ch. X. P. 85.

   (b) It did not sufficiently appear in this case that the stockholders were willing to make a fresh contribution in money or in money's worth in return for a participation reasonably equivalent to their contribution. P. 85.

   (c) It did not appear that continuation of the state proceedings would deny junior creditors any benefits which Ch. X would afford

them. The full priority rule which obtains under Ch. X protects the rights of senior creditors against dilution either by junior creditors or by equity interests. P. 86.

(d) It did not sufficiently appear in this case that a state foreclosure proceeding, instituted for and on behalf of first mortgage creditors exclusively, was inadequate, measured by Ch. X standards, to protect their interests. P. 87.

125 F. 2d 296, affirmed.

CERTIORARI, 315 U. S. 794, to review the reversal of an order of the District Court, 41 F. Supp. 814, approving a petition under Chapter X of the Bankruptcy Act filed by a debtor corporation.

Mr. Arthur E. Friedland for petitioner.

Mr. Chester T. Lane, with whom *Solicitor General Fahy* and *Messrs. Richard S. Salant, John F. Davis, Homer Kripke, Morton E. Yohalem, George Zolotar,* and *Mortimer Weinbach* were on the brief, for the Securities and Exchange Commission; and *Mr. Charles E. Hughes, Jr.,* with whom *Mr. Curtiss E. Frank* was on the brief, for the Manufacturers Trust Co., Trustee, respondents.

By special leave of Court, *Mr. Benjamin Heffner,* Assistant Attorney General of New York, with whom *Messrs. John J. Bennett, Jr.,* Attorney General, *Henry Epstein,* Solicitor General, *John F. X. McGohey,* Assistant Attorney General, and *Mr. Edward F. Keenan* were on the brief, for the State of New York, as *amicus curiae,* urging affirmance.

Messrs. Martin A. Schenck, Samuel Kramer, Carl J. Austrian, Clarence F. Corner, and *George J. Gillespie* filed a brief on behalf of certain charitable institutions, as *amici curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question in this case is whether the Circuit Court of Appeals was in error in holding that a debtor's petition filed by petitioner under Ch. X of the Bankruptcy Act (52 Stat. 883, 11 U. S. C. § 501) was not filed in "good faith."

The debtor's sole asset is an apartment building in New York City which is subject to a first mortgage of $370,000. This mortgage is held by the respondent, Manufacturers Trust Co. (successor to The Mortgage Corporation of New York), as trustee for certificate holders. There are also junior mortgages and other claims, including an unspecified amount of unsecured indebtedness. Concededly the property of the debtor is worth less than the amount of the first mortgage debt. The first mortgage was originally created in 1931 and was held by Title Guarantee and Trust Co., which issued and sold to the public certificates of participation, guaranteed as to principal and interest by Bond and Mortgage Guarantee Co. The latter company became involved in financial difficulties in 1933 and was taken over by the Superintendent of Insurance of New York for rehabilitation.[1] Pursuant to provisions of the Schackno Act (N. Y. Laws 1933, c. 745), the Superintendent of Insurance promulgated, in 1934, a plan for the readjustment of the rights of the certificate holders in the mortgage, by which the mortgage was extended to December 1, 1937 and the interest reduced. Over two-thirds of the certificate holders consented to the plan, and the debtor joined in the extension agreement. The New York court approved it. In 1935 the New York Mortgage Commission succeeded the Superintendent of Insurance as administrator of certificated bonds and mortgages.

[1] See generally, Report of Commissioner George W. Alger to the Governor of the State of New York, Oct. 5, 1934.

N. Y. Laws 1935, c. 19, c. 290. That Commission,[2] in 1938, proposed the designation of the Mortgage Corporation of New York as trustee of the bond and mortgage in the instant case, under a declaration of trust granting the trustee broad and comprehensive powers. This proposal was consented to by over two-thirds of the certificate holders and approved by the New York court. The order of the court provided "that this Court, having assumed jurisdiction of this proceeding, shall retain jurisdiction hereof until the complete liquidation of the Trust Estate and the termination of the trust; and the Trustee, or any other interested party herein, may apply at the foot of this Final Order upon such notice as the Court may direct for such other and further relief as to the Court may seem just and proper."

The principal of the first mortgage was not paid at its extended maturity in 1937. But until April 1, 1941, the debtor made all other payments due under the 1934 extension agreement. At that time the debtor defaulted in payment of interest and taxes. Both before and after that default the debtor and the trustee negotiated for an agreement of further extension and modification. But no agreement between them could be reached and no further proposal for a modification or extension of the mortgage was presented to the state court or to the certificate holders. On May 1, 1941, the trustee instituted foreclosure proceedings in the state court. A receiver was appointed, who took possession. In September 1941 the debtor filed its voluntary petition under Ch. X of the Bankruptcy Act. An *ex parte* order approving the petition and appointing trustees was obtained. Shortly thereafter the mortgage trustee moved to vacate that order and to dismiss the debtor's petition on the ground that it was not filed in

[2] On the activities of the Commission, see Annual Report 1939, N. Y. Leg. Doc., No. 94.

"good faith." That motion was denied. 41 F. Supp. 814. The Circuit Court of Appeals reversed, one judge dissenting, 125 F. 2d 296. We granted the petition for certiorari because of the importance in the administration of the Bankruptcy Act of the problems involved.

Every petition under Ch. X must state, *inter alia*, "the specific facts showing the need for relief under this chapter." § 130 (7). Sec. 141 provides that the judge shall enter an order approving a debtor's petition "if satisfied that it complies with the requirements of this chapter and has been filed in good faith, or dismissing it if not so satisfied." Sec. 146 defines "good faith" and provides in part:

"Without limiting the generality of the meaning of the term 'good faith', a petition shall be deemed not to be filed in good faith if—

. . . . . .

"(4) a prior proceeding is pending in any court and it appears that the interests of creditors and stockholders would be best subserved in such prior proceeding."

The federal bankruptcy power is, of course, paramount and supreme and may be so exercised by Congress as to exclude every competing or conflicting proceeding in state or federal tribunals. *Kalb* v. *Feuerstein*, 308 U. S. 433. In fashioning Ch. X Congress, however, did not go so far. While the pendency of prior proceedings in state or federal courts does not bar the filing of a petition under Ch. X (§ 256), Congress in effect directed the bankruptcy courts not to approve petitions under Ch. X in such cases unless it appeared that the interests of creditors and stockholders would not be best subserved in the prior proceedings. And it put the burden on the petitioner to make that showing. The Report of the House Judiciary Committee states that the purpose of § 146 (4) was to "stop the removal of prior pending cases from other courts where the interests of creditors and stockholders would be better served by retaining and continuing the prior proceedings." H. Rep.

No. 1409, 75th Cong., 1st Sess., p. 42. Sec. 146 represents a codification of some of the interpretations which the courts had given the words "good faith" in proceedings under § 77B. S. Rep. No. 1916, 75th Cong., 3d Sess., p. 27. Thus the necessity of showing "a need for the machinery of 77B as an essential in accomplishing a reorganization because other procedures were either unavailable or more cumbersome and expensive" led courts to find an absence of "good faith," in the sense that no "need for relief" had been established, where 77B was sought to be employed by a debtor as "a mechanism for preserving equities at the expense of creditors." See Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, Securities and Exchange Commission, Pt. VIII, p. 94 (1940).

In view of that history, it seems clear that, when a prior proceeding is pending, a petitioner's showing of "need for relief" under Ch. X, required to be contained in every petition by the express provisions of § 130 (7), must demonstrate that at least in some substantial particular the prior proceedings withhold or deny creditors or stockholders benefits, advantages, or protection which Ch. X affords. In absence of such a showing, the "need for relief" has not been established and the District Court is not enabled to make an informed judgment on the "good faith" issue.

The Circuit Court of Appeals in this case, as in *Brooklyn Trust Co.* v. *Rembaugh*, 110 F. 2d 838, held that the debtor's petition was not filed in "good faith," since it was seeking to escape the jurisdiction of the state court to which it had voluntarily submitted itself. But that is not the test which Congress has provided in § 146 (4). That provision requires the bankruptcy court to inquire whether "the interests of creditors and stockholders" would be better subserved in the prior proceedings or

under Ch. X. That the desire of the petitioner to escape the prior proceedings is immaterial to that inquiry is supported not only by the language of § 146 (4) but also by the fact that § 256 expressly sanctions the filing of petitions under Ch. X although prior proceedings are pending. To disqualify a petitioner under Ch. X merely because he had in some way participated in the prior proceeding would effect a substantial impairment of § 146 (4), since it would be the exception rather than the rule where both the debtor and the creditors had not taken some part in the prior proceedings. Furthermore, the issue as to the adequacy of the prior proceedings as compared with Ch. X is the same whether the petition is filed by creditors or by the debtor. All petitions, whether filed by the debtor or by others, must show the "need for relief" (§§ 130–131); and in every case the bankruptcy court must be satisfied that the petition has been filed in "good faith." §§ 141–144.

We are of the opinion, however, that the debtor did not sustain the burden which the federal statute places on a petitioner. So far as the "interests" of stockholders are concerned, it is not apparent that the equity owners would be denied in the state foreclosure proceedings benefits, advantages, or protection which Ch. X would afford them. Admittedly the property is worth less than the amount of the first mortgage indebtedness. Under the rule of *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 482, and *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106, a plan of reorganization would not be fair and equitable which in such circumstances admitted the stockholders to participation, unless the stockholders made a fresh contribution in money or in money's worth, in return for "a participation reasonably equivalent to their contribution." *Case* v. *Los Angeles Lumber Products Co., supra,* p. 121. That rule obtains under Ch. X as well as under its predecessor, § 77B. There is no suggestion in the record

that the equity owners desire to make a contribution on that basis, and that, unless they are allowed to do it under Ch. X, they will be barred. All that the record shows is an affidavit by one Silverman that, "if the creditors desire liquidation of their claims on the basis of present actual values rather than on the face amount of their claims," $50,000 in cash could be raised. Ch. X would not permit such a dilution of creditors' interests. Hence, such a showing does not establish on behalf of the stockholders that "need for relief" which § 130 (7), read in light of § 146 (4), requires. In fact, the approval of the petition on that ground would be giving the equity owners a nuisance value wholly unjustified by the reorganization standards which are incorporated into Ch. X.

The District Court, however, concluded that it was in the interests of all the creditors that the Ch. X petition be approved. It noted that the market value of the certificates was far under par and that there were lienors and creditors, other than the first mortgage certificate holders, with which the bankruptcy court, but not the state court, could deal. If there were a showing, for example, that the property was worth more than the amount of first mortgage indebtedness and it appeared that that excess value would be lost to the junior interests in the state proceedings, or that the state proceedings were less adequate by reorganization standards than the bankruptcy court to protect such interests, approval of the petition clearly would be justified whether filed by the debtor or by creditors. But no such showing was made. Hence it was not established that continuation of the state proceedings would deny the junior creditors any benefits which Ch. X would afford them. Approval of the petition on the grounds advanced by the District Court could be made only under the composition theory of reorganization, which Ch. X, like § 77B, rejected in favor of the full priority rule of the *Boyd* case. See *Case* v. *Los Angeles*

Lumber Products Co., supra, p. 119, n. 14. That rule protects the rights of senior creditors against dilution either by junior creditors or by equity interests. See *id.,* p. 123; *Consolidated Rock Products Co.* v. *Du Bois,* 312 U. S. 510, 525–526, 529–530.

There remains the contention that it was in the "interests" of the certificate holders to have the proceedings transferred to Ch. X. In this connection, much emphasis is placed on numerous safeguards contained in Ch. X, which this Court reviewed in *Securities & Exchange Commission* v. *United States Realty & Imp. Co.,* 310 U. S. 434, 448–450. And it is asserted that comparable safeguards are wholly or largely lacking in proceedings under the Schackno Act. Those considerations would be highly relevant and persuasive if this were a case of the usual reorganization proceeding dealing with more than one class of securities under the older procedures which Ch. X was designed to improve and supplant. See *Securities & Exchange Commission* v. *United States Realty & Imp. Co., supra,* p. 448; H. Rep. No. 1409, 75th Cong., 1st Sess., pp. 37 *et seq.* Then the safeguards afforded by Ch. X would have special significance in protecting the respective classes of investors against improvident, unfair or inequitable adjustments, compromises, and settlements—steps which are basic to the reorganization process but which in selfish hands led to much abuse. H. Rep. No. 1409, 75th Cong., 1st Sess., pp. 37 *et seq.* But here the machinery of the state which is being used is the foreclosure proceeding, which, so far as appears, has been invoked on behalf of the certificate holders alone. Presumptively, the result of the foreclosure will be an appropriation of the assets of the debtor for the benefit of the certificate holders exclusively. There is no showing that the foreclosure proceedings have been conducted in such a way as to jeopardize the interests of the certificate holders contrary to the design of Ch. X. There is no showing

that assets subject to the payment of the certificates are being neglected. Thus it is not shown that the claim against the guarantee company is not being pursued or that its collection could better be handled in proceedings under Ch. X. There is no showing that the machinery employed or available in the state foreclosure proceeding to safeguard and protect the interests of those creditors *after* the sale is not comparable to that contained in Ch. X for the consummation of plans which are not only fair but feasible. § 221 (2). In view of the burden on a petitioner to make the showing required by § 130 (7) and § 146 (4), the bankruptcy court is not warranted in assuming, without more, that a state foreclosure proceeding, instituted for and on behalf of the first mortgage creditors exclusively, is inadequate, measured by Ch. X standards, to protect their interests. The contrary course would result in Ch. X making greater inroads on prior proceedings than § 130 (7) and § 146 (4) indicate was the purpose.

Affirmed.

WARREN-BRADSHAW DRILLING CO. *v.* HALL, AGENT, ET AL.

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

No. 21. Argued October 16, 1942.—Decided November 9, 1942.

1. The application of the Fair Labor Standards Act depends upon the character of the activities of the employee. P. 90.
2. Employees seeking to recover overtime compensation and liquidated damages under § 16 (b) of the Fair Labor Standards Act, *held* to have sustained the burden of proving that they were engaged in the production of goods for interstate commerce within the meaning of the Act. P. 90.
3. Members of a rotary drilling crew, engaged within a State, as employees of an independent contractor, in partially drilling oil wells

(to a depth short of the oil sand stratum)—which wells were later "brought in" by other workmen; and some of the oil and gas from which, in crude form or as refined products, moved in interstate commerce—were engaged in a "process or occupation necessary to the production" of oil for interstate commerce, and were covered by the Fair Labor Standards Act. P. 91.

4. Assuming that this is prerequisite to the application of the Act in this case, there were reasonable grounds for the employer to anticipate, at the time of drilling, that oil when produced by the wells would move into other States. P. 92.
5. In the case of an employee who is employed on the basis of an eight hour day at a fixed daily wage, and regularly works seven days a week, the fact that he is paid, and accepts, wages which are in excess of the statutory minimum, including the minimum for overtime, does not constitute compliance with the overtime compensation requirements of the Fair Labor Standards Act. *Overnight Transportation Co.* v. *Missel,* 316 U. S. 572. P. 93.

124 F. 2d 42, affirmed.

CERTIORARI, 316 U. S. 660, to review the affirmance of a judgment, 40 F. Supp. 272, against an employer in an action on behalf of certain of its employees for unpaid overtime compensation and liquidated damages under § 16 (b) of the Fair Labor Standards Act.

Mr. Frank Settle, with whom *Mr. Sam Clammer* was on the brief, for petitioner.

Mr. Dallas Scarborough, with whom *Mr. Ellis Douthit* was on the brief, for respondents.

Solicitor General Fahy and *Messrs. Irving J. Levy, Mortimer B. Wolf,* and *Peter Seitz* filed a brief on behalf of the Administrator of the Wage and Hour Division, U. S. Department of Labor, as *amicus curiae,* urging affirmance.

MR. JUSTICE MURPHY delivered the opinion of the Court.

We are concerned here, as in *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, with a problem of statutory delineation, not

constitutional power, in the application of the Fair Labor Standards Act [1] to a particular situation. This is an action to recover unpaid overtime compensation and an equal amount as liquidated damages, brought by respondent employees under § 16 (b). We must decide whether respondents are engaged "in the production of goods for commerce," within the meaning of § 7 (a) of the Act. The district court held that they were so engaged, and, since petitioner had failed to compensate them for overtime hours as required by § 7 (a), accordingly rendered judgment for each respondent in the appropriate amount.[2] The Circuit Court of Appeals affirmed with an immaterial modification,[3] and the case comes here on certiorari.

The application of the Act depends upon the character of the employees' activities. *Kirschbaum Co.* v. *Walling, supra,* p. 524. The burden was therefore upon respondents to prove that, in the course of performing their services for petitioner and without regard to the nature of its business, they were, as its employees, engaged in the production of goods, within the meaning of the Act, and that such production was for interstate commerce. We agree with both courts below that respondents have sustained that burden.

Petitioner is the owner and operator of rotary drilling equipment and machinery, who contracts with the owners or lessees of oil lands to drill holes to an agreed-upon depth short of the oil sand stratum. When that depth is reached, the rotary rig is removed, and the machinery and crew move on to other locations. For reasons peculiar to the oil industry, a cable drilling crew then undertakes with cable tools to "bring in" the well, or else demonstrate that it is a dry hole. Respondents were employed by peti-

[1] 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*

[2] 40 F. Supp. 272.

[3] 124 F. 2d 42.

tioner as members of its rotary drilling crew and worked on approximately thirty-two wells in the Panhandle Oil Field of Texas; thirty-one of those wells produced oil, and the other one produced gas. Petitioner was not the owner or lessee of any of the lands on which respondents drilled, and was not shown to have any interest therein or in the oil produced.

In § 3 (j) Congress has broadly defined the term "produced," [4] and has provided that "an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State." Whether or not respondents, in drilling to a specified depth short of oil, may be regarded as engaged in producing or mining—and we certainly are not to be understood as intimating that they may not—recognition of the obvious requires us to hold that, at the very least, they were engaged in a "process or occupation necessary to the production" of oil. Oil is obtained only by piercing the earth's surface; drilling a well is a necessary part of the productive process to which it is intimately related. The connection between respondents' activities in partially drilling wells and the capture of oil is quite substantial, and those activities certainly bear as "close and immediate tie" to production as did the services of the building maintenance workers held within the Act in *Kirschbaum Co.* v. *Walling, supra,* pp. 525–526.

The evidence supports the finding that some of the oil produced ultimately found its way into interstate commerce. All the wells had pipeline connections, some of them being with petroleum companies operating on a

[4] " 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; . . ."

national scale, wherein the oil was commingled with the production of other wells. Officials of the State of Texas testified that some crude oil is shipped out of the State by these pipelines, and that a large percentage of crude oil sent to refineries in Texas thereafter passes out of the State in the form of refined products.

Petitioner contests the applicability of the Act on the ground that it, as an independent contractor not financially interested in the wells, had no intention, expectation or belief that any oil produced would be shipped in interstate commerce, and cites as support *United States* v. *Darby,* 312 U. S. 100, 118, where it was said that the "production for commerce" intended by Congress includes "at least production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce." Respondents counter with the proposition that it is enough that the owners of the oil wells expected the oil produced to move across state lines, but the Government does not ask,[5] and there is no need for, us to pass upon that proposition. The Act extends at least to the employer who expects goods to move in interstate commerce. *United States* v. *Darby, supra.* Assuming that such expectation, or a reasonable basis therefor, was necessary on petitioner's part before the application of the Act to petitioner, it is here present. The record contains ample indication that there were reasonable grounds for petitioner to anticipate, at the time of drilling, that oil produced by the wells drilled, would move into other states. Petitioner, closely identified as it is with

[5] The Solicitor General submitted a brief on behalf of the Administrator of the Wage and Hour Division, United States Department of Labor, as amicus curiae.

the business of oil production, cannot escape the impact of the Act by a transparent claim of ignorance of the interstate character of the Texas oil industry. *St. John* v. *Brown,* 38 F. Supp. 385, 388; cf. *Fleming* v. *Enterprise Box Co.,* 37 F. Supp. 331, 334–335, affirmed, 125 F. 2d 897.

One final contention merits but slight consideration. Respondents were employed on the basis of an eight hour day and regularly worked seven days a week, receiving fixed wages ranging from $6.50 to $11 per day. There was no agreement providing for an hourly rate of pay or that the weekly salary included additional compensation for overtime hours. Petitioner urges that it complied with the overtime compensation requirements of the Act because respondents received wages in excess of the statutory minimum wage, including time and one-half of that minimum wage for all overtime hours, which wages respondents impliedly agreed included overtime compensation by accepting them. A similar argument was squarely rejected in *Overnight Motor Co.* v. *Missel,* 316 U. S. 572.

Affirmed.

MR. JUSTICE ROBERTS:

I dissent, as I did in *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, and for the same reason. But I think the present a more extravagant application of the statute than that there approved. We may assume that Congress, in drafting the Act, had in mind the practical, as distinguished from a theoretical, distinction between what is national and what is local,—between what, in fact, touches interstate commerce and what, in truth, is intrastate.

The phrases on which respondents rely are these: An employee "who is engaged in [interstate] commerce or in the production of goods for [interstate] commerce," § 7 (a); and " 'Produced' means produced, manufactured,

mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State," § 3 (j).

The opinion disavows any thought that the respondents may be classed as those who mine the oil which passes into commerce; but this seems to be a reservation intended not to preclude such a holding. The Court relies, rather, on the Act's inclusion of anyone employed "in any process or occupation necessary to the production" of goods for commerce.

The reasoning seems to be as follows: The oil will pass into commerce if it is mined. But it cannot be mined unless somebody drills a well. An independent contractor's men do part of the drilling. Their work is "necessary" to the mining and the transportation of the oil. So they fall within the Act.

This is to ignore all practical distinction between what is parochial and what is national. It is but the application to the practical affairs of life of a philosophic and impractical test. It is but to repeat, in another form, the old story of the pebble thrown into the pool, and the theoretically infinite extent of the resulting waves, albeit too tiny to be seen or felt by the exercise of one's senses.

The labor of the man who made the tools which drilled the well, that of the sawyer who cut the wood incidentally used, that of him who mined the iron of which the tools were made, are all just as necessary to the ultimate extraction of oil as the labor of respondents. Each is an antecedent of the consequent,—the production of the goods for commerce. Indeed, if respondents were not fed, they could not have drilled the well, and the oil would not have

gone into commerce. Is the cook's work "necessary" to the production of the oil, and within the Act?

I think Congress could not and did not intend to exert its granted power over interstate commerce upon what in practice and common understanding is purely local activity, on the pretext that everything everybody does is a contributing cause to the existence of commerce between the States, and in that sense necessary to its existence.

RIGGS, SPECIAL GUARDIAN, *v.* DEL DRAGO ET AL.

CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, NEW YORK.

No. 30. Argued October 20, 1942.—Decided November 9, 1942.

1. Section 124 of the New York Decedent Estate Law, requiring that, unless otherwise directed by the decedent's will, the burden of any federal estate tax paid by the executor or administrator be apportioned among the beneficiaries of the estate, is not in conflict with the federal estate tax law (Internal Revenue Code, § 800 *et seq.*), and does not contravene the supremacy clause of the Federal Constitution. Pp. 97, 102.

   The intent of Congress was that the federal estate tax should be paid out of the estate as a whole, and that the distribution of the remaining estate and the ultimate impact of the federal tax should be determined under the state law. The provisions of the Revenue Act of 1916 and subsequent Acts, their legislative history and administrative interpretation support this conclusion; and §§ 826 (b), 826 (c), and 826 (d) of the Internal Revenue Code do not require a different result.
2. Nor does the fact that the ultimate incidence of the federal estate tax is thus governed by state law violate the constitutional requirement of geographical uniformity in federal taxation. P. 102.

287 N. Y. 61, 38 N. E. 2d 131, reversed.

CERTIORARI, 315 U. S. 795, to review a decision of the Court of Appeals of New York, holding unconstitutional Section 124 of the New York Decedent Estate Law. The Surrogate's Court entered its order upon the remittitur of the Court of Appeals.

Mr. John W. Davis, with whom *Mr. Otis T. Bradley* was on the brief, for petitioner.

Mr. Henry Cohen, with whom *Mr. Ludwig M. Wilson* was on the brief, for Giovanni del Drago et al.; *Mr. Anthony J. Caputo* submitted for Byron Clark, Jr., Executor; and *Mr. Harold W. Hastings* submitted for Harold W. Hastings, Special Guardian,—respondents.

Briefs of *amici curiae* were filed by *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Arnold Raum,* and *Valentine Brookes* on behalf of the United States; by *Messrs. John J. Bennett, Jr.,* Attorney General of the State of New York, and *Henry Epstein,* Solicitor General, on behalf of that State (with the States of Florida, Vermont, Georgia, Arkansas, New Mexico, and Michigan, by their respective Attorneys General, joining in the brief); by *Messrs. Harrison Tweed* and *Weston Vernon, Jr.;* and by *Mr. George Gray Zabriskie* on behalf of Arnold Wood, Jr.,—all in support of petitioner.

Mr. Bethuel M. Webster filed a brief on behalf of Mary Ann Blumenthal, as *amicus curiae,* urging affirmance.

Mr. Justice Murphy delivered the opinion of the Court.

The question for decision is whether § 124 of the New York Decedent Estate Law,[1] which provides in effect that, except as otherwise directed by the decedent's will, the burden of any federal death taxes paid by the executor or administrator shall be spread proportionately among the distributees or beneficiaries of the estate, is unconstitutional because in conflict with the federal estate tax law, Internal Revenue Code, § 800 *et seq.*

[1] Chapter 709, Laws of 1930.

Testatrix, a resident of New York, died on October 8, 1937, leaving a will dated March 27, 1934, which, after certain gifts of personal effects and small sums of cash, bequeathed $300,000 outright to respondent Giovanni del Drago, and created a trust of $200,000 for the benefit of respondent Marcel del Drago during his life, with remainder over upon his death. The residue of testatrix's estate was left in trust for the benefit of Giovanni during his life, with remainder over upon his death. The will contained no reference to the payment of estate or inheritance taxes.

The executors paid approximately $230,000 on account of the federal estate tax, and then asked the Surrogate, in a petition for the settlement of their account, to determine whether that payment should be equitably apportioned among all the persons beneficially interested in the estate, pursuant to § 124 of the Decedent Estate Law. Giovanni and Marcel del Drago answered, raising objections to the constitutionality of § 124. Petitioner, who was appointed special guardian to represent the interests of the infant remaindermen under the residuary trust, urged that the tax be apportioned. The Surrogate overruled the constitutional objections, and directed apportionment.[2] The New York Court of Appeals, by a divided court, reversed, holding § 124 repugnant to the federal estate tax law—particularly to § 826 (b) of the Internal Revenue Code—and in violation of the supremacy (Art. VI, cl. 2) and the uniformity (Art. I, § 8, cl. 1) clauses of the Constitution.[3] The importance of the question moved us to grant certiorari.

We are of opinion that Congress intended that the federal estate tax should be paid out of the estate as a whole,

[2] 175 Misc. (N. Y.) 489, 23 N. Y. S. 2d 943.

[3] 287 N. Y. 61, 38 N. E. 2d 131.

and that the applicable state law as to the devolution of property at death should govern the distribution of the remainder and the ultimate impact of the federal tax; accordingly, § 124 is not in conflict with the federal estate tax law. This conclusion is based upon the provisions of the Revenue Act of 1916, 39 Stat. 756, and subsequent acts, their legislative history and their administrative interpretation.

In the Act of 1916 Congress turned from the previous century's inheritance tax upon the receipt of property by survivors (see *Knowlton* v. *Moore*, 178 U. S. 41; *Scholey* v. *Rew*, 23 Wall. 331) to an estate tax upon the transmission of a statutory "net estate" by a decedent. That act directed payment by the executor in the first instance, § 207, but provided also for payment in the event that he failed to pay, § 208. It did not undertake in any manner to specify who was to bear the burden of the tax. Its legislative history indicates clearly that Congress did not contemplate that the Government would be interested in the distribution of the estate after the tax was paid, and that Congress intended that state law should determine the ultimate thrust of the tax.[4] That Congress, from

[4] Congressman Cordell Hull, one of the supporters of the 1916 Act and its reputed draftsman, declared: "Under the general laws of descent the proposed estate tax would be first taken out of the net estate before distribution, and distribution made under the same rule that would otherwise govern it. Where the decedent makes a will he can allow the estate tax to fasten on his net estate in the same manner, or if he objects to this equitable method of imposing it upon the entire net estate before distribution he can insert a residuary clause or other provision in his will, the effect of which would more or less change the incidence of the tax." 53 Cong. Rec. 10657.

Congressman Kitchin, Chairman of the House Ways and Means Committee, stated: "We levy an entirely different system of inheritance taxes. We levy the tax on the transfer of the flat or whole net estate. We do not follow the beneficiaries and see how much this one gets and that one gets, and what rate should be levied on lineal

1916 onward, has understood local law as governing the distribution of the estate after payment of the tax (with the limited exceptions created by § 826 (c) and (d) of the Internal Revenue Code, to be discussed presently) is confirmed by § 812 (d) of the Code, dealing with charitable deductions, which recognizes that estate taxes may be payable in whole or in part out of certain bequests, etc., "by the law of the jurisdiction under which the estate is administered." [5] The administrative interpretation has been in accord,[6] and that has been the understanding of the federal courts,[7] and of some state courts.[8]

---

and what on collateral relations, but we simply levy on the net estate. This also prevents the Federal Government, through the Treasury Department, going into the courts contesting and construing wills and statutes of distribution." 53 Cong. Rec. app. p. 1942.

[5] Section 812 (d) was first enacted as § 303 (a) of the 1924 Act, 43 Stat. 253. It was repealed by § 323 (a) of the 1926 Act, 44 Stat. 9, and reënacted by § 807 of the 1932 Act, 47 Stat. 169. The committee reports accompanying the 1932 Act recognize that local law determines the ultimate incidence of the federal estate tax. H. Rep. No. 708, 72d Cong., 1st Sess., p. 49; S. Rep. No. 665, 72d Cong., 1st Sess., p. 52. See also Article 44 of Regulations 68 and Regulations 80; § 81.84 of Regulations 105.

[6] The Treasury has taken the position, at least since 1922, that it has no interest in the distribution of the burden of the estate tax. See Article 85 of Regulations 63; Article 87 of Regulations 68, Regulations 70 (1926 and 1929 eds.), and Regulations 80 (1934 and 1937 eds.); and § 81.84 of Regulations 105.

[7] *Edwards* v. *Slocum,* 287 F. 651, 653, affirmed, 264 U. S. 61, 63; *Y. M. C. A.* v. *Davis,* 264 U. S. 47, 51; *New York Trust Co.* v. *Eisner,* 256 U. S. 345, 349; *Hepburn* v. *Winthrop,* 65 App. D. C. 309, 83 F. 2d 566, 572.

[8] *Amoskeag Trust Co.* v. *Trustees of Dartmouth College,* 89 N. H. 471, 200 A. 786; *Thompson* v. *Union Mercantile Trust Co.,* 164 Ark. 411, 262 S. W. 324; *Henderson* v. *Usher,* 125 Fla. 709, 170 So. 846. And see *In re Newton's Estate,* 74 Pa. Super. Ct. 361; *Plunkett* v. *Old Colony Trust Co.,* 233 Mass. 471, 124 N. E. 265; *Corbin* v. *Townshend,* 92 Conn. 501, 103 A. 647; *Gaede* v. *Carroll,* 114 N. J. Eq. 524, 169 A. 172.

In reaching a contrary result, the court below relied primarily upon § 826 (b).[9] But that section does not direct how the estate is to be distributed, nor does it determine who shall bear the ultimate burden of the tax. As pointed out before, while the federal statute normally contemplates payment of the tax before the estate is distributed, § 822 (b) of the Code, provision is made for collection of the tax if distribution should precede payment, § 826 (a). If any distributee is thus called upon to pay the tax, § 826 (b) provides that such person "shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate." By that section Congress intended to protect a distributee against bearing a greater burden of the tax than he would have sustained had the

---

But compare *Matter of Hamlin*, 226 N. Y. 407, 124 N. E. 4; *Farmers' Loan & Trust Co.* v. *Winthrop*, 238 N. Y. 488, 144 N. E. 769; *Matter of Oakes*, 248 N. Y. 280, 162 N. E. 79; *Bemis* v. *Converse*, 246 Mass. 131, 140 N. E. 686.

[9] This section was originally enacted as part of § 208 of the Act of 1916. Its full text is as follows:

SEC. 826. COLLECTION OF UNPAID TAX.

. . . . . .

(b) *Reimbursement out of estate.* If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

tax been carved out of the estate prior to distribution; any doubt that this is the proper construction is removed by the concluding clause of the section, specifically stating that it is "the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution." Section 826 (b) does not command that the tax is a non-transferable charge on the residuary estate; to read the phrase "the tax shall be paid out of the estate" as meaning "the tax shall be paid out of the residuary estate" is to distort the plain language of the section and to create an obvious fallacy. For in some estates there may be no residue, or else one too small to satisfy the tax; resort must then be had to state law to determine whether personalty or realty, or general, demonstrative or special legacies abate first. In short, § 826 (b), especially when cast in the background of Congressional intent, discussed before, simply provides that, if the tax must be collected after distribution, the final impact of the tax shall be the same as though it had first been taken out of the estate before distribution, thus leaving to state law the determination of where that final impact shall be.

Respondents also rely on § 826 (c),[10] authorizing the executor to collect the proportionate share of the tax from the beneficiary of life insurance includable in the gross estate by reason of § 811 (g), and § 826 (d),[11] authorizing similar action against a person receiving property subject to a power which is taxable under § 811 (f), as forbidding further apportionment by force of state law against other

---

[10] This section was first adopted in § 408 of the 1918 Act, 40 Stat. 1057. See H. Rep. No. 767, 65th Cong., 2d Sess.

[11] This section was added by § 403 (c) of the Revenue Act of 1942, approved October 21, 1942. See H. Rep. No. 2333, 77th Cong., 2d Sess., p. 161.

distributees.[12] But these sections deal with property which does not pass through the executor's hands, and the Congressional direction with regard to such property is wholly compatible with the intent to leave the determination of the burden of the estate tax to state law as to properties actually handled as part of the estate by the executor.

Since § 124 of the New York Decedent Estate Law is not in conflict with the federal estate tax statute, it does not contravene the supremacy clause of the Constitution. Nor does the fact that the ultimate incidence of the federal estate tax is governed by state law violate the requirement of geographical uniformity. Cf. *Phillips* v. *Commissioner*, 283 U. S. 589, 602.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* OHIO LEATHER CO.*

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

No. 40. Argued October 21, 1942.—Decided November 9, 1942.

1. A corporation claiming a credit under § 26 (c) (2) of the Revenue Act of 1936, in the computation of the tax imposed by that Act on undistributed profits, has the burden of showing compliance with the exact terms of the Section. P. 106.
2. The obligation of the taxpayer's contract in each of these cases, to pay a specified portion of the earnings of the taxable year upon

---

[12] This argument was accepted in *Bemis* v. *Converse*, 246 Mass. 131, 140 N. E. 686, and *Farmers' Loan & Trust Co.* v. *Winthrop*, 238 N. Y. 488, 144 N. E. 769.

* Together with No. 41, *Helvering, Commissioner of Internal Revenue*, v. *Strong Mfg. Co.*, and No. 42, *Helvering, Commissioner of Internal Revenue*, v. *Warren Tool Corp.*, also on writs of certiorari, 316 U. S. 651, to the Circuit Court of Appeals for the Sixth Circuit.

indebtedness, was only that payment should be made on or before a certain date subsequent to the close of the taxable year; and a credit in computing the tax on undistributed profits was not allowable under § 26 (c) (2) of the Revenue Act of 1936, since the contract did not require the specified portion of earnings "to be paid within the taxable year" or "to be irrevocably set aside within the taxable year," within the meaning of the Section. P. 107.

3. That a taxpayer with such a contract might be constrained by prudent business judgment or by the possibility of fiduciary liability to refrain from using the portion of earnings involved or actually to set it aside, is immaterial. Nor is it material that anticipatory payments were in fact made within the taxable year. P. 107.
4. Section 43 of the Revenue Act of 1936 is inapplicable here, since the question is not whether the taxpayers made payment, either on a cash or on an accrual basis, within the taxable year, but whether their contracts required them to pay or to "irrevocably set aside" within the taxable year. P. 108.
5. That the interpretation of a tax deduction statute in accordance with its plain meaning produces harsh results is a matter for Congress and not the courts. P. 110.
6. The legislative history of § 26 (c) (2) does not support the contention that the Section embraces the contracts involved here. P. 110.

124 F. 2d 360, 397, reversed.

CERTIORARI, 316 U. S. 651, to review the affirmance of decisions of the Board of Tax Appeals (No. 41, 41 B. T. A. 1273) redetermining tax deficiencies.

Mr. Valentine Brookes argued the cause, and *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Edward First,* and *Richard S. Salant* were on the brief, for petitioner.

Mr. Donald J. Lynn for the Ohio Leather Company; *Mr. Raymond S. Powers,* with whom *Mr. Arthur Morgan* was on the brief, for the Strong Manufacturing Company; and *Mr. Raymond T. Sawyer, Jr.,* with whom *Mr. Raymond T. Jackson* was on the brief, for the Warren Tool Corporation,—respondents.

MR. JUSTICE MURPHY delivered the opinion of the Court.

The issue is whether respondents are entitled to certain claimed credits against their undistributed profits tax for the 1936 taxable year[1] by virtue of § 26 (c) (2) of the Revenue Act of 1936, 49 Stat. 1648.[2]

In each of these cases the taxpayer corporation contracted prior to May 1, 1936, by a written agreement, to apply a percentage of its net earnings of a particular calendar year to an indebtedness of the corporation; in each case the agreement expressly provided only that the payment of the specified percentage was to be made on or before a certain date—April 1 in the case of the Ohio Leather Company and Warren Tool Corporation, and April 15 in the case of the Strong Manufacturing Company—in the year following the calendar year during

---

[1] Taxpayer in No. 42 is also claiming a credit for the 1937 taxable year.

[2] SEC. 26. CREDITS OF CORPORATIONS.

In the case of a corporation the following credits shall be allowed to the extent provided in the various sections imposing tax—

. . . . .

(c) *Contracts Restricting Payment of Dividends.*—

. . . . .

(2) *Disposition of Profits of Taxable Year.*—An amount equal to the portion of the earnings and profits of the taxable year which is required (by a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the disposition of earnings and profits of the taxable year) to be paid within the taxable year in discharge of a debt, or to be irrevocably set aside within the taxable year for the discharge of a debt; to the extent that such amount has been so paid or set aside. For the purposes of this paragraph, a requirement to pay or set aside an amount equal to a percentage of earnings and profits shall be considered a requirement to pay or set aside such percentage of earnings and profits. As used in this paragraph, the word "debt" does not include a debt incurred after April 30, 1936.

which the net earnings arose.[3] However, the specified percentage was actually paid during the taxable year in each case. By reason of these contracts and payments, taxpayers have sought to avail themselves of the credit authorized by § 26 (c) (2), which relieves from the tax on undistributed profits, imposed by § 14 of the 1936 Act, any profits which may not be distributed because of a contract requiring that a portion of earnings of the taxable year be paid or irrevocably set aside within the taxable year for the discharge of a debt. The Commissioner of Internal Revenue determined that the credits claimed should not be allowed, and assessed deficiencies in each case. The Board of Tax Appeals overruled the Commis-

[3] The relevant contractual provisions in each case are as follows:

No. 40

By an indenture entered into on April 17, 1936, the Ohio Leather Company covenanted to pay $25,000 annually to a trustee to create a sinking fund for the security of its debentures, and further covenanted that it would "on or before the next succeeding first day of April, pay an amount equal to ten percent (10%) of the net earnings earned by the Company during the fiscal year ending on the thirty-first day of the next preceding December, as such net earnings are defined hereinafter in the Article, which sums and amounts shall be held by the Trustee for the security of all outstanding Debentures until paid out as hereinafter provided."

No. 41

By a note and mortgage agreement executed April 15, 1932, the Strong Manufacturing Company bound itself to apply forty per centum of its net earnings upon its unpaid obligation. The mortgage provided:

"The Company covenants and agrees that until the principal and interest of the note hereby secured shall have been fully paid and beginning on January 1st, One Thousand nine hundred thirty-four, the Company will apply forty per centum (40%) per annum of its net earnings for any calendar year in payment of the interest accruing and becoming payable upon such note in such year, and the balance of the principal amount of such note unpaid prior to April 15th in such year; provided, however, that the covenant herein made shall not be con-

sioner, and the Circuit Court of Appeals affirmed.[4] We granted certiorari because of an asserted conflict with *Antietam Hotel Corp.* v. *Commissioner,* 123 F. 2d 274.[5]

Since § 26 (c) (2) grants a special credit in the nature of a deduction, the taxpayer must sustain the burden of showing compliance with its exact terms. *Helvering* v. *Northwest Steel Mills,* 311 U. S. 46, 49; *White* v. *United States,* 305 U. S. 281, 292; *New Colonial Ice Co.* v. *Helvering,* 292 U. S. 435, 440. We agree with the Commissioner that taxpayers have not carried that burden.

Section 26 (c) (2) expressly sets up three specific conditions precedent with which a corporation devoting part of its earnings to the payment of debts rather than the payment of dividends must comply before it is entitled to relief from the tax on undistributed profits—(1) there must be a written contract executed by the corporation

---

strued to relieve the Company from the payment on April 15th in such year of the installment specified for payment by the terms of said note nor of the regular interest payments in such year, likewise as specified in said note.

. . . . .

"Settlement for all amounts becoming payable under this provision in excess of the principal and interest payments absolutely required in the calendar year as of which such net earnings are determined shall be made by the Company to the Bank not later than April 15th of the succeeding year."

No. 42

On November 1, 1932, the Warren Tool Corporation executed a first mortgage and deed of trust to secure a bond issue. The mortgage contained a sinking fund provision which required the Corporation, on and after April 1, 1935, to pay to the trustee "on or before the 1st day of April of each year thereafter to and including April 1, 1942, a sum of money equal to Twenty-five Per Cent (25%) of its net earnings for the calendar year next preceding."

[4] An opinion was written only in *Commissioner* v. *Strong Mfg. Co.,* 124 F. 2d 360. The other two cases were per curiam affirmances on the authority of that opinion. 124 F. 2d 397.

[5] Compare *Helvering* v. *Moloney Electric Co.,* 120 F. 2d 617, 621.

prior to May 1, 1936; (2) this contract must contain a provision expressly dealing with the disposition of earnings and profits of the taxable year; and (3) this contract must contain a provision requiring that a portion of such earnings and profits either (a) "be paid within the taxable year in discharge of a debt," or (b) "be irrevocably set aside within the taxable year for the discharge of a debt." A taxpayer whose contract satisfies each of these three requirements is entitled to a credit to the extent of the amount which has been so paid or irrevocably set aside.

While taxpayers have met the first two statutory requirements—the written contracts antedate May 1, 1936, and contain provisions expressly dealing with the disposition of earnings for the taxable year—, they have not met the third one.[6] The contracts clearly contain no provision requiring the payment of earnings "within the taxable year in discharge of a debt." Nor do they, contrary to taxpayers' assertion, require the irrevocable setting aside of earnings "within the taxable year for the discharge of a debt," within the meaning of § 26 (c) (2). The contracts are wholly silent in respect of any setting aside; they do not in terms require taxpayers to set aside the amount due, nor do they direct any segregation or physical retention whatsoever. The only requirement is that taxpayers pay on or before a date *after* the close of the taxable year. This is not enough. Until that date taxpayers were free to use the specified percentages as they pleased, so far as the agreements were concerned. That prudent business judgment, or the possibility of fiduciary liability imposed by operation of law might have con-

[6] This holding makes it unnecessary to consider the Commissioner's contention that the Strong Manufacturing Company did not meet the second requirement as to $5,000 of the $46,500 paid in 1936, because it was obligated to pay that sum by April 15, 1937, even in the event that there were no earnings in 1936.

strained taxpayers to refrain from using these percentages and actually to set them aside is immaterial; such setting aside was not required by the terms of the written contracts, and therefore did not satisfy § 26 (c) (2). Cf. *Helvering* v. *Northwest Steel Mills,* 311 U. S. 46, 52. Likewise, the fact that taxpayers actually irrevocably set the funds aside by anticipatory payments within the taxable year is of no moment, because these payments were voluntary and not pursuant to the command of the agreements.

That Congress did not intend that the statutory condition of an irrevocable setting aside would be satisfied by a contract which, without more, merely requires that a percentage of earnings of the taxable year be paid in some future year for the discharge of a debt, is evident, because such a construction reduces the alternative condition of § 26 (c) (2), relating to actual payment within the taxable year, to a meaningless superfluity. The date specified for payment would become immaterial for all purposes if the mere requirement by contract of future payment out of earnings in a given year automatically entails an "irrevocable setting aside" within that year.

Taxpayers here place great emphasis upon the different prepositions used in the alternative phrases—"to be paid within the taxable year *in* discharge of a debt, or to be irrevocably set aside within the taxable year *for* the discharge of a debt"—to show that payment may be made after the taxable year compatibly with § 26 (c) (2). True enough, payment can be postponed to a future year and a credit allowed if, but only if, the contract directing such future payments requires, in terms, the irrevocable setting aside within the taxable year of those future payments. The instant contracts do not so provide.

Respondents, the Ohio Leather Company and Warren Tool Corporation, contend that because they were on an accrual basis of accounting, they were entitled to the

credit by virtue of § 43,[7] which states that it is to be disregarded in computing the credit provided by § 27 and makes no statement with regard to § 26. The contention is without merit because principles of accrual accounting have no bearing on the question of whether a contract in terms requires a payment or an irrevocable setting aside within the taxable year. The question here is not whether taxpayers made payment, either on a cash or an accrual basis, within the taxable year, but whether their contracts required them to pay or irrevocably set aside within the taxable year.

Taxpayers insist that it would be unreasonable to hold that only contracts expressly requiring payment or an irrevocable setting aside of a percentage of earnings within the taxable year satisfy § 26 (c) (2), because many corporations are unable to determine their earnings until after the close of their fiscal year, and consequently their contracts disposing of a percentage of earnings in satisfaction of debt customarily allow some short period after the close of the year, before payment is required. The legislative history of the 1936 Act reveals that Congress was conversant with the problem of computing earnings before the end of the taxable year, in connection with dividend payments, but declined to act.[8] Corporations

---

[7] "Sec. 43. Period for Which Deductions and Credits Taken. "The deductions and credits (other than the dividends paid credit provided in section 27) provided for in this title shall be taken for the taxable year in which 'paid or accrued' or 'paid or incurred,' dependent upon the method of accounting upon the basis of which the net income is computed, . . ."

[8] The original House bill (H. R. 12395, 74th Cong., 2d Sess., introduced at 80 Cong. Rec. 5978) provided for the use of the "dividend year" in computing undistributed net income under § 13 and dividend credit under § 15. Section 27 defined "dividend year" as the period beginning on the 15th day of the third month after the day before the beginning of the taxable year, and ending on the 14th day of the third month after the close of the taxable year. Thus, where the calendar

with oral contracts, or written contracts executed after May 1, 1936, dealing with the disposition of profits in satisfaction of debts, also probably think § 26 (c) (2) is a most unreasonable statute. But arguments urging the broadening of a tax deduction statute beyond its plain meaning to avoid harsh results are more properly addressed to Congress than to the courts. *White* v. *United States*, 305 U. S. 281, 292.[9]

Finally, taxpayers contend that the legislative history of § 26 (c) (2) supports the view that their contracts are covered by that section. An examination of the entire legislative background of the undistributed profits tax demonstrates, contrary to taxpayers' contentions, that Congress intended the tax to be imposed primarily upon income not distributed in the form of dividends, rather than only upon corporate income which was not distributed at all, and accordingly meant to limit severely credits for a corporation's payment of debts and precisely to define the area in which taxpayers were to be entitled to the credit. Thus, while the original House bill contained complicated provisions affording some relief to corporations with deficits, or contractually obligated either to pay debts or not to pay dividends, the Senate Finance

---

year and the taxable year coincided, the "dividend year" would cover the period from March 15 of the taxable year to March 14 of the following year. Congressman Hill, chairman of the subcommittee of the House Ways and Means Committee, explained that the "dividend year" was designed to allow corporations time to cast up their accounts after the close of the taxable year and then determine what dividends should be distributed. 80 Cong. Rec. 6005. Nevertheless, Congressman Hill later offered, and the House adopted, a committee amendment substituting the "taxable year" for the "dividend year." 80 Cong. Rec. 6308. See also 80 Cong. Rec. 10265.

[9] Appeals to Congress because of the limited scope of § 26 (c) (2) were successful in 1938. Section 27 (a) (4) of the Revenue Act of 1938 allows a credit without reference to the particular terms or requirements of the indebtedness. See H. Rep. No. 1860, 75th Cong., 3d Sess., p. 4.

Committee struck them all out, substituting only a provision dealing with a credit for contractual prohibitions against the payment of dividends.[10] An amendment offered from the Senate floor, giving a broad credit for all portions of adjusted net income used to purchase or replace machinery, equipment, etc., or "expended or applied during the taxable year for the liquidation, payment, or reduction of the principal of any bona-fide indebtedness outstanding at the date of enactment of this Act," was rejected.[11] The much narrower amendment which became § 26 (c) (2) was then offered, with little explanation other than that it was intended to supplement the credit for contractual prohibition against dividend payments, the provision which became § 26 (c) (1).[12]

We conclude that the judgments below were erroneous. Accordingly they are reversed, and the causes remanded with directions to uphold the determination of the Commissioner.

Reversed.

WICKARD, SECRETARY OF AGRICULTURE, ET AL. *v.* FILBURN.

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

No. 59. Argued May 4, 1942. Reargued October 13, 1942.—Decided November 9, 1942.

1. Pending a referendum vote of farmers upon wheat quotas proclaimed by the Secretary of Agriculture under the Agricultural Adjustment Act of 1938, the Secretary made a radio address in which he advocated approval of the quotas and called attention to the recent enactment by Congress of the amendatory act, later approved

---

[10] This legislative history is discussed in *Helvering* v. *Northwest Steel Mills*, 311 U. S. 46, 50.

[11] 80 Cong. Rec. 9055, 9070, 74th Cong., 2d Sess.

[12] 80 Cong. Rec. 9071, 74th Cong., 2d Sess.

May 26, 1941. The speech mentioned the provisions of the amendment for increase of loans on wheat but not the fact that it also increased the penalty on excess production, and added that because of the uncertain world situation extra acreages of wheat had been deliberately planted and "farmers should not be penalized because they have provided insurance against shortages of food." There was no evidence that the subsequent referendum vote approving the quotas was influenced by the speech. *Held*, that, in any event and even assuming that the penalties referred to in the speech were those prescribed by the Act, the validity of the vote was not thereby affected. P. 117.

2. The wheat marketing quota and attendant penalty provisions of the Agricultural Adjustment Act of 1938, as amended by the Act of May 26, 1941, when applied to wheat not intended in any part for commerce but wholly for consumption on the farm are within the commerce power of Congress. P. 118.
3. The effect of the Act is to restrict the amount of wheat which may be produced for market and the extent as well to which one may forestall resort to the market by producing for his own needs. P. 127.
4. That the production of wheat for consumption on the farm may be trivial in the particular case is not enough to remove the grower from the scope of federal regulation, where his contribution, taken with that of many others similarly situated, is far from trivial. P. 127.
5. The power to regulate interstate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. P. 128.
6. A factor of such volume and variability as wheat grown for home consumption would have a substantial influence on price conditions on the wheat market, both because such wheat, with rising prices, may flow into the market and check price increases and, because, though never marketed, it supplies the need of the grower which would otherwise be satisfied by his purchases in the open market. P. 128.
7. The amendatory Act of May 26, 1941, which increased the penalty upon "farm marketing excess" and included in that category wheat which previously had not been subject to penalty, *held* not invalid as retroactive legislation repugnant to the Fifth Amendment when applied to wheat planted and growing before it was enacted but harvested and threshed thereafter. P. 131.

43 F. Supp. 1017, reversed.

APPEAL from a decree of the District Court of three judges which permanently enjoined the Secretary of Agriculture and other appellants from enforcing certain penalties against the appellee, a farmer, under the Agricultural Adjustment Act.

Solicitor General Fahy, with whom *Assistant Attorney General Arnold* and *Messrs. Robert L. Stern, John S. L. Yost, W. Carroll Hunter,* and *Robert H. Shields* were on the briefs, on the original argument and on the reargument (*Mr. James C. Wilson* was also on the brief on the original argument), for appellants.

Messrs. Webb R. Clark and *Harry N. Routzohn,* with whom *Mr. Robert S. Nevin* was on the briefs, for appellee.

Messrs. William Lemke, Louis M. Day, and *T. A. Billingsly* filed a brief, as *amici curiae,* in support of appellee.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The appellee filed his complaint against the Secretary of Agriculture of the United States, three members of the County Agricultural Conservation Committee for Montgomery County, Ohio, and a member of the State Agricultural Conservation Committee for Ohio. He sought to enjoin enforcement against himself of the marketing penalty imposed by the amendment of May 26, 1941,[1] to the Agricultural Adjustment Act of 1938,[2] upon that part of his 1941 wheat crop which was available for marketing in excess of the marketing quota established for his farm. He also sought a declaratory judgment that the wheat marketing quota provisions of the Act as amended and applicable to him were unconstitutional because not sus-

[1] 55 Stat. 203, 7 U. S. C. (Supp. No. I) § 1340.

[2] 52 Stat. 31, as amended, 7 U. S. C. § 1281 *et seq.*

tainable under the Commerce Clause or consistent with the Due Process Clause of the Fifth Amendment.

The Secretary moved to dismiss the action against him for improper venue, but later waived his objection and filed an answer. The other appellants moved to dismiss on the ground that they had no power or authority to enforce the wheat marketing quota provisions of the Act, and after their motion was denied they answered, reserving exceptions to the ruling on their motion to dismiss.[3] The case was submitted for decision on the pleadings and upon a stipulation of facts.

The appellee for many years past has owned and operated a small farm in Montgomery County, Ohio, maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs. It has been his practice to raise a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding. The intended disposition of the crop here involved has not been expressly stated.

In July of 1940, pursuant to the Agricultural Adjustment Act of 1938, as then amended, there were established for the appellee's 1941 crop a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat an acre. He was given notice of such allotment in July of 1940, before the Fall planting of his 1941 crop of wheat, and again in July of 1941, before it was harvested. He sowed, however, 23 acres, and harvested from his 11.9 acres of excess acreage 239 bushels, which under the terms of the Act as amended on May 26, 1941, constituted farm

[3] Because of the conclusion reached as to the merits, we need not consider the question whether these appellants would be proper if our decision were otherwise.

marketing excess, subject to a penalty of 49 cents a bushel, or $117.11 in all. The appellee has not paid the penalty and he has not postponed or avoided it by storing the excess under regulations of the Secretary of Agriculture, or by delivering it up to the Secretary. The Committee, therefore, refused him a marketing card, which was, under the terms of Regulations promulgated by the Secretary, necessary to protect a buyer from liability to the penalty and upon its protecting lien.[4]

The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce.[5] Within prescribed limits and by prescribed standards the Secretary of Agriculture is directed to ascertain and proclaim each year a national acreage allotment for the next crop of wheat, which is then apportioned to the states and their counties, and is eventually broken up into allotments for individual farms.[6] Loans and payments to wheat farmers are authorized in stated circumstances.[7]

The Act further provides that whenever it appears that the total supply of wheat as of the beginning of any marketing year, beginning July 1, will exceed a normal year's domestic consumption and export by more than 35 per cent, the Secretary shall so proclaim not later than May 15 prior to the beginning of such marketing year; and that during the marketing year a compulsory national marketing quota shall be in effect with respect to the marketing

---

[4] Wheat—507, §§ 728.240, 728.248, 6 Federal Register 2695, 2699–2701.

[5] § 331, 7 U. S. C. § 1331.

[6] § 335, 7 U. S. C. § 1335.

[7] §§ 302 (b) (h), 303, 7 U. S. C. §§ 1302 (b) (h), 1303; § 10 of the amendment of May 26, 1941, 7 U. S. C. (Supp. I), § 1340 (10).

of wheat.[8] Between the issuance of the proclamation and June 10, the Secretary must, however, conduct a referendum of farmers who will be subject to the quota, to determine whether they favor or oppose it; and, if more than one-third of the farmers voting in the referendum do oppose, the Secretary must, prior to the effective date of the quota, by proclamation suspend its operation.[9]

On May 19, 1941, the Secretary of Agriculture made a radio address to the wheat farmers of the United States in which he advocated approval of the quotas and called attention to the pendency of the amendment of May 26, 1941, which had at the time been sent by Congress to the White House, and pointed out its provision for an increase in the loans on wheat to 85 per cent of parity. He made no mention of the fact that it also increased the penalty from 15 cents a bushel to one-half of the parity loan rate of about 98 cents, but stated that "Because of the uncertain world situation, we deliberately planted several million extra acres of wheat. . . . Farmers should not be penalized because they have provided insurance against shortages of food."

Pursuant to the Act, the referendum of wheat growers was held on May 31, 1941. According to the required published statement of the Secretary of Agriculture, 81 per cent of those voting favored the marketing quota, with 19 per cent opposed.

The court below held, with one judge dissenting, that the speech of the Secretary invalidated the referendum; and that the amendment of May 26, 1941, "in so far as it increased the penalty for the farm marketing excess over the fifteen cents per bushel prevailing at the time of planting and subjected the entire crop to a lien for the payment thereof," should not be applied to the appellee because

[8] § 335 (a), 7 U. S. C. § 1335 (a).

[9] § 336, 7 U. S. C. § 1336.

as so applied it was retroactive and in violation of the Fifth Amendment; and, alternatively, because the equities of the case so required. 43 F. Supp. 1017. Its judgment permanently enjoined appellants from collecting a marketing penalty of more than 15 cents a bushel on the farm marketing excess of appellee's 1941 wheat crop, from subjecting appellee's entire 1941 crop to a lien for the payment of the penalty, and from collecting a 15-cent penalty except in accordance with the provisions of § 339 of the Act as that section stood prior to the amendment of May 26, 1941.[10] The Secretary and his co-defendants have appealed.[11]

I

The holding of the court below that the Secretary's speech invalidated the referendum is manifest error. Read as a whole and in the context of world events that constituted his principal theme, the penalties of which he spoke were more likely those in the form of ruinously low prices resulting from the excess supply rather than the penalties prescribed in the Act. But under any interpretation the speech cannot be given the effect of invalidating the referendum. There is no evidence that any voter put upon the Secretary's words the interpretation that impressed the court below or was in any way misled. There is no showing that the speech influenced the outcome of the referendum. The record in fact does not show that any, and does not suggest a basis for even a guess as to how many, of the voting farmers dropped work to listen to "Wheat Farmers and the Battle for

[10] 7 U. S. C. § 1339. This imposed a penalty of 15¢ per bushel upon wheat marketed in excess of the farm marketing quota while such quota was in effect. See also, amendments of July 26, 1939, 53 Stat. 1126, 7 U. S. C. § 1335 (c), and of July 2, 1940, 54 Stat. 727, 7 U. S. C. § 1301 (b) (6) (A), (B).

[11] 50 Stat. 752–753, § 3, 28 U. S. C. § 380a.

Democracy" at 11:30 in the morning of May 19th, which was a busy hour in one of the busiest of seasons. If this discourse intended reference to this legislation at all, it was of course a public Act, whose terms were readily available, and the speech did not purport to be an exposition of its provisions.

To hold that a speech by a Cabinet officer, which failed to meet judicial ideals of clarity, precision, and exhaustiveness, may defeat a policy embodied in an Act of Congress, would invest communication between administrators and the people with perils heretofore unsuspected. Moreover, we should have to conclude that such an officer is able to do by accident what he has no power to do by design. Appellee's complaint, in so far as it is based on this speech, is frivolous, and the injunction, in so far as it rests on this ground, is unwarranted. *United States* v. *Rock Royal Co-operative,* 307 U. S. 533.

II

It is urged that under the Commerce Clause of the Constitution, Article I, § 8, clause 3, Congress does not possess the power it has in this instance sought to exercise. The question would merit little consideration since our decision in *United States* v. *Darby,* 312 U. S. 100,[12] sustaining the federal power to regulate production of goods for commerce, except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm. The Act includes a definition of "market" and its derivatives, so that as related to wheat, in addition to its conventional meaning, it also means to dispose of "by feeding (in any

[12] See also, *Gray* v. *Powell,* 314 U. S. 402; *United States* v. *Wrightwood Dairy Co.,* 315 U. S. 110; *Cloverleaf Co.* v. *Patterson,* 315 U. S. 148; *Kirschbaum Co.* v. *Walling,* 316 U. S. 517; *Overnight Transportation Co.* v. *Missel,* 316 U. S. 572.

form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of." [13] Hence, marketing quotas not only embrace all that may be sold without penalty but also what may be consumed on the premises. Wheat produced on excess acreage is designated as "available for marketing" as so defined, and the penalty is imposed thereon.[14] Penalties do not depend upon whether any part of the wheat, either within or without the quota, is sold or intended to be sold. The sum of this is that the Federal Government fixes a quota including all that the farmer may harvest for sale or for his own farm needs, and declares that wheat produced on excess acreage may neither be disposed of nor used except upon payment of the penalty, or except it is stored as required by the Act or delivered to the Secretary of Agriculture.

Appellee says that this is a regulation of production and consumption of wheat. Such activities are, he urges, beyond the reach of Congressional power under the Commerce Clause, since they are local in character, and their effects upon interstate commerce are at most "indirect." In answer the Government argues that the statute regulates neither production nor consumption, but only marketing; and, in the alternative, that if the Act does go beyond the regulation of marketing it is sustainable as a "necessary and proper" [15] implementation of the power of Congress over interstate commerce.

The Government's concern lest the Act be held to be a regulation of production or consumption, rather than of marketing, is attributable to a few dicta and decisions of this Court which might be understood to lay it down that activities such as "production," "manufacturing," and

---

[13] 54 Stat. 727, 7 U. S. C. § 1301 (b) (6) (A), (B).

[14] §§ 1, 2, of the amendment of May 26, 1941; Wheat—507, § 728.251, 6 Federal Register 2695, 2701.

[15] Constitution, Article I, § 8, cl. 18.

"mining" are strictly "local" and, except in special circumstances which are not present here, cannot be regulated under the commerce power because their effects upon interstate commerce are, as matter of law, only "indirect." [16] Even today, when this power has been held to have great latitude, there is no decision of this Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof. We believe that a review of the course of decision under the Commerce Clause will make plain, however, that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as "production" and "indirect" and foreclose consideration of the actual effects of the activity in question upon interstate commerce.

At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. *Gibbons* v. *Ogden,* 9 Wheat. 1, 194–195. He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes. *Id.* at 197.

---

[16] After discussing and affirming the cases stating that such activities were "local," and could be regulated under the Commerce Clause only if by virtue of special circumstances their effects upon interstate commerce were "direct," the opinion of the Court in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 308, stated that: "The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about. . . . the matter of degree has no bearing upon the question here, since that question is not—What is the *extent* of the local activity or condition, or the *extent* of the effect produced upon interstate commerce? but—What is the *relation* between the activity or condition and the effect?" See also, cases cited *infra,* notes 17 and 21.

For nearly a century, however, decisions of this Court under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause, and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce. During this period there was perhaps little occasion for the affirmative exercise of the commerce power, and the influence of the Clause on American life and law was a negative one, resulting almost wholly from its operation as a restraint upon the powers of the states. In discussion and decision the point of reference, instead of being what was "necessary and proper" to the exercise by Congress of its granted power, was often some concept of sovereignty thought to be implicit in the status of statehood. Certain activities such as "production," "manufacturing," and "mining" were occasionally said to be within the province of state governments and beyond the power of Congress under the Commerce Clause.[17]

It was not until 1887, with the enactment of the Interstate Commerce Act,[18] that the interstate commerce power began to exert positive influence in American law and life. This first important federal resort to the commerce power was followed in 1890 by the Sherman Anti-Trust Act[19] and, thereafter, mainly after 1903, by many others. These statutes ushered in new phases of adjudication, which required the Court to approach the interpretation of the Commerce Clause in the light of an actual exercise by Congress of its power thereunder.

When it first dealt with this new legislation, the Court adhered to its earlier pronouncements, and allowed but

---

[17] *Veazie* v. *Moor,* 14 How. 568, 573–574; *Kidd* v. *Pearson,* 128 U. S. 1, 20–22.

[18] 24 Stat. 379, 49 U. S. C. § 1, *et seq.*

[19] 26 Stat. 209, 15 U. S. C. § 1, *et seq.*

little scope to the power of Congress. *United States* v. *Knight Co.*, 156 U. S. 1.[20] These earlier pronouncements also played an important part in several of the five cases in which this Court later held that Acts of Congress under the Commerce Clause were in excess of its power.[21]

Even while important opinions in this line of restrictive authority were being written, however, other cases called forth broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in *Gibbons* v. *Ogden, supra.*

Not long after the decision of *United States* v. *Knight Co., supra,* Mr. Justice Holmes, in sustaining the exercise of national power over intrastate activity, stated for the Court that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co.* v. *United States,* 196 U. S. 375, 398. It was soon demonstrated that the effects of many kinds of intrastate activity upon interstate commerce were such as to make them a proper subject of federal regulation.[22] In some cases sustaining the exercise of federal power over intrastate matters the term "direct"

---

[20] See also, *Hopkins* v. *United States,* 171 U. S. 578; *Anderson* v. *United States,* 171 U. S. 604.

[21] *Employers' Liability Cases,* 207 U. S. 463; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330; *Schechter Corp.* v. *United States,* 295 U. S. 495; *Carter* v. *Carter Coal Co.,* 298 U. S. 238; cf. *United States* v. *Dewitt,* 9 Wall. 41; *Trade-Mark Cases,* 100 U. S. 82; *Hill* v. *Wallace,* 259 U. S. 44; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, 259–260; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172, 178–179; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165.

[22] *Northern Securities Co.* v. *United States,* 193 U. S. 197; *Swift & Co.* v. *United States, supra; Loewe* v. *Lawlor,* 208 U. S. 274; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612; *Southern Ry. Co.* v. *United States,* 222 U. S. 20; *Second Employers' Liability Cases,* 223 U. S. 1; *United States* v. *Patten,* 226 U. S. 525.

was used for the purpose of stating, rather than of reaching, a result; [23] in others it was treated as synonymous with "substantial" or "material"; [24] and in others it was not used at all.[25] Of late its use has been abandoned in cases dealing with questions of federal power under the Commerce Clause.

In the *Shreveport Rate Cases,* 234 U. S. 342, the Court held that railroad rates of an admittedly intrastate character and fixed by authority of the state might, nevertheless, be revised by the Federal Government because of the economic effects which they had upon interstate commerce. The opinion of Mr. Justice Hughes found federal intervention constitutionally authorized because of "matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance." *Id.* at 351.

The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause, ex-

---

[23] *United Leather Workers* v. *Herkert Co.,* 265 U. S. 457, 471; cf. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 511; *Di Santo* v. *Pennsylvania,* 273 U. S. 34, 44 (dissent); *Northern Securities Co.* v. *United States,* 193 U. S. 197, 395; *Standard Oil Co.* v. *United States,* 221 U. S. 1, 66–69.

[24] In *Santa Cruz Co.* v. *Labor Board,* 303 U. S. 453, 466–467, Chief Justice Hughes said: " 'direct' has been contrasted with 'indirect,' and what is 'remote' or 'distant' with what is 'close and substantial.' Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection.' "

[25] *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612; *Second Employers' Liability Cases,* 223 U. S. 1; *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U. S. 194.

emplified by this statement, has made the mechanical application of legal formulas no longer feasible. Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be "production," nor can consideration of its economic effects be foreclosed by calling them "indirect." The present Chief Justice has said in summary of the present state of the law: "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. . . . 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. . . . 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." *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119.

Whether the subject of the regulation in question was "production," "consumption," or "marketing" is, therefore, not material for purposes of deciding the question of federal power before us. That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it.[26] The same consideration might help in determining whether in the absence of Congressional action it would be permissible for the state

[26] Cf. *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349.

to exert its power on the subject matter, even though in so doing it to some degree affected interstate commerce. But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

The parties have stipulated a summary of the economics of the wheat industry. Commerce among the states in wheat is large and important. Although wheat is raised in every state but one, production in most states is not equal to consumption. Sixteen states on average have had a surplus of wheat above their own requirements for feed, seed, and food. Thirty-two states and the District of Columbia, where production has been below consumption, have looked to these surplus-producing states for their supply as well as for wheat for export and carry-over.

The wheat industry has been a problem industry for some years. Largely as a result of increased foreign production and import restrictions, annual exports of wheat and flour from the United States during the ten-year period ending in 1940 averaged less than 10 per cent of total production, while during the 1920's they averaged more than 25 per cent. The decline in the export trade has left a large surplus in production which, in connection with an abnormally large supply of wheat and other grains in recent years, caused congestion in a number of markets; tied up railroad cars; and caused elevators in some instances to turn away grains, and railroads to institute embargoes to prevent further congestion.

Many countries, both importing and exporting, have sought to modify the impact of the world market conditions on their own economy. Importing countries have taken measures to stimulate production and self-sufficiency. The four large exporting countries of Argen-

tina, Australia, Canada, and the United States have all undertaken various programs for the relief of growers. Such measures have been designed, in part at least, to protect the domestic price received by producers. Such plans have generally evolved towards control by the central government.[27]

In the absence of regulation, the price of wheat in the United States would be much affected by world conditions. During 1941, producers who coöperated with the Agricultural Adjustment program received an average price on the farm of about $1.16 a bushel, as compared with the world market price of 40 cents a bushel.

Differences in farming conditions, however, make these benefits mean different things to different wheat growers. There are several large areas of specialization in wheat, and the concentration on this crop reaches 27 per cent of the crop land, and the average harvest runs as high as

---

[27] It is interesting to note that all of these have federated systems of government, not of course without important differences. In all of them, wheat regulation is by the national government. In Argentina, wheat may be purchased only from the national Grain Board. A condition of sale to the Board, which buys at pegged prices, is the producer's agreement to become subject to restrictions on planting. See Nolan, Argentine Grain Price Guaranty, Foreign Agriculture (Office of Foreign Agricultural Relations, Department of Agriculture) May, 1942, pp. 185, 202. The Australian system of regulation includes the licensing of growers, who may not sow more than the amount licensed, and who may be compelled to cut part of their crops for hay if a heavy crop is in prospect. See Wright, Australian Wheat Stabilization, Foreign Agriculture (Office of Foreign Agricultural Relations, Department of Agriculture) September, 1942, pp. 329, 336. The Canadian Wheat Board has wide control over the marketing of wheat by the individual producer. 4 Geo. VI, c. 25, § 5. Canadian wheat has also been the subject of numerous Orders in Council. E. g., 6 Proclamations and Orders in Council (1942) 183, which gives the Wheat Board full control of sale, delivery, milling and disposition by any person or individual. See, also, Wheat Acreage Reduction Act, 1942, 6 Geo. VI, c. 10.

155 acres. Except for some use of wheat as stock feed and for seed, the practice is to sell the crop for cash. Wheat from such areas constitutes the bulk of the interstate commerce therein.

On the other hand, in some New England states less than one per cent of the crop land is devoted to wheat, and the average harvest is less than five acres per farm. In 1940 the average percentage of the total wheat production that was sold in each state, as measured by value, ranged from 29 per cent thereof in Wisconsin to 90 per cent in Washington. Except in regions of large-scale production, wheat is usually grown in rotation with other crops; for a nurse crop for grass seeding; and as a cover crop to prevent soil erosion and leaching. Some is sold, some kept for seed, and a percentage of the total production much larger than in areas of specialization is consumed on the farm and grown for such purpose. Such farmers, while growing some wheat, may even find the balance of their interest on the consumer's side.

The effect of consumption of home-grown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production. The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant.

The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the

scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial. *Labor Board* v. *Fainblatt*, 306 U. S. 601, 606 *et seq.*; *United States* v. *Darby*, *supra*, at 123.

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices.[28] One of the primary purposes of the Act in question was to increase the market price of wheat, and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress

---

[28] *Swift & Co.* v. *United States*, 196 U. S. 375; *Stafford* v. *Wallace*, 258 U. S. 495; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1; *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295; *United States* v. *Trenton Potteries Co.*, 273 U. S. 392; *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; *Standard Oil Co. of Indiana* v. *United States*, 283 U. S. 163; *Currin* v. *Wallace*, 306 U. S. 1; *Mulford* v. *Smith*, 307 U. S. 38; *United States* v. *Rock Royal Co-operative*, *supra*; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381; *United States* v. *Darby*, *supra*; *United States* v. *Wrightwood Dairy Co.*, *supra*; *Federal Power Commission* v. *Pipeline Co.*, 315 U. S. 575.

may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.

It is said, however, that this Act, forcing some farmers into the market to buy what they could provide for themselves, is an unfair promotion of the markets and prices of specializing wheat growers. It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process.[29] Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do.

III

The statute is also challenged as a deprivation of property without due process of law contrary to the Fifth Amendment, both because of its regulatory effect on the appellee and because of its alleged retroactive effect. The court below sustained the plea on the ground of forbidden retroactivity, "or in the alternative, that the equities of the case as shown by the record favor the plaintiff." 43 F. Supp. 1017, 1019. An Act of Congress is not to be refused application by the courts as arbitrary and capricious and forbidden by the Due Process Clause merely

[29] Cf. *M'Culloch* v. *Maryland*, 4 Wheat. 316, 413–415, 435–436; *Gibbons* v. *Ogden*, *supra*, at 197; *Stafford* v. *Wallace*, 258 U. S. 495, 521; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 37; *Helvering* v. *Gerhardt*, 304 U. S. 405, 412.

because it is deemed in a particular case to work an inequitable result.

Appellee's claim that the Act works a deprivation of due process even apart from its allegedly retroactive effect is not persuasive. Control of total supply, upon which the whole statutory plan is based, depends upon control of individual supply. Appellee's claim is not that his quota represented less than a fair share of the national quota, but that the Fifth Amendment requires that he be free from penalty for planting wheat and disposing of his crop as he sees fit.

We do not agree. In its effort to control total supply, the Government gave the farmer a choice which was, of course, designed to encourage coöperation and discourage non-coöperation. The farmer who planted within his allotment was in effect guaranteed a minimum return much above what his wheat would have brought if sold on a world market basis. Exemption from the applicability of quotas was made in favor of small producers.[30] The farmer who produced in excess of his quota might escape penalty by delivering his wheat to the Secretary, or by storing it with the privilege of sale without penalty in a later year to fill out his quota, or irrespective of quotas if they are no longer in effect, and he could obtain a loan of 60 per cent of the rate for coöperators, or about 59 cents a bushel, on so much of his wheat as would be subject to penalty if marketed.[31] Finally, he might make other disposition of his wheat, subject to the penalty. It is agreed

---

[30] Section 7 of the amendment of May 26, 1941 provided that a farm marketing quota should not be applicable to any farm on which the acreage planted to wheat is not in excess of fifteen acres. When the appellee planted his wheat the quota was inapplicable to any farm on which the normal production of the acreage planted to wheat was less than 200 bushels. § 335 (d) of the Agricultural Adjustment Act of 1938, as amended by 54 Stat. 232.

[31] §§ 6, 10 (c) of the amendment of May 26, 1941.

that as the result of the wheat programs he is able to market his wheat at a price "far above any world price based on the natural reaction of supply and demand." We can hardly find a denial of due process in these circumstances, particularly since it is even doubtful that appellee's burdens under the program outweigh his benefits. It is hardly lack of due process for the Government to regulate that which it subsidizes.

The amendment of May 26, 1941 is said to be invalidly retroactive in two respects: first, in that it increased the penalty from 15 cents to 49 cents a bushel; secondly, in that, by the new definition of "farm marketing excess," it subjected to the penalty wheat which had theretofore been subject to no penalty at all, i. e., wheat not "marketed" as defined in the Act.

It is not to be denied that between seed time and harvest important changes were made in the Act which affected the desirability and advantage of planting the excess acreage. The law as it stood when the appellee planted his crop made the quota for his farm the normal or the actual production of the acreage allotment, whichever was greater, plus any carry-over wheat that he could have marketed without penalty in the preceding marketing year.[32] The Act also provided that the farmer who, while quotas were in effect, marketed wheat in excess of the quota for the farm on which it was produced should be subject to a penalty of 15 cents a bushel on the excess so marketed.[33] Marketing of wheat was defined as including disposition "by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, . . ." [34] The amendment of May 26,

---

[32] § 335 (c) as amended July 26, 1939, 53 Stat. 1126, 7 U. S. C. § 1335 (c).

[33] § 339, 7 U. S. C. § 1339.

[34] § 301 (b) (6) (A), (B), as amended July 2, 1940, 54 Stat. 727, 7 U. S. C. § 1301 (b) (6) (A), (B).

1941, made before the appellee had harvested the growing crop, changed the quota and penalty provisions. The quota for each farm became the actual production of acreage planted to wheat, less the normal or the actual production, whichever was smaller, of any excess acreage.[35] Wheat in excess of this quota, known as the "farm-marketing excess" and declared by the amendment to be "regarded as available for marketing," was subjected to a penalty fixed at 50 per cent of the basic loan rate for coöperators,[36] or 49 cents, instead of the penalty of 15 cents which obtained at the time of planting. At the same time, there was authorized an increase in the amount of the loan which might be made to non-coöperators such as the appellee upon wheat which "would be subject to penalty if marketed" from about 34 cents per bushel to about 59 cents.[37] The entire crop was subjected by the amendment to a lien for the payment of the penalty.

The penalty provided by the amendment can be postponed or avoided only by storing the farm marketing excess according to regulations promulgated by the Secretary or by delivering it to him without compensation;

---

[35] By an amendment of December 26, 1941, 55 Stat. 872, effective as of May 26, 1941, it was provided that the farm marketing excess should not be larger than the amount by which the actual production exceeds the normal production of the farm wheat-acreage allotment, if the producer establishes such actual production to the satisfaction of the Secretary, provision being made for adjustment of the penalty in the event of a downward adjustment in the amount of the farm marketing excess.

[36] §§ 1, 2, 3 of the amendment of May 26, 1941.

[37] Section 302 (b) had provided for a loan to non-coöperators of 60% of the basic loan rate for coöperators, which in 1940 was 64¢. See United States Department of Agriculture Press Release, May 20, 1940. The same percentage was employed in § 10 (c) of the amendment of May 26, 1941, and the increase in the amount of the loan is the result of an increase in the basic loan rate effected by § 10 (a) of the amendment.

and the penalty is incurred and becomes due on threshing.[38] Thus the penalty was contingent upon an act which appellee committed not before but after the enactment of the statute, and had he chosen to cut his excess and cure it or feed it as hay, or to reap and feed it with the head and straw together, no penalty would have been demanded. Such manner of consumption is not uncommon. Only when he threshed and thereby made it a part of the bulk of wheat overhanging the market did he become subject to penalty. He has made no effort to show that the value of his excess wheat consumed without threshing was less than it would have been had it been threshed while subject to the statutory provisions in force at the time of planting. Concurrently with the increase in the amount of the penalty, Congress authorized a substantial increase in the amount of the loan which might be made to coöperators upon stored farm marketing excess wheat. That appellee is the worse off for the aggregate of this legislation does not appear; it only appears that, if he could get all that the Government gives and do nothing that the Government asks, he would be better off than this law allows. To deny him this is not to deny him due process of law. Cf. *Mulford* v. *Smith,* 307 U. S. 38.

Reversed.

[38] Wheat—507, § 728.251 (b), 6 Federal Register 2695, 2701.

HUGHES *v.* WENDEL, COUNTY TREASURER, ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 176. Decided November 16, 1942.

Since the record does not contain the contract nor an adequate summary thereof, appellant's claim of unconstitutional impairment of the obligation of the contract can not be determined, and the appeal is dismissed. P. 134.

139 Ohio St. 632, 41 N. E. 2d 702, appeal dismissed.

Mr. George S. Hawke was on the brief for appellant.

Mr. Paul A. Baden was on the brief for John W. Wendel, County Treasurer, and was with *Mr. Charles Williams* on the brief for the Oxford Loan & Building Association,—appellees.

PER CURIAM.

Appellant is the owner of a 99-year perpetually renewable lease of which the University of Miami, in Ohio, is lessor, and which has been subjected to assessment of county taxes pursuant to § 5330 of the Ohio General Code. Appellant contends that this statute as applied violates an exemption from taxation granted by § 13 of an Ohio statute of February 17, 1809 (7 Ohio Laws, p. 188), which allegedly became a part of her contract through execution of the lease, and impairs the obligation of her contract contrary to Article I, § 10 of the Constitution. The record, however, does not set forth appellant's lease, and the incomplete summary of it contained in her pleading is not adequate to enable us to determine what her rights may be. Accordingly, we must dismiss the appeal.

Dismissed.

STATE BANK OF HARDINSBURG *v.* BROWN ET UX.

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

No. 23. Argued October 16, 1942.—Decided November 16, 1942.

1. Under § 75 (n) of the Bankruptcy Act, the filing of a farmer-debtor's petition can not bring into the jurisdiction of the bankruptcy court property which has been sold in mortgage foreclosure proceedings, and as to which, under the state law, every equity or right of the debtor has been extinguished. P. 138.
2. The law of Indiana gives the debtor a year from the institution of foreclosure suit within which to redeem and terminates his right and interest in the property at the sale. The delivery of a deed by the sheriff becomes a ministerial act constituting merely a record evidence of the purchaser's title which is perfect from the date of sale. P. 141.

124 F. 2d 701, reversed.

CERTIORARI, 315 U. S. 794, to review a judgment which reversed an order of the bankruptcy court, striking a farm from the bankrupt's schedules.

Mr. Telford B. Orbison for petitioner.

Messrs. Samuel E. Cook and *Ulysses S. Lesh* submitted for respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The court below has construed § 75 (n) of the Bankruptcy Act[1] as bringing within the court's jurisdiction property mortgaged by the debtor as to which, after foreclosure, the debtor's equity of redemption had expired.[2] Because of conflict of decision[3] we granted certiorari.

[1] 11 U. S. C. § 203.

[2] 124 F. 2d 701.

[3] *Glenn* v. *Hollums*, 80 F. 2d 555; *Shreiner* v. *Farmers Trust Co.*, 91 F. 2d 606. Compare *In re Randall*, 20 F. Supp. 470; *Buttars* v. *Utah Mortgage Loan Corp.*, 116 F. 2d 622.

Subsequent to the adoption of § 75 the respondents borrowed $2,500 from the petitioner and gave a promissory note secured by mortgage on their farm in Indiana. In a foreclosure proceeding in an Indiana state court petitioner obtained judgment November 20, 1939, ordering that the property be sold to satisfy the debt. May 25, 1940, the sheriff sold the farm to the petitioner. The respondents, who had not redeemed, filed their petition under § 75 on May 28, 1940, listing the farm in their schedules.

June 1, 1940, the sheriff executed and delivered his deed to the petitioner; and, June 30, 1940, petitioner filed, in the District Court, a motion to strike the farm from the schedules on the ground that, at the date of the petition, the respondents had no right or equity in the property as the period of redemption provided by state law expired at the time of the sheriff's sale. The court granted the motion and struck the property from the schedules. The Circuit Court of Appeals, by a divided court, reversed the judgment.

Section 75 (n), so far as pertinent, provides:

"The filing of a petition . . . praying for relief under . . . [this section] shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others . . . the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.

"In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been

confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section."

The applicable statute of Indiana is Chapter 90 of the Acts of 1931.[4] Although this statute appears not to have been construed by the state courts, it seems plain that under its provisions a sale in foreclosure can not be had until one year after the institution of the proceedings and that a sale, then made, cuts off all equity of redemption. The court below so conceded.

The question then is, should § 75 (n) be so read that, although the debtor has no interest or equity in the land which has been sold, and is at most a trustee of the bare legal title, the land is to be drawn into the bankruptcy if the sheriff has not delivered his deed at the date of the initiation of the proceedings. The respondents insist that the section literally so provides and should be given effect accordingly. The petitioner replies that the fair meaning of the section as a whole is that only if the debtor still retains an equity of redemption does the land come under the bankruptcy jurisdiction. It adds that if the language be of doubtful import the legislative history fully supports the construction for which it contends. We hold with the petitioner.

Section 75 (n), after declaring that all the debtor's property shall come under the exclusive jurisdiction of the bankruptcy court, adds that any equity or right in such property shall be within the court's jurisdiction. It then attempts to detail such rights, by a clause opening with the phrase "including, among others, . . . the right or the equity of redemption where the period of redemption has not or had not expired, . . ." This language would seem adequate to vest in the trustee any unexpired equity of redemption and furnish the basis for dealing with the

[4] Burns Indiana Statutes 1933, §§ 3–1801 to 3–1809, inclusive.

property subject to such equity of redemption. Apparently out of an excess of caution the sentence then proceeds to catalog certain instances where, under state law, some act or thing has not occurred whose occurrence is essential to the termination of the equity of redemption. Thus the section proceeds "or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition." It is, of course, common knowledge that, in various states, one or other of the events mentioned is necessary finally to cut off the equity of redemption.

The second paragraph of the section merely extends the period of redemption in cases where, at the time of filing the petition, the period of redemption has not or had not expired. Here again, however, in an excess of caution, the statute provides, after mentioning the expiration of the period of redemption, "or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended . . ." It seems clear that if no right of redemption exists there can be no period of redemption to extend.

A fair reading of the entire section indicates a clear intent to extend the bankruptcy jurisdiction over all property which still remains subject to redemption under state law at the time of filing the petition. The section does not evidence any intent on the part of Congress to bring back into the bankruptcy proceeding property which was once owned by the bankrupt and as to which his ownership and interest has been extinguished, unless such intent can be drawn from the provisions qualifying the general words of the section. We think that if Congress intended that a bankruptcy might reach back into the past and bring under the court's jurisdiction a former interest in

property, which, under state law, had irrevocably passed to a third person, it would have so stated in terms too clear to leave any doubt.

If it be conceded that the construction of the section is doubtful, the legislative history is overwhelmingly in support of the view we have stated.

Subsection (n) as originally enacted [5] provided that the filing of a petition under § 75 "shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court." In administering this section the federal courts held diverse views as to their power to deal with the equity of redemption of a mortgagor after foreclosure.[6] When Congress came to amend the Act to meet the decision of this court in *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, it had in mind the fact that in many states a deed of trust is used as a method of giving real estate security for loans whereunder the trustee may make a sale; that in some states the equity of redemption exists until a deed has been delivered; that in others it expires with the actual sale under foreclosure; that in others it expires when the sale has been confirmed by the court and that in some, although all of these acts have been performed, the debtor has a right to relief during a specified period after confirmation of sale, delivery of deed and entry into possession by the purchaser.[7] The Committee Reports in the House and Senate [8] with respect to the proposed amendment evince a purpose to amend the existing law so as to render it clear that, whatever the right of redemption under state law, the bankrupt and his estate were to have the benefit of that right. Referring,

[5] 47 Stat. 1473.

[6] See 99 A. L. R. 1390–1393.

[7] See Jones, Mortgages (8th Ed.) §§ 1695–1746; Wiltsie, Mortgage Foreclosure (5th Ed.) § 1199.

[8] H. R. Report No. 1808, 74th Cong., 1st Sess.; S R. 985, 74th Cong., 1st Sess.

inter alia, to the amendments to subsection (n), the House Report states:

"These other amendments are largely clarification, and have become necessary because of the diverse rulings and holdings of the various United States district courts in the construction of section 75. Some of these courts have held that the farmer debtor could not take advantage of the act after foreclosure sale, and during the period of redemption. Some of these courts have refused to permit the farmer in that position to file his petition, although under the law of his State he was in possession, entitled to rents and profits, and in full control of the property, and could redeem it within the period allowed.

"Again, other courts have held that the farmer could not take advantage of the act during the period of moratorium established by a State, while others have held that the debtor could not take advantage of the act after sale, but prior to confirmation, although in all of these cases if the debtor had the money, and were in a position to pay, he could redeem, and save the property.

"It is clear that these courts are reasoning too technically, and have failed to carry out the intention of Congress, which was to protect the farmer's home and property, and at the same time to protect the creditor. On the other hand, other courts have held just the opposite, and have given full protection, and carried out the intent of Congress. Under this condition, we think it is admitted by all that there should be uniformity."

The language of the Senate Report goes into somewhat more detail but is of the same purport. When the amendments were before the Senate, Senator Borah, a member of the Committee, explained them to the Senate in the following language:[9]

"In the first place, however, it ought to be said that we undertook to make some amendments in section 75 before

[9] Cong. Rec. Vol. 79, Pt. 13, p. 13632.

we got to subsection (s). These amendments are for the purpose of clarifying section 75. Some of the courts have held that the farmer debtor could not take advantage of the act after foreclosure sale and during the period of redemption. The bill undertakes to clarify it so as to permit the farmer to take advantage of section 75 after foreclosure and during the period of redemption.

"Some of the courts also refused to permit the farmer who was in that position to file his petition, although under the law of the State he was in possession and full control of the property and could redeem it during the period of moratorium established by the States. One of the amendments to section 75 takes care of that objection which was raised by the court.

"Amended subsection (s) construes, interprets, and clarifies both subsections (n) and (o) of section 75. By reading subsections (n) and (o) as now enacted, it becomes clear that it was the intention of Congress, when it passed section 75, that the debtor and all of his property should come under the jurisdiction of the court of bankruptcy, and that the benefits of the act should extend to the farmer prior to confirmation of sale and during the period of redemption. In other words, the amendments provide that the farmer may avail himself of the act after foreclosure and during the period of redemption, and may also avail himself of the act during the period of the moratorium provided for him within the State."

The law of Indiana gives the debtor a year from the institution of foreclosure suit within which to redeem and terminates his right and interest in the property at the sale. The delivery of a deed by the sheriff, therefore, becomes a ministerial act which he can be compelled to perform.[10] Such delivery constitutes mere record evi-

[10] *Jessup* v. *Carey*, 61 Ind. 584, 592; *Hubble* v. *Berry*, 180 Ind. 513, 519, 103 N. E. 328; *State ex rel. Miller* v. *Bender*, 102 Ind. App. 185, 1 N. E. 2d 662.

dence of the purchaser's title which is perfect from the date of sale. As the sale cut off all rights of the debtor, § 75 (n) does not bring the property within the jurisdiction of the bankruptcy court.

The petitioner urges that the construction given the section by the court below would render it unconstitutional. The view we take of the meaning of the statute makes it unnecessary to consider this contention.

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

Reversed.

MR. JUSTICE MURPHY, dissenting:

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and I cannot agree with the opinion of the Court. Section 75 (n) subjects to the exclusive jurisdiction of the bankruptcy court all property in which the petitioning farmer-debtor has any equity or right, "including, among others . . . the right or the equity of redemption where the period of redemption has not or had not expired, . . . *or* where deed had not been delivered, at the time of filing the petition." Conceding that respondents' equity of redemption was cut off under Indiana law prior to the filing of their petition, the deed had not been delivered at the time of filing. Respondents thus come within the exact terms of § 75 (n), and the property should not have been struck from their schedules.

We have said that doubts in § 75 are to be settled in the debtor's favor, and that it "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 Central Ins. Co.*, 311 U. S. 273, 279. But we are now told that the spirit and the letter of § 75 (n), especially the phrase "or where deed had not been delivered," may be disregarded upon a

"fair reading of the entire section" and a consideration of its legislative history, both of which, it is claimed, disclose that Congress did not intend the benefits of § 75 to extend beyond the expiration of the equity of redemption by force of state law, the above-quoted phrase being added, "apparently out of an excess of caution," to provide for those states in which the equity of redemption survives until the delivery of a deed. If Congress so intended, its words were poorly chosen. Congress could easily have declared that bankruptcy jurisdiction does not survive the extinguishment of the equity of redemption under state law, whether that extinguishment is accomplished by sale, confirmation, or the delivery of a deed. Instead Congress used the disjunctive "or". That Congress did not so intend is clear from the legislative history of the Act. The true Congressional purpose was "to protect the farmer's home and property, and at the same time to protect the creditor." [1] This purpose is best achieved by giving effect to the precise words of § 75 (n). The farmer is given a chance to rehabilitate himself so long as he has any vestige of a right in the property, call it "bare legal title" or what you will. The creditor is protected because the value of the property remains, under adequate safeguards provided by the Act, as security for the debt. "There is no constitutional claim of the creditor to more than that." *Wright* v. *Union Central Ins. Co.*, 311 U. S. 273, 278.

---

[1] H. Rep. No. 1808, 74th Cong., 1st Sess., p. 2. See also S. Rep. No. 985, 74th Cong., 1st Sess., p. 2.

PFISTER *v.* NORTHERN ILLINOIS FINANCE CORP. ET AL.

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

Nos. 26 and 27. Argued October 19, 1942.—Decided November 16, 1942.

1. The time within which a petition may be filed to review an order of a conciliation commissioner, fixing rental or granting stay or directing sale, is governed by § 39 (c) of the Bankruptcy Act and is fixed at ten days after the entry of the order "or within such extended time as the court may for cause shown allow." P. 147.
2. The ten-day period for filing a petition to review a commissioner's order under § 39 (c) is not extended by a petition for rehearing which is denied by the commissioner without reëxamination of the basis of the original order. P. 150.
3. The ten-day period prescribed by § 39 (c) is a limitation on the right of the aggrieved party to appeal, but not a limitation on the jurisdiction of the reviewing court to act. The District Court in the exercise of sound discretion can review orders on petitions to review filed after the ten-day period has run. P. 152.
4. In this case, the commissioner entertained out-of-time petitions to rehear orders fixing rental, granting stay and directing sale and denied the petitions upon the ground that they were inadequate to induce a reëxamination of the merits of the orders they sought to re-open. *Held,* on the facts of this case, that the District Court did not err in refusing an out-of-time review of the merits of the original orders. P. 153.

123 F. 2d 543, affirmed.

CERTIORARI, 315 U. S. 795, to review a judgment of the Circuit Court of Appeals which affirmed orders of the District Court en banc dismissing, for want of jurisdiction, petitions to review orders of a conciliation commissioner.

Mr. Elmer McClain for petitioner.

Mr. Elmer C. Tobin, with whom *Mr. John K. Newhall* was on the brief, for respondents.

MR. JUSTICE REED delivered the opinion of the Court.

This certiorari, 315 U. S. 795, brings here certain rulings on the right of petitioner, a farmer-debtor, to have reviewed the orders of a conciliation commissioner [1] under § 75 of the Bankruptcy Act. This section deals with Agricultural Compositions and Extensions. A conflict of circuits as to whether the ten-day period for filing a petition for review of a commissioner's order was a limitation on the power of the reviewing court to act or on the right of an aggrieved party to appeal,[2] impelled us to grant our writ. *In re Pfister,* 123 F. 2d 543, 548; *Thummess* v. *Von Hoffman,* 109 F. 2d 291, and *In re Albert,* 122 F. 2d 393.

In addition to this point, numerous other questions as to the right to review are presented which may be fairly subsumed under petitioner's allegations of error below: (1) because the courts did not apply the limitation in the proviso of 75 (s) [3] instead of that in 39 (c); (2) because

[1] The referee appointed by the District Court for handling agricultural compositions is known as a conciliation commissioner. § 75 (a)–(r). When the farmer seeks bankruptcy under (s) the conciliation commissioner acts as referee. § 75 (s) (4). 49 Stat. 942.

[2] 52 Stat. 840, 858.

Section 39 (c). "A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. . . ."

[3] 49 Stat. 942, 943.

Section 75 (s). "Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be

petitions for rehearing of a conciliation commissioner's orders, which petitions were entertained and denied, were not held to extend the period for review; and (3) because the order of stay approved by the Commissioner under 75 (s) (2) was for less than the statutory period of three years from the entry of the stay order.

After failing to obtain a composition or extension under § 75 (a) to (r) of the Bankruptcy Act, the petitioner, a farmer, sought relief under § 75 (s). In due course on August 10, 1940, he petitioned the Commissioner to fix his rent, permit him to retain his property and establish a stay or moratorium. In the petition he stated that his moratorium began to run on April 26, 1940. On August 13, 1940, the Commissioner, after hearing evidence upon its amount, ordered that the rental be fixed at a sum named, and directed a stay from April 26, 1940, as the petitioner suggested. An appraisal was approved by a separate order on the same day, August 13. On September 7, 1940, orders were entered for the sale of certain property, chiefly livestock, stipulated by the debtor to be perishable under § 75 (s) (2). After the ten days fixed for review under 39 (c), petitions for rehearing on the orders fixing

---

allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this Act. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: *Provided,* That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal."

Six other subdivisions of subsection (s) follow, numbered (1) to (6) inclusive, and relate chiefly to proceedings after appraisal.

rental, granting stay and directing sale were filed with the Commissioner. The basis of these petitions and the reasons for their denial by the Commissioner are detailed in division II of this opinion.

Petitions for review were filed which were timely if petitioner was right in his contention that the Commissioner's action on the petitions for rehearing extended the time for appeal for ten days from the entry of the Commissioner's order denying rehearing. The two numbers, 26 and 27, of our docket, refer to these two petitions for review consolidated for hearing. The District Court denied each of the petitions for review on the ground that there was no jurisdiction in it to review, since the petitions for review were filed after the ten days provided by 39 (c) and the rules of the District Court, and since the denial of the petitions for rehearing did not extend the time. The Court of Appeals affirmed the judgment on the grounds that 39 (c) governed, that the time for review was not extended by the petitions for rehearing, that there was no basis for reversing the Commissioner's action on the petitions for review, and that the "petitions for review were not filed in time." We disagree with the Court of Appeals upon the last ground on the assumption that the language meant that the District Court was without "power" to review the orders. We agree with the Court of Appeals upon the first three grounds and therefore affirm the judgment.

I. The proviso of subsection 75 (s), note 3 *supra,* is, we think, limited in its effect to steps before commissioners authorized by the provisions of § 75 (s) which precede the proviso. Congress evidently intended to allow adequate time for reflection and preparation before appeal by parties aggrieved by the basic and difficult finding of value. The provisions of § 75 (s) following the proviso authorize orders setting aside exemptions, leaving the ap-

praised property in the hands of the debtor and fixing rentals therefor, staying judicial proceedings, selling perishable property, directing reappraisals and final sale of the estate. It is obvious that this proviso, couched in terms of appeal, could not have been intended to control the review of the manifold activities of a commissioner engaged in handling an estate through three or more years of bankruptcy. To hold the proviso generally applicable would leave unregulated reviews of orders entered more than four months after the commissioner approves the appraisal. The section applicable to these reviews is § 39 (c).[4]

II. The petitions for review of the Commissioner's orders of August 13, 1940, and September 7, 1940, which were filed November 28, 1940, and October 9, 1940, no extension having been granted, were out of time under § 39 (c) [5] unless, in accordance with the petitioner's con-

[4] The legislative history of the proviso indicates the soundness of this conclusion. It appears first in the earlier subsection (s), 48 Stat. 1289, which was held unconstitutional in *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555. The preceding provisions were substantially the same as the present ones but the proviso read "That in case of real estate either party may file objections, exceptions, and appeals within one year from date of order approving appraisal." The specification of real estate, of course, excluded the proviso from any generality of scope. When the section was amended after the Radford case, the committee reports treated the paragraph of (s), as quoted in note 3, separately from the succeeding numbered paragraphs and the language connotes the idea that the proviso relates only to appeals from the appraisal. The comment is as follows: "It provides that the referee, under the jurisdiction of the court, shall designate and appoint appraisers, to appraise all of the property of the debtor, at its then fair and reasonable market value. The appraisal is made in all other respects, with rights of objections, exceptions, and appeals, in accordance with the Bankruptcy Act; and either party may file objections, exceptions, or take such appeals within 4 months. Surely there is no question of constitutionality up to this point." S. Rep. No. 985, 74th Cong., 1st Sess., p. 3; H. Rep. No. 1808, 74th Cong., 1st Sess., pp. 3-4.

[5] See note 2, *supra*.

tentions, the time for review was to run from the entry of the orders of the Commissioner denying the petitions for rehearing of the order of August 13, which petition was filed September 16, 1940, and of the orders of September 7, which petition was filed September 20, 1940. These orders of the Commissioner denying the petitions for rehearing were entered November 28, 1940, and September 30, 1940.

Where a petition for rehearing of a referee's order is permitted to be filed, after the expiration of the time for a petition for review, and during the pendency of the bankruptcy proceedings, as here, they may be acted on,[6] that is, they may be granted "before rights have vested on the faith of the action," and the foundations of the original order may be reëxamined. *Wayne Gas Co.* v. *Owens-Illinois Co.*, 300 U. S. 131, 137.[7] When such a petition for rehearing is granted and the issues of the original order are reëxamined and an order is entered, either denying or allowing a change in the original order, the time for review under 39 (c) begins to run from that entry. *Bowman* v. *Loperena*, 311 U. S. 262, 266; *Wayne Gas Co.* v. *Owens-Illinois Co.*, 300 U. S. 131, 137–8. The reason for taking the later date for beginning the running of the time for review is that the opening of the earlier order by the court puts the basis of that earlier order again in issue. A refusal to modify the original order, however, requires the appeal to be from the original order, even though the time is counted from the later order refusing to modify the original. An appeal does not lie from

[6] See the discussion in division III of this opinion.

[7] Where a petition for rehearing is filed before the time for a petition for review has expired, it tolls the running of the time, and limitation upon proceedings for review begins from the date of denial of the petition for rehearing. *Morse* v. *United States*, 270 U. S. 151, 153–4; *United States* v. *Seminole Nation*, 299 U. S. 417, 421; *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498.

the denial of a petition for rehearing. *Conboy* v. *First National Bank,* 203 U. S. 141, 145; *Bowman* v. *Loperena,* 311 U. S. 262, 266; *Brockett* v. *Brockett,* 2 How. 238; *Roemer* v. *Bernheim,* 132 U. S. 103; *Jones* v. *Thompson,* 128 F. 2d 888; *Missouri* v. *Todd,* 122 F. 2d 804.

On the other hand, where out of time petitions for rehearing are filed and the referee or court merely considers whether the petition sets out, and the facts—if any are offered—support, grounds for opening the original order and determines that no grounds for a reëxamination of the original order are shown, the hearing upon or examination of the grounds for allowing a rehearing does not enlarge the time for review of the original order. This result follows from the well-established rule that where an untimely petition for rehearing is filed which is not entertained or considered on its merits the time to appeal from the original order is not extended.[8]

If a consideration of the reasons for allowing a rehearing out of time which are brought forward by the petition for rehearing were sufficient to resurrect the original order, the mere filing of an out of time petition would be enough. Of course, the court must examine the petition to see whether it should be granted. Indeed the examination given a motion to file such a petition might just as well be said to justify the advancement of the time for review. It is quite true that in a petition for review upon the ground of error in law in the original order, the examination of the grounds of the petition for rehearing is equivalent to a reëxamination of this basis of the original decree. But in such a case the order on the petition for review would control. It would show either a refusal to allow the petition for rehearing or a refusal to modify the

[8] *Bernards* v. *Johnson,* 314 U. S. 19, 31; *Bowman* v. *Loperena,* 311 U. S. 262, and cases cited; *Chapman* v. *Federal Land Bank,* 117 F. 2d 321, 324.

original order. Cf. *Wayne Gas Co.* v. *Owens-Illinois Co.*, 300 U. S. 131, 137–38. Whether time for appeal would be enlarged or not would depend upon what the order showed the court did.

In the present case it is quite plain the denial was grounded upon a failure of the petitions for rehearing to establish adequate grounds for the reëxamination of the original orders. The petition for rehearing of the order of August 13, relating to rent, sought to produce evidence that the rental fixed was too high, raised a question of law that a full three years stay was not allowed and alleged a lack of representation by counsel. A motion to dismiss the petition for rehearing as out of time was denied. The Commissioner examined the petition for rehearing and determined that the debtor had had full opportunity to present his evidence at the hearing and that the stay was in accordance with the debtor's motion and that counsel for the debtor appeared at each hearing and knew of each order. He therefore concluded "that there is no equity or merit in the petition for rehearing" and denied the petition. The petition for rehearing of the orders of September 7 was similarly handled. They were orders for sales of perishable property, § 75 (s) (2), stipulated to be perishable by counsel for the debtor. Rehearing was sought because of lack of representation by counsel and lack of notice of the orders. The Commissioner's decision on the petition for rehearing sets out the record facts showing representation and notice. We therefore conclude that the Commissioner did not reëxamine the basis of any of the original orders and that time for filing the petitions for review was not extended.

III. Since the petitions for rehearing, in our opinion, did not extend the time for review, we are brought to examine the question as to whether § 39 (c), *supra* note 2, is a limitation on the power of the District Court to act

or on the right of a party to seek review. Courts of bankruptcy are courts of equity without terms. Commissioners, like referees, masters and receivers, supervise estates under the eyes of the court with their orders subject to its review. The entire process of rehabilitation, reorganization or liquidation is open to reëxamination out of time by the District Court, in its discretion, and subject to intervening rights. Cf. *Wayne Gas Co.* v. *Owens-Illinois Co.*, 300 U. S. 131, 137; *Bowman* v. *Loperena,* 311 U. S. 262, 266.

Prior to the adoption of 39 (c), General Order in Bankruptcy No. XXVII,[9] now abrogated,[10] governed review of referees' orders but it prescribed no time limitations. It was held that petitions should be filed within a reasonable time.[11] Some local court rules therefore specified time limitations. Where such rules imposed definite limits on the time within which a petition for review could be filed, with extensions to be granted on cause shown, out of time petitions nevertheless were entertained and considered if cause was shown.[12]

Section 39 (c) was intended to establish definitely and clearly the proceeding for review of a referee's order in the interest of certainty and uniformity but the legislative history reveals no intention to change the preëxisting rule as to power.[13] Indeed, the Chandler Act by the amend-

[9] 172 U. S. 662.

[10] Abrogated January 16, 1939, effective February 13, 1939. 305 U. S. 681.

[11] *American Trust Co.* v. *W. S. Doig, Inc.,* 23 F. 2d 398; *Crim* v. *Woodford,* 136 F. 34; *Bacon* v. *Roberts,* 146 F. 729; *In re Grant,* 143 F. 661; *In re Foss,* 147 F. 790. 8 Remington on Bankruptcy (5th Ed. 1942) § 3704.

[12] *In re Oakland & Belgrade Silver Fox Ranch Co.,* 26 F. 2d 748; *In re T. M. Lesher & Son,* 176 F. 650; *Amick* v. *Hotz,* 101 F. 2d 311; *In re Wister,* 232 F. 898, affirmed 237 F. 793; see *Roberts Auto & Radio Supply Co.* v. *Dattle,* 44 F. 2d 159.

[13] H. Rep. No. 1409, 75th Cong., 1st Sess., p. 11; Committee Print, H. R. 12889, 74th Cong., 2d Sess., 149–50.

ment to § 2 (10) [14] sought to conform the act to the prevailing practice as to the bankruptcy court's exercise of its appellate jurisdiction over referees' orders.[15] We do not think § 39 (c) was intended to be a limitation on the sound discretion of the bankruptcy court to permit the filing of petitions for review after the expiration of the period. The power in the bankruptcy court to review orders of the referee is unqualifiedly given in § 2 (10). The language quoted from § 39 (c) is rather a limitation on the "person aggrieved" to file such a petition as a matter of right.[16]

The review out of time of the Commissioner's orders is then a matter for the discretion of the District Court. As that court was of the opinion it was "without jurisdiction" by virtue of § 39 (c), its discretion was not exercised. However, as we are of the view that the petitions for rehearing were not supported by adequate facts justifying a reëxamination of the bases for the orders of August 13 and September 7, 1940, and no others are alleged, and that therefore the District Court should not have entered into an out of time review of these original orders, there is no reason for a reversal of the judgments. The Commissioner upheld the petitions for rehearing against a motion

[14] Section 2 (10) gives the bankruptcy court jurisdiction to "consider records, findings, and orders certified to the judges by referees, and confirm, modify, or reverse such findings and orders, or return such records with instructions for further proceedings. 52 Stat. 842. Whereas the subsection formerly read "consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees." 30 Stat. 545.

[15] H. Rep. No. 1409, *supra*, p. 19; S. Rep. No. 1916, 75th Cong., 3d Sess., p. 11, compare Committee Print, H. R. 12889, *supra*, p. 11.

[16] *Thummess* v. *Von Hoffman*, 109 F. 2d 291; *In re Albert*, 122 F. 2d 393; *Boyum* v. *Johnson*, 127 F. 2d 491, 497, see *Biggs* v. *Mays*, 125 F. 2d 693, 696; *In re Loring*, 30 F. Supp. 758, 759. Contra, *In re Pfister*, 123 F. 2d 543, 548; *In re Parent*, 30 F. Supp. 943. Compare 2 Collier on Bankruptcy (14th ed. 1940) §§ 39.16, 39.20; 8 Remington on Bankruptcy, *supra*, § 3705.

to dismiss because they were out of time. He thereupon heard and passed upon the petition's merits as bases for rehearings. His reasons for refusing to open the original orders complained of are adequate and amply supported by the record. The appraisal was made and the time of stay fixed pursuant to the debtor's motion, he was represented by one or more counsel at each meeting, had opportunity to present evidence, and stipulated to the perishable character of the property ordered sold. See the last paragraph of division II.

IV. On account of debtor's motion, requesting the running of the moratorium of three years from April 26, 1940, the day of his adjudication in bankruptcy under 75 (s), we do not consider the correctness of a stay of less than three years under other circumstances. In this instance it was correct.

Affirmed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* R. DOUGLAS STUART.*

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

No. 49. Argued October 23, 1942.—Decided November 16, 1942.

1. In resisting a taxpayer's petition for redetermination of deficiencies, the Commissioner of Internal Revenue may invoke before the Circuit Court of Appeals on review, and in this Court by certiorari, provisions of the Revenue Law which were not relied on or adduced in his answer to the taxpayer's petition. P. 159.
2. Section 166 of the Revenue Act of 1934, in providing that the income from a trust shall be taxable as income of the grantor "where at any time the power to revest in the grantor title to any part of the corpus

---

* Together with No. 48, *Helvering, Commissioner of Internal Revenue,* v. *John Stuart,* also on writ of certiorari, 316 U. S. 654, to the Circuit Court of Appeals for the Seventh Circuit. Argued October 22 and 23, 1942.

of the trust is vested in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom," intends that the question whether such power is so vested by the trust instrument shall be determined by the construction and legal effect of the instrument under the state law. P. 161.

3. Section 167 of the Revenue Law of 1934, in providing that "where any part of the income of a trust may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; . . . such part of the income of the trust shall be included in computing the net income of the grantor," intends that whether such a distribution is permissible under the trust instrument shall be determined by the state law. Upon the question whether, under the law of Illinois, in a trust deed for the benefit of the donor's children, a provision purporting to empower a majority of three trustees (the donor's wife, and brother) to amend the deed, by changing the beneficiaries and in other respects, could be applied to revest the property in the donor, this Court accepts the reasoned judgment to the contrary of the Court of Appeals whose circuit embraces that State. P. 161.
4. If reasonably avoidable this Court should not undertake first-instance determinations of rules of local law. P. 164.
5. It would not be an arbitrary or unreasonable or even an unlikely holding on the part of the courts of Illinois to conclude that under the terms of the trusts involved here, equity ought to and would prevent the wife and brother of the donor, claiming, as trustees, authority to change the beneficiaries under the provisions of the indenture, from vesting the property in themselves or in the donor or in others for the benefit of themselves or the donor, to the detriment of the present beneficiaries. P. 164.
6. On the assumption that under such a trust deed the Illinois law forbids the vesting of the *res* in the donor by act of the trustees, within the intendment of § 166 of the Revenue Act of 1934, so also it would be impossible for the trustees to accumulate the income for the donor or to distribute it to him directly, within the intendment of § 167. P. 166.
7. Under the Illinois law, the power to amend which could not be exercised by the trustees in favor of the donor could not be exercised in favor of his creditors. P. 166.
8. Under §§ 22 (a) and 167 of the Revenue Act of 1934, where there is a trust directing and empowering the trustees to devote so much of the net income, as to them shall seem advisable, to the education,

support and maintenance of the donor's minor children, the possibility of the use of the income to relieve the donor, pro tanto, of his parental obligation, causes the entire net income to be taxable as income of the donor. *Douglas* v. *Willcuts*, 296 U. S. 1. P. 167. 124 F. 2d 772, reversed in part; affirmed in part.

CERTIORARI, 316 U. S. 654, to review two judgments of the court below, reversing decisions of the Board of Tax Appeals, 42 B. T. A. 1421, sustaining deficiency income tax assessments.

Assistant Attorney General Clark, with whom *Solicitor General Fahy* and *Messrs. Sewall Key, L. W. Post*, and *Valentine Brookes* were on the briefs, for petitioner.

Messrs. Herbert Pope (in Nos. 48 and 49) and *George I. Haight* (in No. 48) argued the cause, and *Messrs. Benjamin M. Price* and *William D. McKenzie* were with them on the briefs, for respondents.

MR. JUSTICE REED delivered the opinion of the Court.

These petitions for certiorari bring here the liability of each respondent for increased income taxes for the years 1934 and 1935. A deficiency was determined by the Commissioner for each year because of the taxpayers' failure to include in their return income from various trusts previously created by them for the benefit of their children.

The taxpayers are brothers, residents of Illinois. In 1930 John Stuart, the respondent in No. 48, created one trust for each of his three children: Joan, Ellen and John. Later, in 1932, R. Douglas Stuart, the respondent in No. 49, created such trusts for each of his four children: Robert, Anne, Margaret and Harriet. The trusts were much alike. They were made in Illinois and specifically provided that they were to be governed by the laws of that state. The three children of John were all of age

by January 1, 1934. None of the children of Douglas were of age during either of the taxable years.

By the creation of the trusts, each taxpayer transferred to three trustees certain shares of the common stock of the Quaker Oats Company, of which respondents were respectively president and first vice-president. The trustees named in each instrument were the taxpayer-settlor, his wife and his brother. The trusts created by John thus had John, his wife and Douglas as trustees, and those created by Douglas had Douglas, his wife and John as trustees.

The trustees were given the power and authority of "absolute owners" over the handling of the financial details of the respective trusts. They were freed from liability or responsibility except such as were due to actual fraud or willful mismanagement.

In the trusts created by R. Douglas Stuart for his minor children, the trustees were directed to "pay over to [the beneficiary] so much of the net income from the Trust Fund, or shall apply so much of said income for his education, support and maintenance, as to them shall seem advisable, and in such manner as to them shall seem best, and free from control of any guardian, the unexpended portion, if any, of such income to be added to the principal of the Trust Fund. When the said [beneficiary] shall attain the age of twenty-five years, the Trustees shall pay over and deliver to him one-half of the Trust Fund; and they shall pay over to him in reasonable installments the income from the remaining one-half of the Trust Fund until he shall attain the age of thirty years, when they shall pay over and deliver to him the remainder of the Trust Fund."

In the trusts created by John Stuart for his adult children, the directions were that the trustees should for fifteen years "pay over and distribute, in reasonable in-

stallments," to the beneficiaries so much of the net income "as they in their sole discretion shall deem advisable, the undistributed portion of such income to be added to and become a part of the principal of the Trust Fund." After the fifteen years, the entire net income was to be paid to the beneficiary for and during her life.

Each trust provided for the devolution of the corpus to the issue of the beneficiary named in the instrument, and in default of such issue to the issue of the donor, and in default of issue of either to named educational or charitable institutions.

Two paragraphs relating to changes and amendments are important. They were the same in all the instruments and read as follows:

"Eighth. The Donor reserves and shall have the right at any time and from time to time to direct the Trustees to sell the whole of the Trust Fund, or any part thereof, and to reinvest the proceeds in such other property as the Donor shall direct. The Donor further reserves and shall have the right at any time and from time to time to withdraw and take over to himself the whole or any part of the Trust Fund upon first transferring and delivering to the Trustees other property satisfactory to them of a market value at least equal to that of the property so withdrawn.

"Ninth. During the life of the Donor, the said [wife and brother of the donor], or the survivor of them, shall have full power and authority, by an instrument in writing signed and delivered by them or by the survivor of them to the Trustees, to alter, change or amend this Indenture at any time and from time to time by changing the beneficiary hereunder, or by changing the time when the Trust Fund, or any part thereof, or the income, is to be distributed, or by changing the Trustees, or in any other respect."

Pursuant to the authority of paragraph ninth, the two trustees authorized in the trusts to make changes did provide on the 2d and 3d of August, 1935, respectively, for the cancellation and expunction of both the eighth and ninth paragraphs, set out above, and for the substitution of the following in lieu of the expunged ninth paragraph:

"Ninth. This Indenture and all of the provisions thereof are irrevocable and not subject to alteration, change or amendment."

The Commissioner does not claim that any trust income received after these amendments is attributable to the taxpayers.

In answer to the taxpayer's petition in No. 49 for the redetermination of the deficiencies, the Commissioner asserted the increase was required by the provisions of §§ 22, 166, and 167 of the Revenue Act of 1934, 48 Stat. 680. Section 22 was not raised by the Commissioner in his answer to the petition in No. 48. But the applicability of that section was raised by the Commissioner as appellee before the Circuit Court of Appeals (*Helvering* v. *Gowran,* 302 U. S. 238, 245). The contention in the Court of Appeals rested on the facts stipulated in the Board of Tax Appeals. On the rejection of that ground in the court below, the Commissioner was entitled to raise the question, as he did, in his petition for certiorari and rely on § 22 in this Court. *Helvering* v. *Gowran, ibid,* 246; cf. *Hormel* v. *Helvering,* 312 U. S. 552. So far as pertinent the sections are set out in the footnote below.*

---

* Text of statutes, *id.*, 686, 729.

"SEC. 22. GROSS INCOME.

(a) *General Definition.*—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in

The Board of Tax Appeals upheld the Commissioner's determinations that § 166 governed the trusts' incomes because the powers of the wife and brother, as trustees, under the ninth paragraph were sufficient to revest the funds in the grantors and because the trustees were without substantial adverse interests. The Circuit Court of Appeals reversed this determination, *Stuart* v. *Commissioner*, 124 F. 2d 772, on its conclusion that under the law of Illinois "the wife and brother as trustees had no authority . . . to revest the property in the grantor." The same reasoning led the appellate court to say that neither § 167 nor § 22 was applicable, except as to the income of the Douglas Stuart trusts actually used for the support of a minor child.

---

property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . .

. . . . . .

"SEC. 166. REVOCABLE TRUSTS.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

. . . . . .

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, then the income of such part of the trust shall be included in computing the net income of the grantor.

"SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

. . . . . .

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor;

. . . . . .

then such part of the income of the trust shall be included in computing the net income of the grantor."

The applications for certiorari were granted because of differing views in the courts of appeals as to the inclusion of the incomes of trusts with similar provisions in the gross incomes of the donors by virtue of the sections of the Act relied upon by the Commissioner. *Altmaier* v. *Commissioner,* 116 F. 2d 162; *Fulham* v. *Commissioner,* 110 F. 2d 916; *Whiteley* v. *Commissioner,* 120 F. 2d 782; *Commissioner* v. *Buck,* 120 F. 2d 775.

To reach a decision as to the applicability of §§ 166 and 167 of the Revenue Act of 1934 (see footnote, p. 159, *supra*) to these trusts, the instruments must be construed to determine whether the power to revest title to any part of the corpora in the grantors, or to distribute to them any of the income, lies with any persons not having a substantial adverse interest to the grantors. That construction must be made in the light of rules of law for the interpretation of such documents. The intention of Congress controls what law, federal or state, is to be applied. *Burnet* v. *Harmel,* 287 U. S. 103, 110; *Lyeth* v. *Hoey,* 305 U. S. 188, 194. Since the federal revenue laws are designed for a national scheme of taxation, their provisions are not to be deemed subject to state law "unless the language or necessary implication of the section involved" so requires. *United States* v. *Pelzer,* 312 U. S. 399, 402–3. This decision applied federal definition to determine whether an interest in property was called a "future interest." When Congress fixes a tax on the possibility of the revesting of property or the distribution of income, the "necessary implication," we think, is that the possibility is to be determined by the state law. Grantees under deeds, wills and trusts, alike, take according to the rule of the state law. The power to transfer or distribute assets of a trust is essentially a matter of local law. *Blair* v. *Commissioner,* 300 U. S. 5, 9; *Freuler* v. *Helvering,* 291

U. S. 35, 43–45.[1] Congress has selected an event, that is the receipt or distributions of trust funds by or to a grantor, normally brought about by local law, and has directed a tax to be levied if that event may occur. Whether that event may or may not occur depends upon the interpretation placed upon the terms of the instrument by state law. Once rights are obtained by local law, whatever they may be called, these rights are subject to the federal definition of taxability. Recently in dealing with the estate tax levied upon the value of property passing under a general power, we said that "state law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed." *Morgan* v. *Commissioner,* 309 U. S. 78, 80 (a case dealing with the taxability at death of property passing under a general power of appointment). In this case, as in *Lyeth* v. *Hoey,*[2] we were determining what interests or rights should be taxed, not what interests or rights had been created, and therefore applied the federal rule. Cf. *Burnet* v. *Harmel,* 287 U. S. 103, 110; *Palmer* v. *Bender,* 287 U. S. 551, 555; *Heiner* v. *Mellon,* 304 U. S. 271, 279; *Helvering* v. *Fuller,* 310 U. S. 69, 74. In this view the rules of law to be applied are those of Illinois. That state is the residence of the parties, the place of execution of the instrument, as well as the jurisdiction chosen by the parties to govern the instrument.

This was the view of the Circuit Court of Appeals. 124 F. 2d 772, 778. Their examination of the Illinois law

---

[1] The incorporation of local law in federal tax acts has been repeatedly recognized. Cf. *Crooks* v. *Harrelson,* 282 U. S. 55 (Missouri real property excluded from federal estate tax because of state rule of law); *Poe* v. *Seaborn,* 282 U. S. 101 (community property laws); *Uterhart* v. *United States,* 240 U. S. 598, 603 (local law of wills).

[2] 305 U. S. 188, 193, 194 (exemption from income tax of funds received by an heir in compromise of litigation over a will as an inheritance, a result contrary to the law of the state of probate).

led them to conclude that "the wife and brother as trustees had no authority under the Illinois law to revest the property in the grantor," a requirement for liability under § 166. This conclusion does not spring from a statute of that state nor even from a clear or satisfying line of decisions. It is, however, the reasoned judgment of the circuit which includes Illinois in which a judge of long experience in the jurisprudence of that state participated. Without a definite conviction of error in the conclusion, this Court will not reverse that judgment. *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U. S. 280. Cf. *Reitz* v. *Mealey*, 314 U. S. 33, p. 39; *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, 499.

The Government does not challenge the conclusion of the Court of Appeals that Illinois law controls. It sharply differs as to the meaning of paragraph ninth, construed generally, and as to the Illinois rule, but does not urge that a federal rule of interpretation applies.

The suggestion is made that *Helvering* v. *Fitch*, 309 U. S. 149, 156; *Helvering* v. *Fuller*, 310 U. S. 69; *Helvering* v. *Leonard*, *id.* 80; and *Pearce* v. *Commissioner*, 315 U. S. 543, require determination by this Court of the Illinois law. In each of these cases, after courts of appeals had given their opinion of the law of the respective states on the power of the state courts to alter or revise property settlements in judgments of divorce, we reviewed the state decisions to determine whether the husband or wife was taxable under the federal tax system upon the income from the settlements. This depended upon whether the husband could show clearly and convincingly under the state law that the settlement income was not received by the wife pursuant to his continuing obligation to support or whether the wife could raise doubts and uncertainties as to the proper conclusion. *Pearce* v. *Commissioner*, *supra*, 547.

It is true we examined the state cases to determine the applicable state law, but we did it for the purpose of determining whether the taxpayers had met their burden of proving the Commissioner of Internal Revenue wrong in assessing deficiencies against them. We could do the same here but we are satisfied that the finding of the Court of Appeals on Illinois law is a determination that meets that burden. A requirement of a demonstration of state law, "clearly and convincingly," may well necessitate a review of the conclusion of the Court of Appeals, while a requirement of a finding, as here, of the ultimate fact as to the law would not. If reasonably avoidable we should certainly avoid becoming a Court of first instance for the determination of the varied rules of local law prevailing in the forty-eight states. Nor do we see any reason why we should prefer the view of the Board of Tax Appeals concerning Illinois law to that of the Circuit Court of Appeals within which Illinois is embraced.

One cannot say that it would be an arbitrary or unreasonable or even an unlikely holding on the part of the courts of Illinois to conclude that, under the terms of these trusts, equity ought to and would prevent the wife and brother of the donor, claiming authority under the provisions of paragraph nine of the indenture, from vesting the property in themselves or in the donor or in others for the benefit of themselves or the donor, to the detriment of the present beneficiaries. To support this construction, the Court of Appeals cites *Frank* v. *Frank,* 305 Ill. 181, 187, 137 N. E. 151, 152. In that case there was a deed for a life estate in realty with vested remainder to others, with "full power and authority" to the life tenant to sell the premises by her sole deed. The life tenant sold the fee for life support, a consideration necessarily usable by the life tenant alone. The power was construed as applicable to the life estate alone and its use unauthorized

for the fee. In *Rock Island Bank* v. *Rhoads,* 353 Ill. 131, 142, 187 N. E. 139, 141, the Supreme Court of that state construed the authority of a life tenant to use and dispose of the property as may "in her judgment be necessary for her comfort and satisfaction in life" to stop short of permitting her to add any of the life estate property to build up her own separate estate. For the authority of courts of equity in Illinois over trustees, there are cited cases establishing their general power to require action in accordance with the intent of the donor. *Maguire* v. *City of Macomb,* 293 Ill. 441, 453, 127 N. E. 682; *Jones* v. *Jones,* 124 Ill. 254, 262, 264, 15 N. E. 751; *Welch* v. *Caldwell,* 226 Ill. 488, 495, 498, 80 N. E. 1014.

The Commissioner cites no Illinois cases which bring us to a conviction of error on the part of the Court of Appeals. *People* v. *Kaiser,* 306 Ill. 313, 137 N. E. 826, goes no further than to say a residuary estate bequeathed to a trustee for gifts to such charitable institutions or needy persons as the trustee deems deserving will be enforced by the courts. It also seems that in Illinois a general power of appointment is exercisable in favor of the donee or his creditors. *Id.,* 317; *Gilman* v. *Bell,* 99 Ill. 144, 149; *Botzum* v. *Havana National Bank,* 367 Ill. 539, 543, 12 N. E. 2d 203. But evidently the Court of Appeals does not consider that these trustees under Illinois law have the power to vest this property in themselves. Such a result follows from their view that the property could not be vested in the grantors. Consequently, this power of the trustees is not a general power but a power in trust exercisable as fiduciaries to carry out the purposes of the trust. We therefore do not need to decide whether if they could vest the property in themselves they would have an interest adverse to the grantor. Without that power their interest certainly is not adverse. Cf. *Reinecke* v. *Smith,* 289 U. S. 172, 174.

The real issue is whether, under Illinois law, the trustees' authority under paragraph nine of the trust instruments "to alter, change or amend this Indenture at any time and from time to time by changing the beneficiary hereunder . . . or in any other respect," goes so far as to permit the substitution of the donor for the beneficiaries. Would the trustees with authority to change the terms and "the time when the Trust Fund . . . is to be distributed" be permitted to revoke the trust and thus vest the corpus in the donor. These questions are answered in the negative by the Court of Appeals and we accept that conclusion. These trusts, therefore, stand as though an Illinois statute or a provision of the instruments forbade assignments of any of the corpora or of the income to the grantors except as may be specifically provided by their terms. The exception is of importance in examining the trusts' provisions for the minor children of Douglas Stuart.

On the assumption that the Illinois law forbids the vesting of the trust res in the taxpayers under § 166, it would also be impossible for the trustees to accumulate the income for or to distribute it to the grantor directly so as to come within § 167. 124 F. 2d 772, 778. Consequently, the contention that the donors are taxable, as direct beneficiaries, because of the provisions of § 167 alone, must fail. Could it be, however, that the donors were taxable under § 167 because the trustees could change the beneficiaries of the trusts to the creditors of the donors or to any other person and thereby relieve the donor of a legal obligation? Assuming that such a change would result in a distribution to the grantor under § 167 and *Douglas* v. *Willcuts,* 296 U. S. 1, the ruling of the Court of Appeals on Illinois law forbids such a distribution from these trusts. A decision that a donor cannot take from a trust under state law certainly prohibits a change of the instrument so as to relieve the donor of legal obligations.

The Commissioner, however, raised in the Court of Appeals and has pressed here the liability of the donors for taxation under 22 (a), see footnote, p. 159, on the ground that the trust incomes are chargeable to the donors under the rule of *Helvering* v. *Clifford,* 309 U. S. 331. That is, whether after the establishment of the trust the grantor may still be treated as the owner of the corpus and therefore taxable on its income. It is obvious that if each of the trust incomes is attributable to the donors under this rule, they become a part of the present taxpayers' income under § 167 (a) (1) and (2) also. This leads us to consider both § 22 (a) and § 167, and their interplay on one another, together.

Section 167 took its present form in the Revenue Act of 1932. It was enacted especially to prevent avoidance of surtax by the trust device, when the income really remained in substance at the disposal of the settlor. S. Rep. No. 665, 72d Cong., 1st Sess., pp. 34–35. It is to be interpreted in the light of its purpose for the protection of the federal revenue. *United States* v. *Hodson,* 10 Wall. 395, 406; *United States* v. *Pelzer,* 312 U. S. 399, 403. Of course, where the settlor or donor is not actually or in substance a present or possible beneficiary of the trust, he escapes the surtax by a gift in trust. Revenue Act of 1934, §§ 161 to 168, Supplement E, 48 Stat. 727. Cf. *Helvering* v. *Fuller,* 310 U. S. 69, 74. In the absence of a legislative rule, we have left to the process of repeated adjudications the line between "gifts of income-producing property and gifts of income from property of which the donor remains the owner, for all substantial and practical purposes." *Harrison* v. *Schaffner,* 312 U. S. 579, 583.

In the John Stuart trusts, the trustees, in their discretion, were to distribute income to the named beneficiaries for fifteen years and thereafter to distribute the entire net income. In the Douglas Stuart trusts, the directions authorized discretionary distribution to the beneficiaries

or its application to their education, support and maintenance until the children reached the age of twenty-five years. Undistributed portions of the income were to be added to the corpus. Plainly, these distributions or accumulations were to be used for the economic advantage of the children of the settlors and to the amount of these distributions and accumulations would satisfy the normal desire of a parent to make gifts to his children. Is this alone sufficient to make the income of the trusts taxable to the settlors?

Disregarding for the moment the minority of some of the beneficiaries, we think not. So broad a basis would tax to a father the income of a simple trust with a disinterested trustee for the benefit of his adult child. No act of Congress manifests such an intention. Economic gain realized or realizable by the taxpayer is necessary to produce a taxable income under our statutory scheme. That gain need not be collected by the taxpayer. He may give away the right to receive it, as was done in *Helvering* v. *Horst,* 311 U. S. 112, *Helvering* v. *Eubank,* 311 U. S. 122, 125, and *Harrison* v. *Schaffner,* 312 U. S. 579. But the donor nevertheless had the "use [realization] of his economic gain." 311 U. S. at 117. In none of the cases had the taxpayer really disposed of the res which produced the income. In *Corliss* v. *Bowers,* 281 U. S. 376, he had disposed of the res but with a power to revoke at any moment. This right to realize income by revocation at the settlor's option overcame the technical disposition. The "non-material satisfactions" (gifts-contributions) of a donor are not taxable as income. *Helvering* v. *Horst. supra.*

That economic gain for the taxable year, as distinguished from the non-material satisfactions, may be obtained through a control of a trust so complete that it must be said the taxpayer is the owner of its income. So

it was in *Helvering* v. *Clifford,* 309 U. S. 331, 335, 336. Cf. *Helvering* v. *Fuller,* 310 U. S. 69, 72 note 1, 76. Section 22 (a), we have said, indicated the intention of Congress to use its constitutional powers of income taxation to their "full measure." *Helvering* v. *Clifford,* 309 U. S. 331, 334; *Helvering* v. *Midland Life Ins. Co.,* 300 U. S. 216, 223; *Douglas* v. *Willcuts,* 296 U. S. 1, 9; *Irwin* v. *Gavit,* 268 U. S. 161, 166. Control of the stocks of the company of which the grantors were executives may have determined the manner of creating the trusts. Paragraph eight permits recapture of the stocks from the trust by payment of their value. (See p. 158, *ante.*) Family relationship evidently played a part in the selection of the trustees. On the other hand, broad powers of management in trustees, even though without adverse interest, point to complete divestment of control, as does the impossibility of reversion to the grantors.[3] The interlocking trustees were not appointed simultaneously. The triers of fact have made no finding upon this point. Cf. *Helvering* v. *Clifford, supra,* 336, 338. When the Board of Tax Appeals decided these cases under § 166 it was not necessary for it to reach a conclusion on 22 (a) or its effect upon § 167. That should be done in No. 48, the John Stuart trusts.

In No. 49, the R. Douglas Stuart trusts, the minority of each of the beneficiaries brings the income from the trusts under the provisions of 167 (a) (1) and (2). The grantor owes to each the parental obligation of support. The Court of Appeals assumed that all income expended was used for such a purpose unless the taxpayer showed to the contrary. So far as the income was used to dis-

[3] Cf. *Helvering* v. *Clifford, supra; Suhr* v. *Commissioner,* 126 F. 2d 283; *Whiteley* v. *Commissioner,* 120 F. 2d 782; *Commissioner* v. *Buck,* 120 F. 2d 775; *Fulham* v. *Commissioner,* 110 F. 2d 916.

charge this obligation, the sums expended were properly added to the taxpayer's income.[4]

As indicated in the cases of the Board of Tax Appeals cited in the immediately preceding note, the Board has restricted the tax liability of a grantor of a trust for the support and maintenance of an infant and other purposes to such sums as, actually or by presumption, have been expended to relieve the settlor of his obligations. The Board has not taxed the whole of such income to the taxpayer merely because a part could have been but was not used for the support of an infant. We take a contrary view. Among these involved problems of statutory construction, we observe the time-tried admonition of restricting the scope of our decision to the circumstances before us. We are not here appraising the application of § 167 to cases where a wife is the trustee or beneficiary of the funds which may be used for the family benefit. Cf. *Suhr* v. *Commissioner,* 126 F. 2d 283, 285, with *Altmaier* v. *Commissioner,* 116 F. 2d 162, and *Fulham* v. *Commissioner,* 110 F. 2d 916. We are dealing with a trust for minors where the trustees, without any interest adverse to the grantor, have authority to devote so much of the net income as "to them shall seem advisable" to the "education, support and maintenance" of the minor. The applicable statute says, "Where any part of the income . . . may . . . be distributed to the grantor . . . then such part . . . shall be included in computing the net income of the grantor." Under such a provision the possibility of the use of the income to relieve the grantor, pro tanto,

[4] *Douglas* v. *Willcuts,* 296 U. S. 1; *Commissioner* v. *Grosvenor,* 85 F. 2d 2; Black *v.* Commissioner, 36 B. T. A. 346; Tiernan *v.* Commissioner, 37 B. T. A. 1048, 1054; Pyeatt *v.* Commissioner, 39 B. T. A. 774, 780; Chandler *v.* Commissioner, 41 B. T. A. 165, 178; Wolcott *v.* Commissioner, 42 B. T. A. 1151, 1157.

See also General Counsel's Memorandum 18972, 1937–2 Cum. Bull. 231, 233.

of his parental obligation is sufficient to bring the entire income of these trusts for minors within the rule of attribution laid down in *Douglas* v. *Willcuts*.

No. 48 is reversed and remanded to the Circuit Court of Appeals for remand to the Board of Tax Appeals.

No. 49 is reversed and, for the reasons herein stated, the decision of the Board of Tax Appeals is affirmed.

No. 48 reversed.
No. 49 reversed.

MR. CHIEF JUSTICE STONE:

I think judgment should go for the Government in each case.

Assuming, as the opinion of the Court declares, that we must look to Illinois law to determine whether the trustees were free to distribute to respondents the trust income which the Commissioner has taxed under § 167 of the Revenue Act of 1934, still I think respondents have failed to carry the burden which rests on them to show that the Illinois law prevents such distribution. The power conferred on the trustees to dispose of future income was without restriction. They were in terms authorized at any time to alter the trust instrument so as to change the beneficiary, to change the time when the trust fund or any part of it or the income was to be distributed, or to change it "in any other respect." On its face each trust gave to the trustees other than the settlor plenary power to bestow undistributed income on any person they might choose as beneficiaries, including the settlor.

We are cited to no decision in the Illinois courts which either holds or suggests that a power in trust so broadly phrased may not be exercised for the benefit of its donor. Even the generally accepted rule that the donee of a power in trust may not use it for his own benefit, which Illinois does not appear to follow, would hardly support the conclusion that he could not exercise it for the benefit of the

donor. *Reinecke* v. *Smith,* 289 U. S. 172, 176. We are without even a speculative basis in judicial authority or in reason for predicting that the Supreme Court of Illinois would forbid such an exercise of the power.

When state law has not been authoritatively declared we pay great deference to the reasoned opinion of circuit courts of appeals, whose duty it is to ascertain from all available data what the highest court of the state will probably hold the state law to be. *Wichita Royalty Co.* v. *City Bank,* 306 U. S. 103; *West* v. *A. T. & T. Co.,* 311 U. S. 223. But we have not wholly abdicated our function of reviewing such determinations of state law, merely because courts of appeals have made them.

Here our task is the easier because of the salutary rule that he who assails a deficiency assessment before the Board of Tax Appeals assumes the burden of showing, in point of law as well as of fact, that the tax is unlawfully assessed. *Helvering* v. *Fitch,* 309 U. S. 149. The terms of the trust instruments bring them so plainly within the provisions of the taxing statute as concededly to subject respondents to the tax unless we are able to conclude that some law of Illinois denies effect to their words. Respondents suggest no reason for such a rule of law which has ever been advanced in judicial opinion, treatise or elsewhere, and they point to no decision of the Illinois courts recognizing its existence. I am unable to conclude that it does exist and consequently that the tax was not properly laid.

The Board of Tax Appeals found that the trust instruments meant what they said and that in the family circle involved they would be carried out according to their meaning. It was hardly excessive skepticism on the Board's part to conclude that Illinois law would not prevent compliance with the expressed intention. Its judgment ought not lightly to be disregarded.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join in this opinion.

SOLA ELECTRIC CO. *v.* JEFFERSON ELECTRIC CO.

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

No. 45. Argued October 23, 1942.—Decided December 7, 1942.

1. Where, owing to the invalidity of a patent, a price-fixing stipulation in a license to manufacture the patented article and to sell it in interstate commerce is in conflict with the Sherman Law, the licensee is not estopped to set up the invalidity against the licensor in a suit by the latter to recover royalties and to enjoin sales not in conformity with the license agreement. P. 175.
2. This question of estoppel is a federal question. P. 175.
   Local rules of estoppel will not be permitted to thwart the purposes of statutes of the United States. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, distinguished. P. 176.

125 F. 2d 322, reversed.

CERTIORARI, 316 U. S. 652, to review a judgment affirming the District Court in upholding a price-fixing provision in a patent license agreement, and dismissing a counterclaim.

Mr. J. Bernhard Thiess, with whom *Messrs. Sidney Neuman* and *Leslie W. Fricke* were on the brief, for petitioner.

Mr. Thomas H. Sheridan for respondent.

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

The question for our decision is whether a patent licensee, by virtue of his license agreement, is estopped to challenge a price-fixing clause in the agreement by showing that the patent is invalid, and that the price restriction is accordingly unlawful because not protected by the patent monopoly.

Respondent brought the present suit in the District Court for the Northern District of Illinois, asserting di-

versity of citizenship, and alleging that it was the owner of Patent No. 1,777,256 for improvements in an electrical transformer; that it had entered into a license contract granting petitioner a non-exclusive license to manufacture and sell the patented transformers throughout the United States, its territories, dependencies and possessions, on payment of a stipulated royalty upon each transformer so manufactured and sold. The contract provided that the license was granted on condition that the "prices, terms, and conditions of sale, for use or sale" throughout the licensed territory should not be more favorable to petitioner's customers than those prescribed from time to time by respondent for its own sales and those of its other licensees. Respondent sought recovery of unpaid royalties and also an injunction restraining further sales except in conformity to the terms of the license agreement.

Petitioner by its answer admitted that it had manufactured two types of transformers, one covered by certain narrow claims of the patent, claims 8, 14 and 19, the validity of which it does not challenge, the other alleged to be covered by certain broader claims. Petitioner also filed a counterclaim alleging that the broad claims are invalid for want of novelty, as it asserted had been recognized in the Sixth Circuit in *France Mfg. Co.* v. *Jefferson Electric Co.*, 106 F. 2d 605; and that respondent, by reason of the price control provisions of the licensing contract and the invalidity of the broad claims, was not entitled to recover royalties upon those transformers covered only by the broad claims. Petitioner accordingly prayed a declaratory judgment that most of the claims, except 8, 14 and 19, are invalid, and for other relief.

The Circuit Court of Appeals for the Seventh Circuit affirmed the District Court's order dismissing the counterclaim, 125 F. 2d 322, ruling that petitioner, having accepted a license under the patent, was estopped to deny its validity. And, treating the patent as valid, it held

that the stipulation for control of the sales price of the patented articles manufactured by the licensee was a lawful exercise of the patent monopoly. We granted certiorari, 316 U. S. 652, the question being of importance to the administration of the patent laws and the Sherman Anti-Trust Act.

The Circuit Court of Appeals, in holding that petitioner as a licensee was estopped to challenge the validity of the patent, did not say whether it considered that it was applying a rule of federal or of state law, and it cited no decisions of either the federal or the Illinois courts. Where no price-fixing stipulation was involved in the license contract, this rule of estoppel, which was not questioned by counsel, was applied without discussion in *United States* v. *Harvey Steel Co.,* 196 U. S. 310; cf. *Kinsman* v. *Parkhurst,* 18 How. 289. We need not decide whether in such a case the rule is one of local law, cf. *Dale Tile Mfg. Co.* v. *Hyatt,* 125 U. S. 46, 53–54, or whether, if it be regarded as a rule of federal law because the construction and application of the patent laws are involved, it was rightly applied in *United States* v. *Harvey Steel Co., supra.* For here a different question is presented—whether the doctrine of estoppel as invoked below is so in conflict with the Sherman Act's prohibition of price-fixing that this Court may resolve the question even though its conclusion be contrary to that of a state court.

The present license contract contemplates and requires that petitioner, on sales of the licensed transformers throughout the United States, shall conform to the prices fixed by respondent for the sale of competing patented articles by other licensees and by respondent. Such a restriction on the price of articles entering interstate commerce is a violation of the Sherman Act save only as it is within the protection of a lawfully granted patent monopoly. See *United States* v. *Univis Lens Co.,* 316 U. S. 241, 250, and cases cited; *United States* v. *Masonite Corp.,*

316 U. S. 265, 275–77. Agreements fixing the competitive sales price of articles moving interstate, not within the protection of a patent, are unlawful because prohibited by the Sherman Act.

It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 296; *Prudence Corp.* v. *Geist*, 316 U. S. 89, 95; *Board of Comm'rs* v. *United States*, 308 U. S. 343, 349–50; cf. *O'Brien* v. *Western Union Telegraph Co.*, 113 F. 2d 539, 541. When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. Constitution, Art. VI, cl. 2; *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209; *Deitrick* v. *Greaney*, 309 U. S. 190, 200–01.

The federal courts have been consistent in holding that local rules of estoppel will not be permitted to thwart the purposes of statutes of the United States. See, in the case of federal statutes governing interstate freight rates, *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Fink*, 250 U. S. 577, 582–83; *Chesapeake & Ohio Ry. Co.* v. *Martin*, 283 U. S. 209, 220–22; cf. *Atchison, T. & S. F. Ry. Co.* v. *Harold*,

241 U. S. 371; and federal statutes affecting national banks, *Awotin* v. *Atlas Exchange Bank, supra; Deitrick* v. *Greaney, supra.*

A state by applying its own law of specific performance may not compel the performance of a contract contemplating violation of the federal land laws, *Anderson* v. *Carkins,* 135 U. S. 483. Similarly, this Court has declared that anyone sued upon a contract may set up as a defense that it is in violation of the Sherman Act. *Bement* v. *National Harrow Co.,* 186 U. S. 70, 88. And it has proceeded on the assumption that whether the parties to an agreement in violation of the Act are *in pari delicto* is a question of federal, not state, law. *Harriman* v. *Northern Securities Co.,* 197 U. S. 244; *Eastman Kodak Co.* v. *Southern Photo Co.,* 273 U. S. 359, 376–78. It decided, in *Continental Wall Paper Co.* v. *Voight & Sons Co.,* 212 U. S. 227, that a vendee of goods purchased from an illegal combination in pursuance of an illegal agreement, both in violation of the Sherman Act, can plead the illegality in defense to a suit for the purchase price. This decision went much further than it is necessary to go here to conclude that petitioner may assert the illegality of the price-fixing agreement and may offer any competent evidence to establish its illegality, including proof of the invalidity of the patent.

Local rules of estoppel which would fasten upon the public as well as the petitioner the burden of an agreement in violation of the Sherman Act must yield to the Act's declaration that such agreements are unlawful, and to the public policy of the Act which in the public interest precludes the enforcement of such unlawful agreements. Cf. *Morton Salt Co.* v. *Suppiger Co.,* 314 U. S. 488, 492–93.

Reversed.

503873—43——19

MANGUS ET AL. *v.* MILLER.

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

No. 74. Argued November 17, 1942.—Decided December 7, 1942.

1. The interest of one of two joint tenants in a contract to purchase land payable in installments, where under state law it is an interest which may be alienated and subjected to execution and separate sale, is property which may be administered in farmer-debtor proceedings under § 75 of the Bankruptcy Act, as amended, although subsequent to the filing of the petition the interest of his co-tenant has been forfeited by default in payment of the installments of the purchase price. P. 183.
2. The farmer-debtor in this case, who was a joint tenant of a land-purchase contract, his wife being the other joint tenant, but, so far as appears, not a farmer-debtor, was authorized to file his petition under § 75 of the Bankruptcy Act, and thus to subject his interest to the jurisdiction of the bankruptcy court; and he thereupon became entitled to the benefit of the moratorium afforded by § 75 (o) for the purpose of enabling him to effect a composition with his creditors, failing which he was entitled to proceed under § 75 (s). P. 184.

   In advance of an authoritative determination by the state courts of the rights of purchasers of land as joint tenants when the interest of one of them has been forfeited for non-payment of purchase money, this Court can not say that the difficulties of administering the interests of the parties under § 75 (s) of the Bankruptcy Act are insurmountable. P. 185.
3. The court of bankruptcy, having control under § 75 (e) of the Bankruptcy Act of the farmer's property, is free to permit and to facilitate proceedings in the state courts to adjudicate the interests of the parties to the contract, subject to the stay directed by § 75 (o) of any cancellation of the contract or foreclosure of the farmer-debtor's interest in it. P. 185.
4. In the event that no composition is effected, the farmer-debtor may ask to be adjudicated a bankrupt and as such to be placed in possession of the property under the provisions of § 75 (s) upon terms which will enable him, by paying a suitable rental, to redeem the property unless he is sooner able to finance himself. If his interest is

found to be such that it is impracticable to place him in possession or otherwise to administer the property as provided by § 7 (s), he is entitled to petition the court for leave to redeem the property, and if he is unable to redeem it, a sale of his interest may be ordered as directed by § 75 (s) (3). P. 186.

5. In proceedings for a stay under § 75 (s) (2) of the Bankruptcy Act as an incident to which petitioners made a deposit of rental, they withdrew the deposit when the court rendered a judgment, denying its jurisdiction to review; for review of which they obtained a writ of certiorari. *Held:*

(1) That whether the withdrawal of the amount deposited is so inconsistent with further proceedings for the three-year stay authorized by § 75 (s) upon payment of a prescribed rental, could not be determined on the record brought to this Court, and should, in any case, be determined in the first instance by the bankruptcy court having jurisdiction of the cause. P. 187.

(2) The withdrawal is not inconsistent with other remedies which the bankruptcy court has jurisdiction to give under § 75, or with recourse to measures which the court may take to permit an adjudication of the rights of the parties in the property involved. P. 187.

(3) Since deposit of rental is not prerequisite to jurisdiction, recall and receipt of the money, whatever effect it may have had on the right to the three-year stay authorized by § 75 (s), involved no inconsistency with the assertion in this case of the court's jurisdiction to make an adjudication of the rights of the parties as a basis for composition and afford other relief. P. 187.

125 F. 2d 507, reversed.

CERTIORARI, 316 U. S. 657, to review a judgment of the court below which reversed orders of the court of bankruptcy denying motions by the present respondent to strike from the debtor's schedules of property certain land which respondent had contracted to sell to the farmer-debtor and another in joint tenancy.

Mr. Edwin J. Skeen, with whom *Mr. J. D. Skeen* was on the brief, for petitioners.

Mr. Hadlond P. Thomas for respondent.

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

The question is whether the interest of one of two joint tenants of a land purchase contract can be administered in farmer-debtor proceedings under § 75 of the Bankruptcy Act as amended, 11 U. S. C. § 203, although subsequent to the filing of his petition the interest of his co-tenant had been forfeited by default in payment of installments of the purchase price.

Petitioners, husband and wife, as "joint tenants with full right of survivorship and not as tenants in common," entered into a contract with respondent's assignor for the purchase of a plot of land. They apparently entered into possession under the contract, although the fact does not explicitly appear in the record. The contract stipulated for a down payment of $500 of the purchase price and for payment of the balance in equal monthly installments extending over a period of more than seven years. Nearly two years later, the buyers being in default in payment of installments, respondent gave appropriate notice, in conformity to state law, that the contract would be forfeited unless all payments due were made. Five days before the date on which the forfeiture was to become effective, the husband alone, without reference to his co-tenant, filed his petition as a farmer-debtor under § 75. After the date of forfeiture, respondent moved, on a showing of the facts as stated, to strike the land in question from the schedules of the debtor's property, challenging the jurisdiction of the court to administer it. The wife thereupon filed in the bankruptcy proceeding a "joinder of Rose L. Mangus" in which she asked to be permitted to adopt the petition of her husband for relief under § 75 and his schedules of property, referring to the land in question. It does not appear whether she was an insolvent farmer-debtor within the meaning of § 75 (r), and so entitled to the benefits of

the Act. Upon respondent's filing of a supplemental motion to strike the land from the schedules of the debtor's property, with a showing that at the time of the wife's attempted joinder she had forfeited her interest in the property, the court denied both of respondent's motions.

The Court of Appeals for the Tenth Circuit reversed, 125 F. 2d 507, holding that the right or interest which the wife had acquired in the land by the contract of purchase had been forfeited before her attempted joinder in the bankruptcy proceedings, see *Federal Land Bank* v. *Sorenson,* 121 P. 2d 398; *Leone* v. *Zuniga,* 84 Utah 417, 34 P. 2d 699, and that in consequence she had no remaining interest in the land which she could ask the bankruptcy court to administer. It thought that by the forfeiture respondent became vested as her successor with the interest which she had acquired in the land by virtue of the contract. But it was also of opinion that notwithstanding the forfeiture she remained a joint tenant of the contract with her husband and so was an indispensable party to any judgment or order of the bankruptcy court making disposition of the debtor's interest in the contract and the property. It also pointed out that although the interest of a bankrupt joint tenant may be sold in a regular bankruptcy proceeding, the proceedings under § 75 (a)–(r) do not look in the first instance to a sale of the debtor's property or operate to pass title to a trustee or the court, but contemplate maintenance of the *status quo* by a moratorium pending an adjustment or composition of his debts, and his ultimate emergence from bankruptcy with all his property. See *John Hancock Ins. Co.* v. *Bartels,* 308 U. S. 180, 184; *Wright* v. *Union Central Life Ins. Co.,* 311 U. S. 273.

From all this the court concluded that the difficulties of administration of the bankrupt's interest in § 75 proceedings are so insurmountable as to require dismissal of the

proceeding.[1] In the circumstances of this case, it attributed these difficulties to the uncertainty as to the rights of the husband as joint tenant of the contract with his wife and as tenant in common with respondent of the land. The uncertainty arose, it was suggested, from the doubt whether the husband, upon effecting an adjustment and compromise with creditors, would be entitled to acquire all the land upon payment of the balance of the purchase price, or only to demand half of it on payment of one-half of the purchase money due. We granted certiorari, 316 U. S. 657, on a petition which challenged the rulings of the Circuit Court of Appeals that the wife was an indispensable party to the farmer-debtor proceeding, and that the interest of the husband alone was not susceptible of administration in that proceeding.

Section 75 (n) directs that the filing of the farmer-debtor's petition "shall immediately subject the farmer and all his property . . . for all the purposes of this section, to the exclusive jurisdiction of the court . . . including . . . any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts." Section 75 (o) provides an effective moratorium, pending further proceedings, against the forfeiture of the debtor's interest in the property over which the court has jurisdiction. This it accomplishes by staying, unless otherwise permitted by the court, proceedings for foreclosure of a mortgage, or for cancellation or rescission of an agreement for the sale of land, or for the recovery of possession of land, or for the seizure or sale of the debtor's property under conditional sales agreement. *Kalb* v. *Feuerstein,* 308 U. S. 433; *John Hancock Ins. Co.* v. *Bartels,* 308 U. S. 180.

---

[1] Compare *Buss* v. *Prudential Ins. Co.,* 126 F. 2d 960; *In re Harris,* 15 F. Supp. 304.

We see no reason to doubt that, under these provisions and others presently to be noted, the bankruptcy court had jurisdiction in a § 75 proceeding over the husband's interest as joint tenant in the contract for the purchase of the land. Section 75 (n) expressly subjects to the jurisdiction of the bankruptcy court the vendee's interest in such a contract. And, so far as we are advised, Utah accepts the general common law rules relating to joint tenancies, including the rules permitting alienation of the interest of a joint tenant, and making it property subject to execution and separate sale. Cf. *Spalding* v. *Allred,* 23 Utah 354, 64 P. 1100; *Neill* v. *Royce,* 120 P. 2d 327; § 104–37–9 Revised Statutes of Utah, 1933; and see 3 Tiffany, Real Property (3rd ed.) § 425; 2 Thompson, Real Property, §§ 1714–17. When so locally recognized, the interest of a joint tenant is a property interest subject to the jurisdiction of the bankruptcy court under § 70 of the general Bankruptcy Act, 11 U. S. C. § 110. *Matter of DePree,* 30 A. B. R. (N. S.) 629; *Matter of Williams,* 16 A. B. R. (N. S.) 218; cf. *In re Brown,* 60 F. 2d 269; *In re Williams' Estate,* 16 F. Supp. 909.

Section 75 (n) of the Farm Bankruptcy Act, 11 U. S. C. § 203 (n), which provides that the filing of a petition shall subject "the farmer and all his property" to the jurisdiction of the Court, further directs that, "In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer . . . shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered. . . ." And sub-section (s) (4) of § 75 commands that ". . . the provisions of this title shall be held to apply also to part-

nerships, common, entirety, joint, community ownership . . . and any such parties may join in one petition."

The final clause of this provision, permitting both joint tenants to join in the petition, suggests that either, if entitled to the benefits of the Act, may file a petition without the other. Such was declared to be its purpose by the House Judiciary Committee which recommended its addition by way of amendment to § 75 (s) as originally enacted. In reporting this amendment the Committee pointed out the diversity of rulings of the courts under § 75, saying, "Some have held that if a husband and wife were jointly interested, or had interests in common, or were partners in the farming operations, that then neither of them could take advantage of the Act, nor could they join. Obviously such was not the intention of Congress." H. R. Rep. No. 570, 74th Cong., 1st Sess., p. 4. We need not now determine whether the wife, who does not appear to be a farmer-debtor, could before the forfeiture have joined in the petition. It is enough that one joint tenant is authorized to file his petition under § 75 and subject his interest to the jurisdiction of the bankruptcy court just as he may under § 70 of the general Bankruptcy Act.

Accordingly we conclude that the husband's interest in the property held by him as joint tenant with his wife is property within the meaning of § 75 (n), and that the court acquired jurisdiction over that interest upon the filing of his petition. The husband's interest as joint tenant being subject to the jurisdiction of the bankruptcy court, he was entitled to the benefit of the moratorium afforded by § 75 (o) for the purpose of enabling him to effect a composition with his creditors, failing which he was entitled to proceed under § 75 (s). *John Hancock Ins. Co.* v. *Bartels, supra.*

The Court of Appeals cited no decision of the Utah courts, and we are referred to none, which supports its

conclusion that respondent, as the result of the forfeiture of the wife's interest in the land, succeeded to that interest and became a co-tenant with the husband. So far as the law of that state is concerned, it would seem to be an equally tenable position that the forfeiture freed respondent's title of any equitable interest of the wife and left it subject only to such demands as the husband might assert by virtue of his interest. In advance of an authoritative determination by the state courts of the rights of the parties to the contract after the forfeiture of the wife's interest, we cannot say that the difficulties of administering the husband's interest under § 75 (s) are insurmountable. Indeed, before dismissing the proceedings because of difficulties in ascertaining the rights of the debtor under state law and in administering them in bankruptcy, it would be an appropriate exercise of the court's jurisdiction to take suitable measures to remove those difficulties by affording the interested parties opportunity to assert their rights in the state courts and, when they are ascertained and defined, by administering the debtor's interest as the Act provides, so far as may be found to be practicable.

Section 75 (e) provides that, "after the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the court, the court shall exercise such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors." During such control the court is free to permit and to facilitate proceedings in the state courts which would adjudicate the interests of the parties in the contract, subject to the stay directed by § 75 (o) of any cancellation of the contract or foreclosure of petitioner's interest in it. Utah, by § 104–3–18 of its Revised Statutes, has provided that "all persons holding as tenants in common or as joint tenants, or any number

less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights involved. In all cases one tenant in common or joint tenant can sue his co-tenant." And it has adopted the Uniform Declaratory Judgments Act, under which respondent or petitioners, or either of them, are free to proceed to an adjudication of their rights. §§ 104–64–1 *et seq.*, Revised Statutes of Utah, 1933. We perceive no insurmountable obstacle, if the bankruptcy court is so advised, to the exercise of its jurisdiction so as to permit the parties to ascertain their respective rights by an appropriate proceeding in the state courts. See *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 483. While such practice is to be regarded as exceptional, the circumstances which here suggest it appear to be exceptional. It may be suggested too that if, pending the proceedings for adjustment or composition with creditors, the wife were to release or assign to her co-tenant her interest in the contract, all beneficial interest under which she has forfeited, the technical difficulties thought to exist by reason of her absence as a party from the bankruptcy proceedings might be removed.

With the court's jurisdiction over the debtor's interest in the land and the duty to administer it established, we cannot say that the accommodation with respondent and other creditors which the statute contemplates could not be arrived at. But, in the event that no composition is effected, the debtor may ask to be adjudicated a bankrupt, aid as such to be placed in possession of the property under the provisions of § 75 (s) upon terms which will enable him, by paying a suitable rental, to redeem the property unless he is sooner able to finance himself. See *John Hancock Ins. Co.* v. *Bartels, supra.* If his interest is found to be such that it is impracticable to place him in possession or otherwise to admiiister the property as

provided by § 75 (s), he is entitled to petition the court for leave to redeem the property; and, if he is unable to redeem it, a sale of his interest may be ordered as directed by § 75 (s) (3). *Wright* v. *Union Central Ins. Co., supra.* The sale of the interest of a co-tenant may be separately effected in a bankruptcy proceeding. *In re Toms,* 101 F. 2d 617; *In re Brown, supra,* 273. And we cannot say that a court possessing the powers of a court of equity could not in this case direct a sale on conditions which would protect the rights of the debtor, respondent, and the purchaser.

Respondent moves to dismiss the writ of certiorari because, after the judgment below denying the district court's jurisdiction, petitioners procured a return of rental deposited by them in the bankruptcy court as an incident to proceedings under § 75 (s) (2). It is argued that this action is so inconsistent with petitioners' appeal as to estop them from further prosecution of it. The order, if any, directing the deposit, and the attendant proceedings do not appear in the record. Whether the withdrawal of the amount deposited is so inconsistent with further proceedings for the three-year stay authorized by § 75 (s) upon payment of a prescribed rental, obviously cannot be determined on this record, and should, in any case, be determined in the first instance by the bankruptcy court having jurisdiction of the cause. But it plainly is not inconsistent with other remedies which the court has jurisdiction to give under § 75, or with recourse to measures which the court may take to permit an adjudication of the rights of the parties, on the basis of which a composition may be effected. In any case, since deposit of rental is not prerequisite to jurisdiction, petitioners' recall and receipt of money, whatever effect it may have had on their right to the three-year stay authorized by § 75 (s), involved no inconsistency with the assertion on this appeal of the court's jurisdiction to resolve that question and to take

other appropriate action. The court's authority to give relief upon compliance with such terms as it may properly impose, including the payment of rental, either by moratorium pending a composition with creditors or by sale as the statute provides, remains unaffected. At least it has authority under § 75 (s) and is required to permit redemption of the property by the debtor before ordering a sale. *Wright* v. *Union Central Ins. Co., supra.*

We are of opinion that the bankruptcy court has jurisdiction over the debtor's interest in the property in question, and that in its sound discretion it should, in every practicable way, exercise that jurisdiction for the protection of the interest of the debtor as the statute directs.

The judgment below should be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

ETTELSON ET AL. *v.* METROPOLITAN LIFE INSURANCE CO.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 70. Argued November 12, 13, 1942.—Decided December 7, 1942.

1. In a civil action in the federal District Court against an insurer to recover the proceeds of policies of life insurance, wherein the insurer filed a counterclaim alleging fraud by the insured in the procurement of the policies and praying their cancellation and that further prosecution of the action be enjoined, an order that the issue raised by the counterclaim shall be heard and disposed of by the court prior to the issue raised by the complaint is an interlocutory order granting an injunction, within the meaning of Judicial Code § 129, and is appealable under that Section. P. 190.

The provisions of Rule 1 of the Rules of Civil Procedure, that the object of the Rules is "to secure the just, speedy, and inexpensive determination of every action," and of Rule 2, that "there shall be one form of action to be known as 'civil action,' " do not require a different result.

2. Local law has no bearing on the question here determined. P. 191.
3. The applicability of Jud. Code § 129 is determined not by the terminology of the order but by its substantial effect. P. 192.

CERTIFICATE from the Circuit Court of Appeals upon an appeal to that court from an interlocutory order of the District Court, 42 F. Supp. 488. The suit, to recover upon policies of life insurance, was begun in a state court but was removed by the defendant to the federal court.

Mr. Conover English for the Metropolitan Life Insurance Co.

Mr. Arthur T. Vanderbilt argued the cause, and *Mr. Jack Rinzler* entered an appearance, for Adrian Ettelson et al.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The Circuit Court of Appeals has certified the following question:

"In a civil action in a district court upon a claim of a character formerly cognizable at law in which the defendant has filed a counterclaim of a character formerly cognizable in equity (or in an action at law under the provisions of Section 274b [1] of the Judicial Code), is an order that the issue raised by the counterclaim shall be heard and disposed of by the court prior to the issue raised by the complaint an order granting an injunction within the meaning of Section 129 [2] of the Judicial Code and therefore appealable under that section?"

From the certificate it appears that the question arises upon these facts: The plaintiffs filed, in a New Jersey state court, a complaint in five counts to recover amounts alleged to be due plaintiffs by the defendant on life insur-

[1] 28 U. S. C. § 398.
[2] 28 U. S. C. § 227.

ance policies issued by it upon the life of Richard Ettelson, deceased. The cause was removed to the United States District Court for New Jersey. Plaintiffs demanded a jury trial. The defendant filed an answer in the District Court setting up that the policies were obtained by the fraud of the insured and are void because of material false statements made by the insured in the application for the policies. The answer did not allege that the false statements were knowingly and intentionally made.

With the answer, the defendant filed a counterclaim alleging that the policies were obtained by the fraud of the insured and are void because of the material false statements made by him in the application; and prayed that the policies be decreed void upon the return by the defendant of the premiums paid thereon, and that the plaintiffs be enjoined from further prosecuting the action at law. The plaintiffs moved for dismissal of the counterclaim on the ground that the defendant has an adequate remedy at law on the law side of the court in the pending action in which issue has been joined; and further that the counterclaim fails to state a claim upon which equitable relief can or should be granted by the court.

The District Court denied the motion to dismiss and ordered that the counterclaim should be heard and disposed of by the court sitting in equity prior to trial of the issue made by the complaint and answer in the action at law. 42 F. Supp. 488. The plaintiffs thereupon appealed to the Circuit Court of Appeals; and the defendant moved that court to dismiss the appeal, in the view that the District Court's order is not appealable.

The parties agree that, if the question had arisen prior to the adoption of the Rules of Civil Procedure,[3] our decision in *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, would require an affirmative answer to the question.

---

[3] 308 U. S. 653; 28 U. S. C. 723c.

The defendant asserts, and the plaintiffs deny, that the Rules require a negative answer. The defendant points to Rule 1, which states that the object of the rules is "to secure the just, speedy, and inexpensive determination of every action"; and more particularly to Rule 2, which declares that "there shall be one form of action to be known as 'civil action.' "

The defendant's contention, in brief, is that whereas, when the *Enelow* case was decided, the distinction between actions at law and suits in equity in federal courts still persisted, this distinction has now been abolished; that equitable defenses, whether a bar to plaintiffs' recovery at law or the basis of affirmative relief against the plaintiffs, are part and parcel of the single action initiated by the plaintiffs and that any direction by the court respecting the order in which the claim and the counterclaim are to be heard is interlocutory, amounting, at most, to a stay of the trial of one branch of the litigation, and in no sense an injunction against the plaintiffs. We cannot agree.

At the argument of the cause much time was devoted to the applicable law of New Jersey, where the action originated. It was urged that, under that law, upon allegation and proof of innocent misrepresentations inducing the issue of a policy, an insurer is entitled to a decree cancelling the policy and restraining any action at law upon it. It was urged that this feature of the local law must be considered in determining the appealability of the District Court's order. But, whatever effect should be given the New Jersey law in determining the correctness of the District Judge's action, the local law has no bearing upon the decision of the narrow question certified.

As in the *Enelow* case, so here, the result of the District Judge's order is the postponement of trial of the jury action based upon the policies; and it may, in practical

effect, terminate that action. It is as effective in these respects as an injunction issued by a chancellor. If the order be found to be erroneous, it will have to be set aside and the plaintiffs permitted to pursue their action to judgment. The plaintiffs are, therefore, in the present instance, in no different position than if a state equity court had restrained them from proceeding in the law action. Nor are they differently circumstanced than was the plaintiff in the *Enelow* case. The relief afforded by § 129 is not restricted by the terminology used. The statute looks to the substantial effect of the order made. *Enelow* v. *New York Life Ins. Co., supra,* p. 383. Compare *General Electric Co.* v. *Marvel Rare Metals Co.,* 287 U. S. 430, 432; *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.,* 293 U. S. 449, 451; *Griesa* v. *Mutual Life Ins. Co.,* 165 F. 48, 49.

Question answered "Yes."

MILLER *v.* UNITED STATES.

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

No. 76. Argued November 18, 1942.—Decided December 7, 1942.

1. The *in forma pauperis* statute (Act of July 20, 1892, as amended) does not entitle an indigent defendant in a criminal case to be furnished a verbatim transcript of the evidence at public expense. P. 197.
2. A verbatim transcript of all the evidence is not necessary for the preparation of a bill of exceptions; the bill may be prepared from the judge's or counsel's notes, or from the recollection of witnesses as to what occurred at the trial, or, in short, from any and all sources which will contribute to a veracious account of the trial judge's action and the basis of his ruling. P. 198.
3. Upon a petition to the Circuit Court of Appeals for rehearing of its affirmance, on an appeal *in forma pauperis,* of a conviction in a criminal case, it appeared that the petitioner's contention that the

evidence was insufficient to sustain the verdict had not been properly presented because of his counsel's belief that a transcript of the evidence (which the petitioner was without funds to obtain) was necessary for the preparation of a bill of exceptions covering the point. *Held,* that, in the circumstances, the Circuit Court of Appeals had power, under Rule 4 of the Criminal Appeals Rules, to remand the cause to the District Court for the settlement of a proper bill of exceptions. P. 199.

4. The cause is remanded to the Circuit Court of Appeals for entry of an order permitting settlement in the District Court of a bill of exceptions presenting the point urged by the petitioner. Thereupon, it will be the duty of counsel for the petitioner to submit a bill of exceptions made up from the best sources available; and it will then be the duty of the district judge to assist in amplifying, correcting and perfecting the bill, and to settle the same in order to present the evidence given at the trial. P. 199.

123 F. 2d 715, reversed.

CERTIORARI, 316 U. S. 658, to review the affirmance of a conviction of kidnapping in violation of 18 U. S. C. § 408a. For other opinions of the court below in this case, see 124 F. 2d 849, 126 F. 2d 462.

Mr. Howard C. Westwood, with whom *Mr. Charles M. Davison, Jr.* was on the brief, for petitioner.

Mr. Archibald Cox, with whom *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Robert S. Erdahl* were on the brief, for the United States.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case presents important questions in respect of criminal proceedings against poor persons in federal courts. For this reason we granted certiorari.

The petitioner was indicted, tried, and convicted in the United States District Court for Western Arkansas for kidnapping in violation of Title 18 U. S. Code § 408a. As he was without funds to conduct his defense, the court appointed counsel for him. The person charged to have

503873—43——20

been kidnapped was the illegitimate daughter of petitioner's wife.

Two defenses were presented. The first was that the petitioner came within the exception stated in the statute, that it shall not apply to a kidnapping "in the case of a minor, by a parent thereof." To sustain this defense, petitioner offered evidence to prove that the girl was a minor and that, having married her mother, he stood in the relation of a parent to her. The second defense was that the petitioner had neither taken nor detained the young woman against her will. The District Judge ruled against the petitioner's contention that he was a parent within the intendment of the statute, but sent the case to the jury on the question whether he had apprehended or detained his wife's daughter against her will. The jury rendered a verdict of guilty. Judgment of sentence was entered.

In due time, petitioner's counsel filed notice of appeal in which, amongst others, reasons advanced were that the court erred in refusing peremptory instructions for acquittal at the conclusion of the Government's case and at the conclusion of all the evidence; that the verdict of the jury was contrary to the weight of the evidence; and that the court erred in refusing to instruct the jury that, if they found the complaining witness was under the age of eighteen years at the time of the kidnapping they must find the petitioner not guilty.

The District Court entered an order permitting the petitioner to appeal *in forma pauperis,* and the Circuit Court of Appeals also permitted the prosecution of the proceedings in that court *in forma pauperis.*

In connection with the appeal, errors were specifically assigned to the ruling of the District Court respecting the status of the petitioner as a parent, but no error was so assigned to the action of the court in submitting the fact questions respecting the alleged apprehension and detention of the complaining witness, although the assignments

of error concluded with a prayer for a reversal for "other manifest errors in the record and proceedings." The Bill of Exceptions allowed by the District Court set forth only so much of the proceedings as went to the question of petitioner's asserted parenthood of the alleged minor. It also included the proceedings on motions for directed verdict and the action of the court upon those motions, but none of the evidence on which the motions were based.

The Circuit Court of Appeals affirmed the judgment and, in so doing, dealt only with the question of the petitioner's parenthood.[1] At the close of its opinion it stated: "No other question having been raised on this appeal, it follows that the judgment must be and is affirmed."

The petitioner entered upon service of his sentence and, being without counsel, personally forwarded to the Circuit Court of Appeals a petition for the appointment of counsel and a petition for rehearing. In the latter, he urged that there was no testimony in the record indicating that he took or detained his wife's daughter against her will, and prayed that the Circuit Court of Appeals issue a writ of certiorari to bring up a complete transcript of the testimony taken at his trial. In a *per curiam* opinion,[2] the court stated that it had decided the only question before it, but ordered that the United States Attorney answer the petition so that it might be ascertained whether a Bill of Exceptions could be prepared to raise the questions which the petitioner desired to have decided. The prosecuting officer answered alleging that the entire testimony in the case had been taken stenographically by the district judge's secretary, whose notes were available and could be transcribed. The answer further set forth that the judge's secretary had important duties to perform; that the testimony which he took stenographically was of large volume; that its transcription would involve labor

[1] 123 F. 2d 715.

[2] 124 F. 2d 849.

for which he ought to be paid; and that the Government could not be required to pay for a transcript of the evidence or to furnish such a transcript to the defendant.

To this answer, the petitioner filed a response in which, amongst other things, he alleged that he had repeatedly urged his attorney to present to the Circuit Court of Appeals the question of the sufficiency of the evidence to sustain his conviction, and that his attorney had invariably replied that this could not be done without obtaining a transcript of the evidence so as to make a proper Bill of Exceptions covering the subject; that the attorney further advised him that a transcript of the testimony could not be procured because the petitioner had no funds to pay for its preparation. It stands admitted on the record that these are the facts.

The Circuit Court of Appeals, in a third opinion,[3] stated that it had requested a response to the petition for rehearing in order to ascertain whether the Government, as in *Holmes* v. *United States,* 314 U. S. 583, would consent to the vacation of the judgment so that a proper record might be made as the basis for consideration of the question urged by the petitioner. The court stated that, in view of the Government's opposition to a vacation of the judgment or a reopening of the case, it felt itself without power to act further in the matter, and indicated that if the petitioner desired to bring the cause to this Court such facilities should be furnished him as were necessary to that end without the obligation to pay fees or costs.

The petitioner presented to this Court a petition for certiorari and a petition for leave to proceed *in forma pauperis.* We granted the writ and gave leave to proceed *in forma pauperis.* As he was without counsel, we appointed counsel to act for him in this Court.

---

[3] 126 F. 2d 462.

1. There is no law of the United States creating the position of official court stenographer and none requiring the stenographic report of any case, civil or criminal, and there is none providing for payment for the services of a stenographer in reporting judicial proceedings. The practice has been for the parties to agree that a designated person shall so report. The one selected must be paid by private arrangement with one or more of the parties to the litigation. The amount paid to him is not costs in the cause nor taxable as such against any of the parties.

2. At the instance of the Conference of Senior Circuit Judges, legislation has been introduced in Congress to provide an official system of reporting and to defray the cost of it. That legislation, as we understand, will, if adopted, obviate the difficulties presented in this case. As the matter stands, however, it is clear that the judge's secretary who stenographically reported the trial is not an officer of the United States in his capacity as reporter, is not entitled to fees from the United States for his services, and his compensation cannot be treated as costs. The Act of July 20, 1892, as amended,[4] applies only to court costs, permits the taking of an appeal without prepayment of cost of printing the record in the appellate court, and provides in certain cases for the printing of that record at Government expense. It does not authorize the procurement of a transcript of the testimony nor the payment for services in reporting evidence taken at the trial nor for the obtaining of it by the Government in behalf of an indigent defendant.

3. It is urged by the petitioner that the District Court has inherent power, in the interests of justice, to order preparation of a transcript for the petitioner's use in making up a bill of exceptions and to impose the expense of so

[4] 28 U. S. C. § 832.

doing upon the Government. The respondent points out that the Comptroller General has ruled that there is no appropriation from which such expense may be paid [5] and, whether he is or is not right, it remains that no appropriation is available without authorization of payment by the Attorney General. That officer appears unwilling to test the matter by making such authorization. We need not stop to consider these opposing views because of the facts developed in the briefs and in argument.

4. As we have said, the trial judge's secretary took stenographic notes of the entire testimony and his notes are available. It was stated at the bar that this gentleman stands ready to read his notes into a dictaphone without charge to the petitioner. In the light of these facts it would seem that it is possible to prepare an adequate bill of exceptions fairly reflecting the purport of the testimony.

It has become the usual, because the more convenient, method to prepare a bill of exceptions by the use of a stenographic transcript of the evidence. Even so, the bill ought not to contain all of the evidence but only that which is relevant to the issues made upon the appeal, and often it is expedient and satisfactory to summarize the evidence and transmute it into narrative form. Historically a bill of exceptions does not embody a verbatim transcript of the evidence but, on the contrary, a statement with respect to the evidence adequate to present the contentions made in the appellate court. Such a bill may be prepared from notes kept by counsel, from the judge's notes, from the recollection of witnesses as to what occurred at the trial, and, in short, from any and all sources which will contribute to a veracious account of the trial judge's action and the basis on which his ruling was invoked.

---

[5] 9 Comp. Gen. 503; cf. 21 Comp. Gen. 347.

Counsel in this case could, therefore, have prepared and presented to the trial judge, as was his duty, a bill of exceptions so prepared, and it would then have become the duty of the trial judge to approve it, if accurate, or, if not, to assist in making it accurately reflect the trial proceedings. We are unwilling to hold that the petitioner is foreclosed from obtaining a bill in the circumstances of this case. Petitioner repeatedly insisted that counsel procure a proper record on appeal to present the question of the sufficiency of the evidence to sustain his conviction. The petitioner did everything that lay within his power to obtain such a proper record, and we think he should not be penalized for the failure of his appointed counsel to take the necessary measures, if the power exists to afford him a hearing on the point he deems material.

5. We are of opinion that the Circuit Court of Appeals had power in the circumstances to remand the cause for the settlement of a proper bill of exceptions. Rule 4 of the Criminal Appeals Rules[6] provides that, after the filing of the notice of appeal, the appellate court shall have supervision of the proceedings on appeal, including the proceedings relating to the preparation of the record on appeal, and that it may entertain a motion for directions to the trial court. This power extends to the procurement of a proper bill of exceptions[7] and ought to be liberally exercised where the contention is that the evidence is insufficient to support the verdict.[8]

We think the right course in this instance is to remand the cause to the Circuit Court of Appeals in order that it may enter an order permitting the settlement of a bill

---

[6] 18 U. S. C. A. § 688ff.

[7] *Ray* v. *United States,* 301 U. S. 158, 164, 167; *Holmes* v. *United States,* 314 U. S. 583.

[8] *Hemphill* v. *United States,* 312 U. S. 657.

of exceptions in the District Court to present the point urged by petitioner. Upon the entry of such an order it will be the duty of counsel for petitioner to present a bill made up from the best sources available. It will then become the duty of the district judge to assist in amplifying, correcting, and perfecting this bill from such sources, and to settle the same in order to present the evidence given at the trial. From such a bill the Circuit Court of Appeals will no doubt be able to decide whether there was evidence to sustain petitioner's conviction.

So ordered.

UNITED STATES *v.* WAYNE PUMP CO. ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Nos. 81 and 82. Argued November 16, 1942.—Decided December 7, 1942.

1. The decision of the District Court in these cases, sustaining demurrers to indictments for violations of the Sherman Act, was based not only on the construction of the statute but also on the independent ground of the insufficiency of the indictments as pleadings, and therefore was not appealable directly to this Court under the Criminal Appeals Act. P. 207.
2. The amendment by Act of May 9, 1942, of the Criminal Appeals Act, which for the first time permits appeals to the Circuit Courts of Appeals from orders sustaining demurrers to indictments in cases not directly appealable to this Court, and which directs that such appeals, when erroneously taken to this Court, shall be remanded to the Circuit Court of Appeals, is not retrospective in operation and is inapplicable to appeals for which, when taken, there was no statutory authority. P. 209.

44 F. Supp. 949, appeals dismissed.

APPEALS from judgments of the District Court in two cases, heard together, sustaining demurrers to indictments for violations of the Sherman Antitrust Act.

Assistant Attorney General Arnold, with whom *Solicitor General Fahy* and *Mr. Archibald Cox* were on the brief, for the United States.

Mr. Edward R. Johnston for the Wayne Pump Co. et al.; *Mr. James H. Winston* for the Gilbert & Barker Mfg. Co. et al.; and *Mr. Harold F. McGuire* for Veeder-Root, Inc. et al.,—appellees. With them on the briefs for appellees were *Messrs. Charles L. Byron, Howard Somervell, Louis F. Niezer, Ballard Moore, James M. Carlisle, Arthur S. Lytton, John C. Slade, Bryce L. Hamilton, Barry Gilbert,* and *George W. Ott.*

MR. JUSTICE REED delivered the opinion of the Court.

These are companion appeals from orders sustaining demurrers to indictments for violations of the Sherman Act. The indictment in No. 81 charges the defendants, manufacturers of gasoline pumps, a manufacturer of gasoline computing mechanisms and a gasoline pump manufacturing association, and certain of their officers, with conspiracy, extending from 1932 to the date of the indictment, January 31, 1941, to fix the prices of computer pumps in interstate trade and commerce, in violation of § 1 of the Sherman Act. Computer pumps are gasoline pumps embodying a mechanism which calculates, measures, displays and records the quantities and prices of gasoline passing through the pumps to the purchasers. In No. 82 the defendants are the same except that the association and its officer are omitted. This latter indictment varies from the former in that in two counts it charges a conspiracy to monopolize the manufacture and sale of computer pumps and computing mechanisms in violation of § 2 of the Sherman Act.[1]

[1] Section 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among

The facts alleged to support the charge in the count for price-fixing and those to support the count for monopolizing are substantially the same. The counts vary only as to the purposes alleged. The same means allegedly are employed to carry out each conspiracy. As similar legal issues arise in each case and as our conclusions upon each count are based upon the same reasoning, it is not necessary to make further differentiations between the counts. One opinion was handed down by the District Court. It sets out the indictments quite fully. *United States* v. *Wayne Pump Co.*, 44 F. Supp. 949.

As our decision does not and cannot in our view consider the correctness of a trial court's judgment that an indictment failed properly to allege the facts establishing a crime (*United States* v. *Sanges*, 144 U. S. 310; *United States* v. *Burroughs*, 289 U. S. 159), we do not set out the allegations of these counts *in extenso*. This has been done in *United States* v. *Wayne Pump Co., supra*. We shall state here, for convenience in getting a focus on the problem only, that the counts of the indictments charged conspiracies among the defendants to fix prices on, and monopolize the interstate trade in, computer pumps and

---

the several States, or with foreign nations, is hereby declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 50 Stat. 693, 15 U. S. C. § 1.

Section 2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 26 Stat. 209, 15 U. S. C. § 2.

computing mechanisms by a scheme for using patent rights and licenses to manufacture under them.

The defendants demurred to the indictments as insufficient in law to state an offense. It was said in the demurrers that the indictments failed to describe or particularize the offense attempted to be charged with sufficient definiteness, certainty or specificity to inform the defendants of the nature and causes of the accusations or to enable them to plead an acquittal or conviction thereunder in bar of other proceedings.

The trial court sustained the demurrers to each count, from which ruling appeals to this Court were prayed under the Criminal Appeals Act, 34 Stat. 1246. That statute authorizes an appeal to this Court "from a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded." [2] We have no jurisdiction if the judgment below is not so based. *United States* v. *Hastings*, 296 U. S. 188; *United States* v. *Halsey, Stuart & Co.*, 296 U. S. 451; *United States* v. *Borden Co.*, 308 U. S. 188.

In their statement opposing jurisdiction, appellees contended that the demurrers were sustained because of the insufficiency of the indictments as pleadings, as distinguished from a construction of the statute upon which the indictments were based, and therefore questioned our

---

[2] As amended on May 9, 1942, the Act further provides: "An appeal may be taken by and on behalf of the United States from the district courts to a circuit court of appeals or the United States Court of Appeals for the District of Columbia, as the case may be, in all criminal cases, in the following instances, to wit: From a decision or judgment quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this Act." 56 Stat. 271, 18 U. S. C. § 682.

jurisdiction under the Act. We postponed decision of this question to the argument on the merits and we now come to its decision.

There is disagreement between the parties as to whether the District Court sustained the demurrers on the ground of the deficiency of the pleadings as well as upon a construction of the statute. The language of the opinion makes it apparent to us that the District Court's conclusion was at least in part bottomed upon the indefiniteness, uncertainty and lack of specificity of the indictments. In the opinion it is said, 44 F. Supp. 949, 956:

"There is no charge that defendants fixed the prices of gasoline pumps generally, or restricted their manufacture and sale. They are charged only with fixing the prices of computer pumps, a right which the Wayne Pump Company already had under the statutory monopoly granted by the Government when its patent was issued. What is meant by the phrase 'used the Jauch patent' is not quite clear. If the defendants did more than enter into ordinary patent license agreements, under the terms of which the Wayne Pump Company, as owner of the patent, licensed the others to manufacture computer pumps, and fixed the prices at which the pumps should be sold; or if the Government claims that these defendants were involved in some offense under the Sherman Act other than the exercise of a patent monopoly, then such offense should be set out clearly in the indictments."

The court further said, *id.*, 956:

"How they took joint action or entered into joint agreements to use the Jauch patent to achieve the alleged illegal objectives, or how they went outside the monopoly granted to the patentee and its licensees, is nowhere set out in the indictments."

The lower court in *United States* v. *Colgate & Co.*, 253 F. 522, affirmed 250 U. S. 300, had criticized an indictment

because of failure to set out facts against any set of wholesalers or retailers alleged to have acted in combination with the defendant. In this case, commenting upon what is said to be a similar situation, the District Court said, *id.*, 958:

"So in the case at bar, if these conditions exist, the Government should have no difficulty in setting forth at least one specific instance of where defendants determined the resale price at which jobbers might resell computer pumps. If this condition does exist, surely the Government must be in possession of the facts, and they should be set out in the indictments, so as to reasonably inform defendants of the offense with which they are charged."

The opinion added, *id.*, 958:

"The Government in its argument insists that competing patents are here involved, and that a monopoly of competing patents was acquired by some of the defendants in furtherance of the plan to carry out the conspiracy, but the indictments set out no facts whereby to identify these competing patents, nor in what manner nor by whom such monopoly in them was acquired."

Finally the trial court concluded, *id.*, 959:

"It is fundamental that in every indictment the defendant is entitled to be informed with such definiteness and certainty of the accusations against him as will enable him to make his defense, and avail himself of acquittal or conviction in any further prosecution for the same offense. Having in mind that the subject matter of the instant indictments is protected by a patent, I am of the opinion that the defendants here have not been furnished with such definite and particular allegations of fact as will meet this test. The charges are much too general. They do not adequately describe the nature of the alleged unlawful conspiracy agreements or arrangements which defendants are accused of having made, nor show how the defendants

became parties thereto, nor how they collaborated in doing the unlawful things; nor set out any unlawful means whereby the unlawful objectives were accomplished."

Further, the District Court, in our opinion, made it altogether clear that it was not determining solely the limits of a patent monopoly. It pointed out that a patentee might license (*id.*, 954) as it chose, provided only that in so doing it did not violate any other law. The Sherman Act was in mind. The court said, *id.*, 956:

"While ownership of the patent gives to the patentee a complete monopoly within the field of his patent, it of course does not give him any license to violate the provisions of the Sherman Act or of any other law. Under his monopoly he may not use his patent as a pretext for fixing prices on an unpatented article of commerce; nor fix the resale price on his patented article; nor make use of 'tying clauses.' "

The Government, of course, recognizes that the opinion manifests the District Court's view that the indictment failed to allege violations of the Sherman Act with sufficient definiteness and particularity. But the Government urges that such a ruling arose from the District Court's error in holding, on the merits, that the facts set out in the indictment do not charge, as a matter of substance, crimes within the meaning of the Sherman Act. It is the Government's contention that, after making this fundamental ruling, the District Court "then simply went on to say that the indictments are defective as pleadings if they are intended to charge crimes within the Sherman Act as that Act is construed by the court below."

We do not read the District Court's opinion in that way. Where a court interprets a criminal statute so as to exclude certain acts and transactions from its reach, it would of necessity also hold, expressly or impliedly, as the Government suggests, that the indictment, considered

merely as a pleading, was defective. Yet, the essence of the ruling would be based upon a construction of the statute. We accept as correct, for the purposes of this discussion only, the Government's understanding of the opinion as holding that the allegations of the indictment, considered in substance and apart from required specificity, did not allege violations of the Sherman Act. It was a statutory construction such as that just stated which led this Court to accept jurisdiction under the Criminal Appeals Act in *United States* v. *Hastings,* 296 U. S. 188, 195.

In the light of the opinion, however, we conclude that the judgment upholding the demurrer was based also on grounds independent of the construction of the statute involved. The demurrers upon which the ruling below was based show on their face, as appears from the typical example below, that they were aimed not at the coverage of the Sherman Act but at the form of the indictments.[3]

[3] The formal parts are omitted:

"1. Said indictment and each count thereof, in violation of the rights guaranteed to said defendants by the Fifth and Sixth Amendments to the Constitution of the United States, fails to describe and particularize the offenses attempted to be charged therein with sufficient definiteness, certainty and specificity to inform them of the nature and cause of the accusation, to enable them to prepare and make their defense thereto, and to enable them to plead an acquittal or a conviction thereunder in bar of any other proceedings against them based on the matters or things, or any of them, on which said indictment is based.

2. The averments of said indictment, and each count thereof, purporting to charge a combination and conspiracy to monopolize the manufacture and sale of computer pumps and a combination and conspiracy to monopolize the manufacture and sale of computing mechanisms are mere conclusions.

3. Said indictment fails to make averments sufficient to identify and describe the supposed combination and conspiracy in each count of said indictment alleged in that it does not allege with particularity any of the following:

(a) The factual basis upon which the United States relies for its charge that said combinations and conspiracies exist or have existed:

This was the objection determined by the court. The excerpts from the opinion quoted above are conclusive, we think, that the District Court rested its ruling on the insufficiency of the pleading as an independent ground.

Since the judgment below was not placed solely upon the invalidity or construction of the statute but had an additional and independent ground, the Criminal Appeals Act does not authorize review. *United States* v. *Hastings*, 296 U. S. 188, 193; *United States* v. *Halsey, Stuart & Co.*, 296 U. S. 451; *United States* v. *Borden Co.*, 308 U. S. 188, 193.[4] Any contrary holding would be to assume a power of review not bestowed by Congress.[5] Furthermore, at the time of the entry of the District Court judgment, there was no provision for review of orders sustaining demurrers upon grounds other than those involving the construction of the basic statute.

The Criminal Appeals Act,[6] under which the Government brought these cases here, now contains a provision

---

(b) The manner of formation of the supposed combinations and conspiracies;

(c) The terms of the supposed combinations and conspiracies; or

(d) The manner in and by which it is claimed that said defendants became parties to the supposed combinations or conspiracies.

4. The averments in said indictment and each count thereof with respect to the supposed combinations and conspiracies to monopolize, and the intended means for the accomplishment thereof, are so vague, indefinite, uncertain, and conclusory in character as to fail to apprise said defendants of the manner in which the prosecution claims that they have violated the law pertaining to combination or conspiracy to monopolize the manufacture and sale of the computer pumps or the manufacture and sale of computing mechanisms."

[4] At one time, this Court permitted review under the Criminal Appeals Act of questions of statutory construction even where such questions were not the sole basis of the judgment. *United States* v. *Stevenson*, 215 U. S. 190, 195. This practice was disapproved. See *United States* v. *Hastings*, 296 U. S. 188, 194.

[5] *United States* v. *Hastings*, 296 U. S. 188, 192, n. 2.

[6] Act of March 2, 1907, 34 Stat. 1246, 18 U. S. C. § 682.

for a remand to the Circuit Court of Appeals if review by this Court on direct appeal is found to be unauthorized. The Government does not differ with appellees' specific statement that the new provision is inapplicable to this appeal. We do not think that it is applicable. Six weeks after time to appeal had expired [7] the Act was amended.[8] The amendment for the first time permits appeals to the Circuit Courts of Appeals from orders sustaining a demurrer to an indictment in cases not directly appealable to this Court. The time to appeal to all courts remains unchanged. The amendment provides that "if an appeal shall be taken pursuant to this Act to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a circuit court of appeals . . . the Supreme Court of the United States shall remand the cause to the circuit court of appeals . . . which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance; . . ." This language directs the remand of a case in which the appeal, at the time it was taken, should have been taken to the Circuit Court of Appeals but was instead erroneously taken to this Court. It is intended to save to the Government the right of appeal which might otherwise be lost by its erroneous view as to the proper appellate tribunal.[9] At the time the instant appeals were

[7] The orders appealed from are dated February 24, 1942. The act provides that appeals be taken within thirty days after the judgment is rendered. Petitions for appeal were allowed March 26, 1942, within the thirty day period.

[8] Act of May 9, 1942, 56 Stat. 271.

[9] In describing the effect of the bill, it was said by the House Conference Managers that the act "permits appeals to the circuit courts of appeals of the United States where appeals have improperly been taken directly to the Supreme Court. . . . In other words, it permits of a correction of the appeal in cases where appeal has been taken to the wrong court." H. Rep. No. 2052, 77th Cong., 2d Sess., p. 2; see also H. Rep. No. 45, 77th Cong., 1st Sess., p. 2.

taken, there was no statutory authority for an appeal to the Circuit Court of Appeals and therefore no room for an erroneous choice between appellate courts. Consequently, the proviso has no application. To hold otherwise would be to give a right of appeal where none existed at the time the appeal was taken. While this might be permissible if there were such a legislative intention, the amendment is not retrospective in terms. *Stephens* v. *Cherokee Nation,* 174 U. S. 445, 478; *Freeborn* v. *Smith,* 2 Wall. 160. Nor does it appear that Congress had the instant case in mind in enacting the amendment. *H. Rouw Co.* v. *Crivella,* 310 U. S. 612. We therefore view the right to appeal and the court to which an appeal lies as they existed at the time the appeal was taken. *Gwin* v. *United States,* 184 U. S. 669, 674.

Dismissed.

MR. JUSTICE JACKSON took no part in the consideration of these appeals.

MR. JUSTICE DOUGLAS, dissenting:

MR. JUSTICE BLACK, MR. JUSTICE MURPHY and I are of the view that the judgments should be reversed. In our opinion the District Court's rulings that the indictments were defective resulted from interpretations of the Sherman Act and the patent law which are erroneous in light of *United States* v. *Masonite Corporation,* 316 U. S. 265, and related cases.

ALBIN *v.* COWING PRESSURE RELIEVING JOINT CO. ET AL.

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

No. 234. Submitted November 20, 1942.—Decided December 7, 1942.

An order of the bankruptcy court vacating an earlier order restraining the prosecution by the alleged bankrupt of a suit in a state court, in which suit, it was alleged, counterclaims in excess of the amount claimed by the alleged bankrupt were filed, is, under § 24 (a) of the Chandler Act, appealable to the Circuit Court of Appeals. P. 212.
Reversed.

CERTIORARI, *post*, p. 608, to review a decree dismissing for lack of jurisdiction an appeal from an interlocutory order of the bankruptcy court dissolving a restraining order.

Mr. Lewis E. Pennish submitted for petitioner.

Mr. Charles Aaron submitted for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner filed an involuntary petition in bankruptcy against respondent, who answered denying the allegations of the petition. Prior to adjudication, the bankruptcy court entered an *ex parte* order, on petition of the same creditor, restraining the prosecution by respondent or its agents of a suit in the Illinois state courts on a claim against one Fisher, in which suit, it was alleged, Fisher had filed counterclaims which would exceed the amount of the respondent's claim. Thereafter, on petition of respondent and after notice to all parties and a hearing, the bankruptcy court vacated the restraining order. This likewise was, so far as appears, prior to an adjudication.

Petitioner appealed. The Circuit Court of Appeals dismissed the appeal "for lack of jurisdiction." The case is here on certiorari.

Sec. 24 (a) of the Chandler Act (52 Stat. 854, 11 U. S. C. § 47) gives the Circuit Courts of Appeals appellate jurisdiction from courts of bankruptcy "in proceedings in bankruptcy, either interlocutory or final." An order of the bankruptcy court vacating a restraining order against prosecution of a suit in a state court is, like a stay order itself, a proceeding in bankruptcy. See *Harrison Securities Co.* v. *Spinks Realty Co.*, 92 F. 2d 904; *Taylor* v. *Voss*, 271 U. S. 176, 181. The amendments to § 24 (a) made by the Chandler Act practically abolished the distinction between appeals as of right and by leave. S. Rep. No. 1916, 75th Cong., 3d Sess., p. 4. And see *Dickinson Industrial Site* v. *Cowan*, 309 U. S. 382, 385–388. Whatever may still be the possible limitations on the reviewability of interlocutory orders (see *In re Hotel Governor Clinton*, 107 F. 2d 398; *Federal Land Bank* v. *Hansen*, 113 F. 2d 82, 84–85), no reason appears why this one cannot or should not be reviewed. Nor does it appear from the record which is before us that the issue is moot. We intimate no opinion on the merits. The judgment is reversed and the cause remanded to the Circuit Court of Appeals for proceedings in conformity with this opinion.

Reversed.

PYLE *v.* KANSAS ET AL.

CERTIORARI TO THE SUPREME COURT OF KANSAS.

No. 50. Argued November 9, 10, 1942.—Decided December 7, 1942.

1. Habeas corpus is a remedy available in the state courts of Kansas to persons imprisoned in violation of rights guaranteed by the Federal Constitution. P. 215.
2. A petition for a writ of habeas corpus alleging that the petitioner is imprisoned upon a conviction obtained through the use of testimony known by the prosecuting officers to have been perjured, and through the suppression by them of evidence favorable to him, sufficiently alleges a deprivation of rights guaranteed by the Federal Constitution; and the denial of the petition without a determination as to the truth of the allegations was error. P. 216.
3. In view of the inexpert drafting of the petition for the writ of habeas corpus in this case, the remand to the state court is without prejudice to any procedure there designed to achieve greater particularity in the allegations. P. 216.

Reversed.

CERTIORARI, 316 U. S. 654, to review the affirmance of a judgment denying an application for a writ of habeas corpus.

Mr. Joseph P. Tumulty, Jr. for petitioner.

Mr. Jay Kyle, with whom *Messrs. Jay S. Parker,* Attorney General of Kansas, and *Braden C. Johnston,* Assistant Attorney General, were on the brief, for respondents.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Petitioner seeks to review an order of the Supreme Court of Kansas denying his application for writ of habeas corpus. In 1935 petitioner was convicted by a jury in a Kansas state court upon an information charging him

with the crimes of murder and robbery. A motion for a new trial was overruled, and he was sentenced to life imprisonment under his conviction for murder, and to a term of from 10 to 21 years for robbery. On appeal the judgment was affirmed by the Supreme Court of Kansas. *State* v. *Pyle,* 143 Kan. 772, 57 P. 2d 93.

On November 20, 1941, petitioner, a layman acting in his own behalf, filed an original application for writ of habeas corpus in the Supreme Court of Kansas. The crude allegations of this application charge that his imprisonment was the result of a deprivation of rights guaranteed him by the Constitution of the United States, in that the Kansas prosecuting authorities obtained his conviction by the presentation of testimony known to be perjured, and by the suppression of testimony favorable to him. Filed with this application were a brief and an abstract, also apparently prepared by petitioner himself, which are part of the record before us. These documents elaborate the general charges of the application, and specifically allege that "one Truman Reynolds was coerced and threatened by the State to testify falsely against the petitioner and that said testimony did harm to the petitioner's defense"; that "one Lacy Cunningham who had been previously committed to a mental institution was threatened with prosecution if he did not testify for the State"; that the testimony of one Roy Riley, material to petitioner's defense, "was repressed under threat and coercion by the State"; that Mrs. Roy Riley and Mrs. Thelma Richardson were intimidated and their testimony suppressed; and, that the record in the trial of one Merl Hudson for complicity in the same murder and robbery for which petitioner was convicted, held about six months after petitioner's direct appeal from his conviction, reveals that the evidence there presented is inconsistent with the evidence presented at petitioner's trial, and clearly exonerates petitioner.

Certain exhibits accompanied the application; among these were copies, sworn by petitioner to be true and correct copies of the originals, of an affidavit executed by Truman Reynolds in 1940, and a letter dated February 28, 1941, from the former prosecuting attorney who represented the State at petitioner's trial. The affidavit contained a statement that affiant "was forced to give perjured testimony against Harry Pyle under threat by local authorities at St. John, Kansas and the Kansas State Police, of a penitentiary sentence for burglary if I did not testify against Mr. Pyle." The letter stated, "Your conviction was a grave mistake," and further that, "The evidence at the trial of Merl Hudson certainly shattered the conclusions drawn from the evidence produced at your trial."

In connection with his application, petitioner moved for the appointment of counsel to represent him, for subpoenas duces tecum to bring up the records in the trials of Merl Hudson and one Bert (Bud) Richardson, for the subpoenaing of certain witnesses allegedly material to his case, and for his presence in court. The record does not show what disposition, if any, was made of these various motions.

No return was made to the application for the writ. On December 11, 1941, the court below entered an order "that said petition be filed and docketed without costs, and thereupon, after due consideration by the court, it is ordered that said petition for writ of habeas corpus be denied." There was no opinion. A motion to rehear was also denied without opinion. We brought the case here on certiorari, 316 U. S. 654, because of the constitutional issues involved.

Habeas corpus is a remedy available in the courts of Kansas to persons imprisoned in violation of rights guaranteed by the Constitution of the United States. *Cochran* v. *Kansas,* 316 U. S. 255, 258. Petitioner's papers are

inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. *Mooney* v. *Holohan,* 294 U. S. 103. They are supported by the exhibits referred to above, and nowhere are they refuted or denied. The record of petitioner's conviction, while regular on its face, manifestly does not controvert the charges that perjured evidence was used, and that favorable evidence was suppressed with the knowledge of the Kansas authorities. No determination of the verity of these allegations appears to have been made.[1] The case is therefore remanded for further proceedings. *Cochran* v. *Kansas, supra; Smith* v. *O'Grady,* 312 U. S. 329; cf. *Waley* v. *Johnston,* 316 U. S. 101, 104. In view of petitioner's inexpert draftsmanship, we of course do not foreclose any procedure designed to achieve more particularity in petitioner's allegations and assertions.

Reversed.

---

[1] *In re Pyle,* 153 Kan. 568, 112 P. 2d 354, is not such a determination. That was an appeal by petitioner from the dismissal of another petition for writ of habeas corpus by the Kansas district court for the Leavenworth district.

Statement of the Case.

FISHER, RECEIVER, *v.* WHITON, EXECUTRIX, ET AL.

CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE.

No. 85. Argued November 16, 1942.—Decided December 7, 1942.

1. The question as to when the period of limitations begins to run against a receiver's claim upon an assessment levied by the Comptroller of the Currency on stockholders of an insolvent national bank is a federal question; and, in the present case, the question was duly raised and preserved by appropriate exceptions and assignments of error. P. 220.
2. It is within the authority of the Comptroller of the Currency to extend from time to time the date fixed for payment of assessments against stockholders of insolvent national banks. Nothing in the pertinent legislation, 12 U. S. C. §§ 63, 64, 66, 191, 192, prevents such extension. P. 220.
3. The receiver of an insolvent national bank did not have a complete and present cause of action to enforce the liability of a deceased stockholder until the date finally fixed by the Comptroller of the Currency, after extensions of dates previously fixed, for payment; and, in this view, the receiver's claim against the stockholder's estate was not barred by §§ 8225 and 8604 of the Tennessee Code. *Pufahl* v. *Estate of Parks*, 299 U. S. 217, distinguished. P. 220.
4. The desirability of closing decedents' estates speedily does not warrant limiting the power of the Comptroller of the Currency to extend the time for payment of an assessment against stockholders of insolvent national banks. P. 221.

25 Tenn. App. 230, 155 S. W. 2d 882, reversed.

Upon a petition for rehearing, an earlier order of this Court denying certiorari, 316 U. S. 691, was vacated and certiorari was granted, 316 U. S. 707, to review a decree of an intermediate state court which affirmed a decree of the state Chancery Court barring on the ground of limitations a claim by the receiver of an insolvent national bank upon a stockholder's assessment. The highest court of the State denied a petition for a writ of certiorari.

Messrs. John F. Anderson and *S. Bartow Strang,* with whom *Mr. Lee Roy Stover* and *Harriet Buckingham* were on the brief, for petitioner.

Mr. Joe Frassrand, with whom *Mr. Charles A. Noone* was on the brief, for respondents.

MR. JUSTICE MURPHY delivered the opinion of the Court.

In *Rawlings* v. *Ray,* 312 U. S. 96, we decided that state statutes of limitations govern the time within which to enforce the liability imposed upon stockholders of insolvent national banks by assessments levied by the Comptroller of the Currency; that the question as to the time when a complete and present cause of action arises in the receiver to enforce that liability by suit is a federal question; that nothing in the applicable statutes, 12 U. S. C. §§ 63, 64, 191, 192, prevents the Comptroller in making an assessment from fixing a later date for payment; and, that suit cannot be instituted prior to the date fixed for payment and a state statute of limitations does not begin to run until that date. In this case the Comptroller extended the time for payment beyond the date originally set, and we must decide whether time runs from the first or the final date fixed for payment.

Petitioner is the successor to the original receiver for the insolvent First National Bank of Chattanooga. On April 19, 1934, the Comptroller of the Currency levied an assessment against the Bank's stockholders for 100% of the par value of their shares, payable on May 26, 1934.[1] By successive orders entered on May 17, 1934, June 19, 1934, June 22, 1934, and March 11, 1935, the original maturity date of May 26, 1934, was extended to make the assess-

[1] This is the date given in the pleadings. However, the opinions of the courts below refer to May 23, 1934, as the first date fixed for payment.

ment payable on April 15, 1935. Notice of the assessment was given to all stockholders on March 13, 1935.

Respondent, as successor to the original executrix, represents the estate of C. C. Nottingham, which held stock of the Bank, to the extent of $138,000 par value, at the time of the assessment. No steps were taken to enforce against the estate the liability imposed by the assessment until August 2, 1935, when petitioner's predecessor filed an answer and a cross-bill in an action commenced on July 24, 1935, in the Chancery Court for Hamilton County, Tennessee, by the original executrix to require all creditors to appear and establish their claims.

The Chancery Court held that petitioner's assessment claim accrued on the date first fixed for payment, May 23, 1934,[2] and that the claim was barred by § 8225 of the Tennessee Code,[3] fixing a period of "six months from the date the cause of action thereon accrued" within which to enforce previously unmatured claims against decedents. The Court of Appeals affirmed, relying upon § 8604 of the Code [4] as well as § 8225. 25 Tenn. App. 230, 155 S. W. 2d 882. The Supreme Court of the State denied a petition for writ of certiorari. The importance of the question in the administration of insolvent national banks [5] and a conflict with the decision in *Strasburger* v. *Schram,* 68 App. D. C. 87, 93 F. 2d 246, caused us to grant certiorari.

---

[2] See Note 1, *supra.*

[3] Michie's Tennessee Code of 1938, Annotated.

[4] "Sec. 8604. *Time runs from accrual of right, not demand.* When a right exists, but a demand is necessary to entitle the party to an action, the limitation commences from the time the plaintiff's right to make the demand was completed, and not from the date of the demand."

[5] The double liability feature of national bank stock has been eliminated where there has been compliance with the provisions of the statute, but this does not apply to banks in difficulty prior to July 1, 1937, except as to stock issued after June 16, 1933. 12 U. S. C. § 64 (a).

Our starting point, of course, is *Rawlings* v. *Ray, supra.* That case adequately disposes of respondent's contention that no federal question is presented by this case; whether petitioner's cause of action was complete on May 26, 1934, or April 15, 1935, is a federal question, 312 U. S. at p. 98, which was duly raised and preserved by appropriate exceptions and assignments of error. And, even as we found nothing in the applicable statutes to question "the authority of the Comptroller in making an assessment to fix a later date for its payment," *id.* at p. 99, we see nothing in the pertinent legislation, 12 U. S. C. §§ 63, 64, 66, 191, 192, forbidding the Comptroller to extend the date fixed for payment within reasonable limits from time to time. Such extensions seem to be in accord with a long established practice designed to achieve the desirable result of avoiding excessive and unnecessary assessments.[6] See *Strasburger* v. *Schram,* 68 App. D. C. 87, 89; 93 F. 2d 246, 248. Compare *Korbly* v. *Springfield Institution for Savings,* 245 U. S. 330, where, in upholding the power of the Comptroller to withdraw one assessment and levy a later one, we emphasized the desirability of a large measure of administrative discretion and flexibility in the adjustment of assessments to the "exigencies of each case." p. 333.

Since the Comptroller has power to extend the time for payment, respondent was not required to pay until April 15, 1935, and prior to that time suit could not be instituted against her. *Rawlings* v. *Ray, supra,* p. 98. While the receiver enforces the liability created by the assessment, 12 U. S. C. §§ 191, 192, he does so subject to the direction of the Comptroller, *Kennedy* v. *Gibson,* 8 Wall.

[6] The record does not disclose the reason for the extensions of time here, but it appears that they were made at the request of a stockholders' committee which protested the necessity of a 100% assessment and asked for a reappraisal of the Bank's assets. See *Coffey* v. *Fisher,* 100 F. 2d 51, 52, involving the same assessment here considered.

498, 505. So petitioner did not have a complete and present cause of action until April 15, 1935. Since the words "from the date the cause of action accrued thereon," as used in § 8225 of the Tennessee Code, seem to have their usual meaning and refer to the time when suit may be instituted,[7] it follows that petitioner's claim, filed on August 2, 1935, was in time.

Respondent stresses § 8604 of the Code.[8] But, as pointed out above, petitioner had no right to demand payment before April 15, 1935, so, even if § 8604 applies, it does not bar petitioner's claim.

Respondent mistakenly relies upon *Pufahl* v. *Estate of Parks,* 299 U. S. 217, which has no application, because in that case "we were not considering or deciding the question of the application of a statute of limitations to a suit against a stockholder upon an assessment made by the Comptroller where payment was not required before a specified date, prior to which no suit could be maintained." *Rawlings* v. *Ray, supra,* p. 99.

We are not unmindful that it is desirable to close decedents' estate speedily, but there is no warrant in the federal legislation for allowing that consideration to limit the power of the Comptroller to extend the time for payment of an assessment.

The judgment below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

---

[7] See *Jones* v. *Whitworth,* 94 Tenn. 602, 616, 30 S. W. 736; *Gillespie* v. *Broadway National Bank,* 167 Tenn. 245, 249, 68 S. W. 2d 479; *Knoxville* v. *Gervin,* 169 Tenn. 532, 544, 89 S. W. 2d 348.

[8] See Note 4, *supra.*

MOTHER LODE COALITION MINES CO. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 94. Argued November 19, 1942.—Decided December 7, 1942.

1. An income tax return for the year 1934, in which the taxpayer had items of gross income (and related deductions) from a mining property, was the "first return . . . in respect of" the property within the meaning of § 114 (b) (4) of the Revenue Act of 1934, and the taxpayer's failure in that return to state whether it elected to have the depletion allowance for such property computed on the percentage basis foreclosed a claim of a percentage depletion allowance in its return for 1935,—notwithstanding that in 1934 the taxpayer had no net income and no basis for a depletion allowance. P. 223.
2. This construction of § 114 (b) (4) is in accord with the administrative interpretation evidenced by Article 23 (m)–5 of Treasury Regulations 86, which is consistent with the statute and supported also by practical considerations. P. 224.

125 F. 2d 657, affirmed.

CERTIORARI, 316 U. S. 660, to review the affirmance of a decision of the Board of Tax Appeals, 42 B. T. A. 596, sustaining the Commissioner's disallowance of a deduction for depletion in the computation of petitioner's income tax.

Mr. Paul E. Shorb, with whom *Messrs. Charles A. Horsky* and *John T. Sapienza* were on the brief, for petitioner.

Mr. Valentine Brookes argued the cause, and *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Samuel H. Levy, Carlton Fox,* and *Archibald Cox* were on the brief, for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

The ultimate question presented by this case is whether petitioner is entitled to a deduction in its 1935 income tax return for percentage depletion under § 114 (b) (4) of the

Revenue Act of 1934, 48 Stat. 680, which allowed the deduction from gross income in the case of mines, etc., of specified percentages of gross income, but not to exceed 50% of the net income computed without regard to depletion allowance, and required that:

"A taxpayer making his *first return under this title in respect of a property* shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, . . ."[1]

The pivotal question is whether petitioner's income tax return for 1934 or for 1935 was the first return in respect of its mining property within the meaning of § 114 (b) (4). During the tax year 1934, petitioner's copper mine was closed. In its 1934 income tax return, petitioner reported gross income from the sale of ore mined the previous year, but the deductions, most of which were attributed to "Shutdown Expense," were such that there was no net income. Petitioner claimed no depletion allowance in that return—depletion allowances prior to 1933 had exhausted petitioner's cost basis—and made no statement with regard to percentage depletion. In 1935, petitioner derived a net profit from the operation of its mine and claimed a deduction for percentage depletion, stating that it had elected percentage depletion for the future in its 1933

[1] Emphasis added.

return, filed under § 114 (b) (4) of the Revenue Act of 1932, 47 Stat. 169. The Commissioner disallowed the percentage depletion deduction for 1935, ruling that, under § 114 (b) (4) of the 1934 Act, petitioner's 1934 return was its first return in respect of its mining property and that its failure to make an affirmative election in that return constituted an election to compute depletion thereafter without reference to percentage depletion. Accordingly, the Commissioner made a deficiency determination which the Board of Tax Appeals sustained. The court below affirmed. 125 F. 2d 657. We granted certiorari because of an asserted conflict with the decision in *Pittston-Duryea Coal Co.* v. *Commissioner,* 117 F. 2d 436.[2]

Section 114 (b) (4) required petitioner to elect in its "first return under this title [income tax] in respect of a property" whether its depletion allowance was to be computed with or without regard to percentage depletion, and the method thus chosen became binding for the subsequent taxable years. Petitioner's 1934 return falls within the exact statutory definition of "first return." It was the first return filed under the 1934 Act, and it was "in respect of" the mining property since it listed items of gross income and deductions arising out of that property. Petitioner's failure there to state its election foreclosed any subsequent claim to percentage depletion. This has been the administrative interpretation. Article 23 (m)–5 of Regulations 86.[3] We think this regulation is

[2] In granting the writ, we excluded argument on the point, decided adversely to petitioner below, that its election to take percentage depletion in its 1933 return under the Revenue Act of 1932 made unnecessary a new election under the Revenue Act of 1934.

[3] This Article provides in part as follows: "In his first return made under Title I of the Act (for a taxable year beginning after December 31, 1933) the taxpayer must state as to each property with respect to which the taxpayer has any item of income or deduction whether he elects to have the depletion allowance for each such property for the taxable year computed with or without reference to percentage

binding because not only is it practically compelled by the words of § 114 (b) (4), but also it is a reasonable interpretation which, as will be shortly pointed out, is fair and workable in its operation.

Petitioner asserts that this interpretation fails to give effect to the meaning of § 114 (b) (4) as a whole, and contends that, when such effect is given, "first return" must mean the first return in which a depletion allowance could be claimed. The argument for this result runs as follows: Section 114 (b) (4) requires the taxpayer to state in its first return whether it elects to have "the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion," and then provides that "the depletion allowance in respect of such property for such year shall be computed according to the election thus made"; therefore, the "first return" must be one in which petitioner could elect to have the "depletion allowance . . . for the taxable year" computed with or without reference to percentage depletion; and, in its 1934 return, petitioner could not so elect because a percentage depletion allowance is limited in any case to 50% of net income and it had no net income.

The fallacy of this argument is apparent, and the fault lies in the final step. The statute provides for the election of a method of computation for the present and the future; it does not, contrary to petitioner's assertions, make the necessity for election depend upon whether an allowance actually results from the method of computation chosen. Petitioner could have elected in 1934 to have the depletion allowance for 1934 "computed with

depletion. . . . If the taxpayer fails to make such statement in the return in which the election should be so indicated, the depletion allowance for the year for which an election must be first exercised and for all succeeding taxable years will be computed without reference to percentage depletion."

or without regard to percentage depletion," and the computation could then have been made according to the method chosen. It so happened that petitioner was not entitled to any allowance in 1934; its depletable cost had been exhausted, and computation on the percentage basis would have resulted in nothing. So the choice had no significance for that year, *but*, that could be ascertained only after the computation was made. The idea that it would be absurd to compel an election until a deduction actually resulted, see *Pittston-Duryea Coal Co.* v. *Commissioner*, 117 F. 2d 436, 438, is best answered by the fact that the statute gave taxpayers an opportunity to elect a depletion program for the present and future years; nothing in it indicates that Congress was concerned with whether a depletion allowance actually resulted in each year from the program selected.

Petitioner's contentions really resolve into the proposition that "first return" means "first return made by a taxpayer having net income derived from a property." But the statute does not speak of first return showing net income, and there is nothing to indicate that such was Congress' intention.[4] Furthermore, as the court below pointed out, 125 F. 2d 657 at p. 659, if petitioner had a basis for cost depletion in 1934, it would have been put to an election in that year even though it had no net income, because cost depletion allowance is in no manner dependent upon the existence of net income. The fact

[4] Petitioner relies upon the remarks of Representative Disney, who offered an amendment to § 114 (b) (4) of the Internal Revenue Code, as part of the Revenue Act of 1942, which would have written the petitioner's interpretation into the statute with the explanation that the amendment clarified the original Congressional intent. Hearings Before House Committee on Ways and Means on Revenue Revision of 1942, 77th Cong., 2d Sess., p. 3489. However, this amendment was rejected in Committee. Section 145 (a) of the Revenue Act of 1942, approved October 21, 1942, eliminates the necessity of election, but nothing in its legislative history casts any light upon our problem.

that petitioner's depletable cost was exhausted is no reason for expanding the statutory definition. Section 114 (b) (4) is a liberal offer limited to those who meet the exact statutory terms. *Riley Investment Co.* v. *Commissioner,* 311 U. S. 55.

Strong practical considerations also support the Commissioner's construction of the statute and warrant rejection of petitioner's "first return with net income" theory. All taxpayers are put on an equal basis if they must elect their depletion program in the first return filed "in respect of a property"; a taxpayer, situated as petitioner, is not then free to defer election until it has net income at some future date when conditions may be such that its election can be made more advisedly than that of its competitors. Secondly, administrative simplicity and certainty are best achieved by the Commissioner's interpretation. If, by "first return made by a taxpayer having net income derived from a property," petitioner means first return for a year in which there actually was net income, cf. *Kehoe-Berge Coal Co.* v. *Commissioner,* 117 F. 2d 439, it could not be known in some cases whether a taxpayer was put to its election in 1934 or a later year until after finally determining, perhaps after protracted litigation, whether or not the taxpayer had actual net income in 1934. The uncertainty and confusion thereby created would be most undesirable; a taxpayer could not intelligently plan its operations, and the Bureau of Internal Revenue would be compelled to keep open all the returns for subsequent years in order to check the later depletion deductions. If it is petitioner's contention that the critical fact of net income is disclosed by the face of the return, the obligation to state an election would depend to some extent upon the errors of the taxpayer, a consequence which it is not to be presumed that Congress intended.

The judgment below is

Affirmed.

UNITED CARBON CO. ET AL. *v.* BINNEY & SMITH CO.

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

No. 71. Argued November 13, 1942.—Decided December 7, 1942.

1. Product claims of Patent No. 1,889,429, to Weigand and Venuto, "1. Substantially pure carbon black in the form of commercially uniform, comparatively small, rounded, smooth aggregates having a spongy or porous interior. 2. As an article of manufacture, a pellet of approximately one-sixteenth of an inch in diameter and formed of a porous mass of substantially pure carbon black," *held,* bad for indefiniteness. P. 232.
2. A patentee may not broaden his claims by describing the product in terms of function. P. 234.
3. An invention must be capable of accurate definition, and it must be accurately defined, to be patentable. P. 237.

125 F. 2d 255, 126 F. 2d 3, reversed.

CERTIORARI, 316 U. S. 657, to review the reversal of a judgment, 37 F. Supp. 779, dismissing a suit for infringement of a patent.

Mr. Hugh M. Morris, with whom *Messrs. George P. Dike, Arthur M. Smith,* and *Osman E. Swartz* were on the brief, for petitioners.

Mr. Dean S. Edmonds, with whom *Mr. William H. Davis* was on the brief, for respondent.

Mr. Edward F. McClennen filed a brief on behalf of Godfrey L. Cabot, Inc., as *amicus curiae,* urging reversal.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Respondent sued for infringement of Patent No. 1,889,429, issued to Weigand and Venuto, relating to carbon black in aggregated form and a process for its conversion

to that form. Its complaint was particularized to apply only to claims 1 and 2 of the patent, which are product claims and not process claims. The District Court found these claims invalid as lacking novelty and invention and because they failed to define the product asserted to have been invented in such clear, definite, and exact terms as required by patent law. It also found no infringement. 37 F. Supp. 779. The Circuit Court of Appeals held to the contrary on each of these propositions and reversed. 125 F. 2d 255. The importance of the questions in the case prompted us to grant certiorari. 316 U. S. 657.

Carbon black has been manufactured from natural gas since the 1870's. At present the most extensive of its many uses is as a binder in automobile tires.[1] The particles of carbon black in its original form are extremely fine and dispersible. They are smaller than the length of a light wave, having a diameter of about one-millionth of an inch. One pound of them is said to present surfaces sufficient to cover 12 or 13 acres. Unprocessed carbon black weighs but ten pounds or less per cubic foot.

The fineness and dispersibility of the substance causes it to raise in clouds of dust when handled, with consequent losses, discomfort to workmen, and difficulties in manufacturing processes. Since 1915, when carbon black first came to be widely used in the manufacture of rubber, many attempts have been made to cope with the dust problem. In many cases, mixing rooms were segregated at great expense from other parts of rubber factories, and the mills where the carbon black was mixed into the rubber were enclosed to confine the clouds of dust.

Efforts were made to prevent as well as to control the dust. Compressing the carbon black to force out the

[1] Carbon black is also used as an ingredient in various rubber, wax and resin compositions, phonograph records, paints and lacquers, printer's ink, and carbon paper.

air and increase its density met with some, but only indifferent, success. Attempts were made to prevent dust by the use of binders in the carbon black to make the particles adhere. These were not satisfactory, since the binders were unwanted and sometimes injurious substances and, at best, foreign matter to rubber formulas. Wetting and drying the carbon black also proved unsatisfactory, since this caused the particles to adhere in such manner that the aggregate product was not sufficiently friable (i. e., breakable) and dispersible when mixed with other substances.

Weigand and Venuto experimented extensively, and the patent in litigation is the outcome. They mixed carbon black with a liquid such as water; displaced the water with another liquid, such as gasoline, which was substantially immiscible with the first and had a greater ability to wet the carbon particles; agitated the mixture until the water was substantially free from carbon; and finally removed the gasoline by evaporation. As it apparently must in order to assert invention and infringement, respondent argues that Weigand and Venuto solved the problem of carbon black dust by a product consisting of carbon black aggregates formed without the use of any binder, sufficiently hard and flowable to prevent the formation of dust, yet sufficiently friable and dispersible for use as a component in the manufacture of rubber and other products.

Manufacture was undertaken, one Glaxner being employed to put into use the process taught by this patent. He soon bettered his instruction by devising a simpler and much less expensive process employing but one liquid. His process was the subject of another patent,[2] and at once superseded that of the patent in suit, which thereupon became obsolete. Several other processes to achieve

---

[2] Glaxner, Re. No. 21,379.

very similar results, including those used by the petitioner, have also been developed and patented.[3] Commercial success of respondent's process was short-lived, and the really impressive commercial success has been achieved since the development of the Glaxner process.[4]

The product claims which respondent says the petitioner's product infringed, regardless of the process by which it was made, read as follows: "1. Sustantially (*sic*) pure carbon black in the form of commercially uniform, comparatively small, rounded, smooth aggregates having a spongy or porous interior. 2. As an article of manufacture, a pellet of approximately one-sixteenth of an inch in

[3] Billings & Offutt, Re. No. 19,750; Nos. 2,039,766, 2,120,540, 2,120,541; Price, No. 2,127,137; Heller & Snow, No. 2,131,686; Offutt, No. 2,134,950; Grote, Re. No. 21,390.

[4] Commercial success may be gauged by reference to the following statistics on the sales of pounds of carbon black aggregates:

Year	*Sales by respondent*	*Sales by petitioner*			*Sales by Cabot Co. "Cabot" process*
		*"Extrusion" process**	*"Sayre" process†*	*"Cabot" process‡*	
1929	20,000				
1930	164,000				
1931	194,000	(Total gross sales price, about $2,000.)			
1932	281,000	(In this year the Weigand and Venuto process was superseded by the Glaxner process, which made possible the elimination of a price premium.)			
1933	800,000				8,000,000
1934	3,300,000	2,000			23,000,000
1935	15,000,000	84,875		3,656,294	39,000,000
1936	30,000,000	7,031,000		18,135,756	62,000,000
1937	44,000,000	26,205,000	680,363	11,928,742	58,000,000
1938	53,000,000	29,858,000	3,747,538	11,298,887	45,000,000
1939	97,000,000	48,578,000	17,752,439	11,533,200	73,000,000

*In this process, carbon black mixed with water is forced through small apertures, dried, and broken into short cylinders.

†This process, like the Glaxner process, employs but one liquid, water, and agitation.

‡This is a "dry" process, employing only agitation to cause the particles of carbon black to adhere. It is the subject of a number of patents, the first of which was applied for by Billings and Offutt on July 18, 1932 and issued as No. 2,120,540. Manufacture is under license of the Cabot Company, patent owner.

diameter and formed of a porous mass of substantially pure carbon black."

Section 4888 of the Revised Statutes, 35 U. S. C. § 33, requires that the applicant for a patent "shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery." As the Court recently stated in *General Electric Co.* v. *Wabash Corp.*, 304 U. S. 364, 369:

"Patents, whether basic or for improvements, must comply accurately and precisely with the statutory requirements as to claims of invention or discovery. The limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others and the assurance that the subject of the patent will be dedicated ultimately to the public. The statute seeks to guard against unreasonable advantages to the patentee and disadvantages to others arising from uncertainty as to their rights. The inventor must 'inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not.' The claims 'measure the invention.' . . . In a limited field the variant must be clearly defined."

The District Court found that the claims did not meet these requirements, and the Circuit Court of Appeals held that they did. Much testimony was directed to this question at the trial, and it has been discussed in the briefs and argument in this Court. Petitioner seeks reversal on the grounds of anticipation and non-infringement. The scope and sufficiency of the claims in suit necessarily present themselves as preliminary problems in the resolution of these ultimate issues. The courts in determining the questions of invention and infringement brought to them by respondent, no less than the parties-litigant, need and may insist upon the precision enjoined by the statute.

To sustain claims so indefinite as not to give the notice required by the statute would be in direct contravention of the public interest which Congress therein recognized and sought to protect. Cf. *Muncie Gear Works* v. *Outboard, Marine & Mfg. Co.*, 315 U. S. 759.

Here, as in many other cases, it is difficult for persons not skilled in the art to measure the inclusions or to appreciate the distinctions which may exist in the words of a claim when read in the context of the art itself. The clearest exposition of the significance which the terms employed in the claims had for those skilled in the art was given by the testimony of Weigand, one of the patentees, whom respondent called as its witness. Weigand was employed as Director of Research of the Columbian Carbon Company, whose stock respondent owned, and for whom respondent acted as sole selling agent. His testimony in this respect was given principally upon cross-examination, but it was in no wise impeached or contradicted, and is borne out by that of other witnesses. From it we learn that "substantially pure" refers, not to freedom from ash and other impurities, but rather to freedom from binders; "commercially uniform" means only the degree of uniformity demanded by buyers; "comparatively small" is not shown to add anything to the claims, for nowhere are we advised what standard is intended for comparisons; "spongy" and "porous" are synonymous, and relate to the density and gas content of aggregates of carbon black. Although sponginess or porosity is not a necessary attribute of a friable substance, it does contribute to the friability of aggregates of carbon black. It is of value only in that regard. A spongy or porous aggregate of carbon black may be so friable as to permit of the formation of dust; and, on the other hand, it is conceivable that it might not be sufficiently friable to mix satisfactorily with other substances such as those used in the manufacture of rubber products. The correct degree of friability can be ascer-

tained only by testing the performance of the product in actual processes of manufacture of products of which carbon black is a component. A "pellet" of carbon black is "a spheroidal shaped aggregate that has substance and strength to it." For "strength" "we have this rough and ready test: does it survive under gentle rubbing of the fingers. I would not say that is an adequate test to predicate rubber behavior on, but it is a rough and ready test"; and if it responds to that test it is a pellet within the meaning of the claim. Finally, what on first impression appears to be reasonable certainty of dimension disappears when we learn that "approximately one-sixteenth of an inch in diameter" includes a variation from approximately 1/4th to 1/100th of an inch.

So read, the claims are but inaccurate suggestions of the functions of the product, and fall afoul of the rule that a patentee may not broaden his claims by describing the product in terms of function. *Holland Furniture Co.* v. *Perkins Glue Co.*, 277 U. S. 245, 256–258; *General Electric Co.* v. *Wabash Corp., supra,* at 371–372.

Respondent urges that the claims must be read in the light of the patent specification,[5] and that as so read they are sufficiently definite. Assuming the propriety of this

---

[5] This states in pertinent part that:

"The main object of our invention is to secure carbon black having the desired dispersive properties, greater density, freedom from dust, freedom from gritty particles, less absorbed or occluded gases, reduced oil absorption than the ordinary powder form, and capable of considerable handling without crushing or dusting.

. . . . . .

"This process, if carried out under certain conditions, causes the carbon black to form into pellets which are hard enough to stand any ordinary shipment or handling without dusting, flying or breaking down, and which at the same time are easily crushed by moderate pressure, as between the fingers or by the pressures commonly employed in the rolls of rubber compounding machinery, printer's ink mixers and the like. The crushed particles have substantially their

method of construction, cf. *General Electric Co.* v. *Wabash Corp., supra,* at 373–375, it does not have the effect

---

original softness and the material disperses freely without leaving any particles of undispersed carbon in the material.

"While the pellet form is a very convenient form of the carbon black, the shape of the particles is not the most important characteristic of this novel carbon black.

. . . . .

"The pellets are very porous, of substantially spherical or globular form, have a smooth somewhat lustrous outer surface which is not easily broken by handling, are more compact than untreated carbon, are fragile under light pressure, and may be easily reduced to soft minute particles which cannot be told from the original particles except that possibly they have a more unctuous feel. They somewhat resemble lead shot and may be rolled in the hand without dirtying or dusting. Apparently the outer surface portion or shell of each pellet is slightly more compact than the inner part, but still porous.

"In shipping or storing, we find that approximately twice the number of pounds of these pellets can be placed in a container of a given size than is the case with the untreated carbon black. Thus, expense is reduced for shipment or storage.

. . . . .

"There are various factors which enter into the process and these may be varied to get the pellets harder or softer or larger or smaller. Among these factors are the thickness of the paste, the amount of gasoline used, the adding of the gasoline in bulk or a little at a time, speed of agitation, temperature, type of gasoline used, and character of the carbon black.

. . . . .

"If small pellets are desired, a lesser amount of gasoline or other liquid should be used in respect to the amount of water and carbon, and greater agitation should be employed. To secure large pellets, we use a larger amount of gasoline and slower agitation. In practice, we do not consider a size larger than one-quarter of an inch desirable. There are many kinds, grades or varieties of carbon black and often identification of the particular kind or grade is difficult. With our improved process the different kinds or grades may be made into pellets of different sizes so that identification is facilitated, for instance, very small pellets may be made for printer's ink and larger ones for rubber, etc."

claimed, for the description in the specification is itself almost entirely in terms of function. It is therefore unnecessary to consider whether the rejection of certain claims [6] by the Patent Office might in turn deprive the specification of any curative effect in this regard. Cf. *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 311 U. S. 211; *Exhibit Supply Co.* v. *Ace Patents Corp.*, 315 U. S. 126.

The statutory requirement of particularity and distinctness in claims is met only when they clearly distinguish what is claimed from what went before in the art and clearly circumscribe what is foreclosed from future enterprise. A zone of uncertainty which enterprise and experimentation may enter only at the risk of infringement claims would discourage invention only a little less than unequivocal foreclosure of the field. Moreover, the claims must be reasonably clear-cut to enable courts to determine whether novelty and invention are genuine. Congress has provided that a patent may be awarded only for a new and useful manufacture "not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof." R. S.

---

[6] To meet objections of the examiner, the following product claims were withdrawn in course of prosecution of the application:

"4. A pellet formed of (substantially pure)* soft carbon black particles, the pellet being sufficiently hard to withstand ordinary shipment or handling, but readily breaking down to a fine state of subdivision upon the application of slight pressure.

"8. Soft carbon black particles cohering in small masses of substantially uniform size and having smooth outer surfaces.

"2. Carbon black in the form of pellets of sponge-like or porous structure.

"7. A carbon black pellet formed of soft carbon black, the pellet having sufficient hardness to withstand ordinary shipment or handling without dusting, but sufficiently fragile to permit reduction to the original fine state of subdivision upon the application of light pressure."

*Added by amendment.

§ 4886, 35 U. S. C. § 31. While we do not find it necessary to consider questions of novelty and invention, in the view we take of the claims in suit, a mere reading of prior art patents shows how, if they are read with the liberality and inclusiveness claimed for those in suit, they describe products, if not identical, at least of confusing similarity.[7] Whether the vagueness of the claim has its source in the language employed or in the somewhat indeterminate character of the advance claimed to have been made in the art is not material. An invention must be capable of accurate definition, and it must be accurately defined, to be patentable. Cf. *General Electric Co.* v. *Wabash Corp., supra,* at 372–373.

We are of opinion that the claims in litigation are bad for indefiniteness, and have no occasion to consider questions of novelty, invention, and infringement. The judgment below is

Reversed.

---

[7] The prior Knowlton and Hoffman patent, No. 1,286,024, stated in the specification that "Instead of using the lampblack in its natural condition, we prepare and treat the fine powder so as to cause its concretion into friable grains or small lumps, dry and substantially free from dust, and in this form incorporate it with the rubber on the roller mill . . . the friability of the lumps or grains permitting a uniform distribution of the filler throughout the rubber." Claim No. 7 of this patent is: "The method of compounding rubber with lampblack which consists in mixing the lampblack with water and a binder, producing a granular condition, evaporating the water, and incorporating the dry, granular lampblack with rubber on a heated mixing mill."

Claim No. 10 of the prior Coffin and Keen patent, No. 1,561,971, is: "As a new article of manufacture, dried pulverulent material in the form of very small individually dried friable globular masses composed of lightly cohering particles of the material."

SHARPE *v.* BUCHANAN, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 525. Decided December 14, 1942.

Where a judgment of the Circuit Court of Appeals affirming the District Court's refusal of habeas corpus was upon the sole ground that the applicant, who was confined in a state penitentiary, had not applied for habeas corpus to the state courts, this Court vacated the judgment because, after the filing of the petition for certiorari here, habeas corpus had been expressly refused by the State's highest court. P. 238.

121 F. 2d 448, vacated.

PETITION for writ of certiorari to review the affirmance of a judgment denying habeas corpus, 36 F. Supp. 386.

Howard M. Sharpe, pro se.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted and the petition for certiorari is also granted. It appears from the record that, after hearing, the District Court denied an application for habeas corpus filed by petitioner, who is confined in a state penitentiary pursuant to a judgment of conviction of a state court. The Circuit Court of Appeals affirmed the District Court's order, 121 F. 2d 448, on the sole ground that petitioner had not exhausted his state remedies by applying to the state courts for habeas corpus, although an application for a writ of error coram nobis had previously been denied by the Kentucky Court of Appeals. *Sharpe* v. *Commonwealth*, 284 Ky. 88, 143 S. W. 2d 857. The Circuit Court of Appeals denied a petition for rehearing, when it appeared that an application for habeas corpus, filed in a state court after the Circuit Court of Appeals had rendered its judgment, was still pending on appeal in the

Kentucky Court of Appeals. After the petition for certiorari was filed here, the Kentucky Court of Appeals affirmed the state court's order denying habeas corpus. *Sharpe* v. *Commonwealth*, 292 Ky. 86, 165 S. W. 2d 993. It thus appears that this obstacle to a consideration of the merits of petitioner's application, which the Circuit Court of Appeals encountered, has now been removed. The judgment is therefore vacated, without costs, and the cause remanded to the Circuit Court of Appeals for such further proceedings as it may deem appropriate.

So ordered.

GARRETT *v.* MOORE-McCORMACK CO., INC. ET AL.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 67. Argued November 12, 1942.—Decided December 14, 1942.

1. In a suit by a seaman in a state court for damages under § 33 of the Merchant Marine Act and for maintenance and cure, the rights of the parties are measured by the federal statute and admiralty principles. P. 243.
2. The question whether a state court, in an action for damages under § 33 of the Merchant Marine Act and for maintenance and cure, protected all the substantial rights of the parties under controlling federal law is a federal question reviewable under § 237 (b) of the Judicial Code. P. 245.
3. A shipowner, who, in defense of an action by a seaman for personal injuries, sets up the seaman's release, is under the burden of proving that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights. The adequacy of the consideration and the nature of the medical and legal advice available to the seaman at the time of signing the release are relevant to an appraisal of this understanding. P. 246.
4. This general admiralty rule applies not only to actions for maintenance and cure but also to actions for damages under § 33 of the Merchant Marine Act. P. 248.
5. Section 33 of the Merchant Marine Act is to be liberally construed for the seaman's protection; it is an integral part of the maritime law, and rights fashioned by it are to be implemented by admiralty rules not inconsistent with the Act. P. 248.

6. The right of a seaman suing in a Pennsylvania court under § 33 of the Merchant Marine Act to be free from the burden of proof imposed by Pennsylvania law upon one attacking the validity of a written release, is a substantive right inherent in his cause of action. P. 249.

344 Pa. 69, 23 A. 2d 503, reversed.

CERTIORARI, 316 U. S. 656, to review the affirmance of a judgment *non obstante veredicto* rendered against the present petitioner in a suit for damages and for maintenance and cure.

Mr. Abraham E. Freedman, with whom *Mr. Milton M. Borowsky* was on the brief, for petitioner.

Mr. Rowland C. Evans, Jr. for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner was injured while working as a seaman for respondent on a vessel traveling between the United States and European ports, and spent a number of months in hospitals in Gdynia, Poland, and in the United States. He brought this suit in a Pennsylvania state court for damages pursuant to § 33 of the Merchant Marine (Jones) Act,[1] and for maintenance and cure.[2] The Pennsylvania courts, as this litigation evidences, are apparently quite willing to make themselves available for the enforcement of these rights.

Petitioner attributed his condition to a blow by a hatch cover which allegedly fell on him through respondent's

---

[1] 46 U. S. C. 688.

[2] The right of a seaman to recover damages for negligent injury arises under the Jones Act, and the right to maintenance and cure, irrespective of negligence, arises under the law of admiralty. These rights are independent and cumulative. *Pacific S. S. Co.* v. *Peterson,* 278 U. S. 130, 138. For a general discussion of maintenance and cure, see *The Osceola,* 189 U. S. 158; *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 371; *Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525, 527.

negligence. Respondent joined issue generally, contested the extent of any injuries received, and further contended that if serious injuries did exist they were caused by a fight in Copenhagen or by accidents prior to the voyage. As an additional defense the respondent also alleged that for a consideration of $100 petitioner had executed a full release. Denying that he had any knowledge of having signed such an instrument, the petitioner asserted that, if his name appeared on it, his signature was obtained through fraud and misrepresentation, and without "legal, binding and valid consideration."

The petitioner did execute a release for $100 several days after his return to this country. His testimony was that his discussion with respondent's claim agent took place while he was under the influence of drugs taken to allay the pain of his injury, that he was threatened with imprisonment if he did not sign as directed, and that he considered the $100 a payment of wages.[3] The respondent's evidence was that the $100 was paid not for wages but to settle all claims growing out of the petitioner's injuries, that the petitioner had not appeared to be under the influence of drugs, and that no threats of any kind were made.

Upon this and much other evidence relating to the cause and extent of the injuries, the jury rendered a verdict for the petitioner for $3000 under the Jones Act, and $1000 for maintenance and cure.

Respondent made a motion for a new trial and judgment *non obstante veredicto* which under the Pennsylvania

[3] There were two elements of the wage dispute: (a) whether wages should be computed at $50.00 or $72.50 a month; (b) whether, since petitioner was left in a hospital in Poland and could not return with his ship, he should have been paid wages until he actually arrived in his home port. He was paid only up to the time he left the vessel. There is clear authority to support a claim for wages to the end of the voyage for which petitioner had been signed. *The Osceola, supra,* 175.

practice was submitted to the trial court *en banc*.[4] That court gave judgment to the defendant *non obstante veredicto*, not upon an appraisal of disputed questions of fact concerning the accident, but because of a conclusion that petitioner had failed to sustain the burden of proof required under Pennsylvania law to invalidate the release. It conceded that, "in admiralty cases, the responsibility is on the defendant to sustain a release rather than on a plaintiff to overcome it," but concluded that since petitioner had chosen to bring his action in a state, rather than in an admiralty, court, his case must be governed by local, rather than admiralty principles. Under the Pennsylvania rule, one who attacks the validity of a written release has the burden of sustaining his allegation by "clear, precise, and indubitable" evidence, meaning evidence "that is not only found to be credible but of such weight and directness as to make out the facts alleged beyond a reasonable doubt." Witnesses who testify against the release must not only be credible, but "distinctly remember the facts to which they testify and narrate the details exactly." The court held that, since the petitioner had not sustained this burden of proof, the trial judge should have withdrawn the case from the jury.

The Supreme Court of Pennsylvania took a somewhat different view. It held that in an action of this sort the Pennsylvania court was obligated "to apply the federal law creating the right of action in the same sense in which it would have been applied in the federal courts." However, it affirmed the judgment in the belief that the rule as to burden of proof on releases does not affect the substantive rights of the parties, but is merely procedural, and is therefore controlled by state law.

---

[4] In Pennsylvania the trial judge does not pass upon such motions alone; instead, they are heard and decided by three judges of the court sitting *en banc*. Purdon, Penn. Stat. Ann., Vol. 12, Par. 680.

I. Respondent's argument that the Pennsylvania court should have applied state rather than admiralty law in measuring the rights of the parties cannot be sustained.

We do not have in this case an effort of the state court to enforce rights claimed to be rooted in state law. The petitioner's suit rested on asserted rights granted by federal law and the state courts so treated it. Jurisdiction of the state court to try this case rests solely upon § 33 of the Jones Act and upon statutes traceable to the Judiciary Act of 1789 which "in all civil causes of admiralty and maritime jurisdiction" saves to suitors "the right of a common-law remedy where the common law is competent to give it." [5] These statutes authorize Pennsylvania courts to try cases coming within the defined category.[6] Whether Pennsylvania was required by the Acts to make its courts available for those federal remedies, or whether it could create its own remedy as to maintenance and cure based on local law, we need not decide;[7] for, having voluntarily opened its courts to petitioner, the questions are whether Pennsylvania was thereupon required to give to petitioner the full benefit of federal law and, if so, whether it failed to afford that benefit.

There is no dearth of example of the obligation on law courts which attempt to enforce substantive rights arising from admiralty law to do so in a manner conforming to admiralty practice. Contributory negligence is not a barrier to a proceeding in admiralty or under the Jones Act, and the state courts are required to apply this rule in Jones

---

[5] 28 U. S. C. § 371.

[6] *Engel* v. *Davenport*, 271 U. S. 33, 37, 38 (Jones Act); *The Belfast*, 7 Wall. 624, 644; *Leon* v. *Galceran*, 11 Wall. 185, 187–188; *Panama R. Co.* v. *Vasquez*, 271 U. S. 557, 560–561. The last three cases involve non-statutory actions.

[7] *The Hamilton*, 207 U. S. 398, 404; *Just* v. *Chambers*, 312 U. S. 383, 391.

Act actions. *Beadle* v. *Spencer,* 298 U. S. 124. Similarly state courts may not apply their doctrines of assumption of risk in actions arising under the Act. *The Arizona* v. *Anelich,* 298 U. S. 110; *Socony-Vacuum Co.* v. *Smith,* 305 U. S. 424. State courts, whether or not applying the Jones Act to actions arising from maritime torts, have usually attempted, although not always with complete success, to apply admiralty principles.[8] The federal courts, when treating maritime torts in actions at law rather than in suits in admiralty, have also sought to preserve admiralty principles whenever consonant with the necessities of common law procedure.[9]

This Court has specifically held that the Jones Act is to have a uniform application throughout the country, unaffected by "local views of common law rules." *Panama R. Co.* v. *Johnson,* 264 U. S. 375, 392. The Act is based upon, and incorporates by reference, the Federal Employers' Liability Act, which also requires uniform interpretation. *Second Employers' Liability Cases,* 223 U. S. 1, 55 *et seq.* This uniformity requirement extends to the type of proof necessary for judgment. *New Orleans & Northeastern R. Co.* v. *Harris,* 247 U. S. 367.

In many other cases this Court has declared the necessary dominance of admiralty principles in actions in vindication of rights arising from admiralty law.[10] *Belden* v.

---

[8] *Colonna Shipyard* v. *Bland,* 150 Va. 349, 358, 143 S. E. 729 (contributory negligence); *Paulsen* v. *McDuffie,* 4 Cal. 2d 111, 47 P. 2d 709 (assumption of risk); *Lieflander* v. *States S. S. Co.,* 149 Ore. 605, 42 P. 2d 156 (burden of proof).

[9] *Berwind-White Coal Mining Co.* v. *Eastern Steamship Corp.,* 228 F. 726; *Port of New York Stevedoring Corp.* v. *Castagna,* 280 F. 618.

[10] *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, 159; *Carlisle Packing Co.* v. *Sandanger,* 259 U. S. 255, 259; *Messel* v. *Foundation Co.,* 274 U. S. 427, 434; and see *Schuede* v. *Zenith*

Chase, 150 U. S. 674, an 1893 decision which respondent relies upon as establishing a contrary rule, has never been thus considered in any of the later cases cited.

It must be remembered that the state courts have concurrent jurisdiction with the federal courts to try actions either under the Merchant Marine Act or in personam such as maintenance and cure. The source of the governing law applied is in the national, not the state, government.[11] If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the State would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law.[12] And admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State.[13] So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so raises a federal question reviewable

---

S. S. Co., 216 F. 566. Disagreement over the Constitutional issues of the cases in the Jensen line has not extended to this principle. Cf. *The Lottawanna,* 21 Wall. 558, 575; *Detroit Trust Co.* v. *The Thomas Barlum,* 293 U. S. 21, 43.

[11] *The Steamer St. Lawrence,* 1 Black 522, 526–527.

[12] *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

[13] *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 242. Cf. *The Hamilton, supra.*

here under § 237 (b) of the Judicial Code, 28 U. S. C. § 344 (b).[14]

II. A seaman in admiralty who attacks a release has no such burden imposed upon him as that to which the Pennsylvania rule subjects him. Our historic national policy, both legislative and judicial, points the other way. Congress has generally sought to safeguard seamen's rights. The first Congress, on July 20, 1790, passed a protective act for seamen in the merchant marine service, safeguarding wage contracts, providing summary remedies for their breach, and requiring shipowners to keep on board fresh medicines in condition for use. 1 Stat. 131. The fifth Congress, July 16, 1798, 1 Stat. 605, originated our present system of marine hospitals for disabled seamen. The language of Justice Story, sitting on Circuit in 1823, described the solicitude with which admiralty has traditionally viewed seamen's contracts:

"They are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and *cestuis que trustent* with their trustees. . . . If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that *pro tanto* the bargain ought to be set aside as inequitable. . . . And on every occasion the court expects to be satisfied, that the compensation for every material alteration is entirely adequate to the diminution

[14] See *Claflin* v. *Houseman*, 93 U. S. 130, 136–42; cf. *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 483.

of right or privilege on the part of the seamen." *Harden* v. *Gordon*, Fed. Cas. No. 6047, at pp. 480, 485.

In keeping with this policy, Congress has itself acted concerning seamen's releases in respect to wages by providing that a release for wages must be signed by a seaman in the presence of a shipping commissioner, and that, even then, "any court having jurisdiction may on good cause shown set aside such release and take such action as justice shall require." [15] General Congressional policy is further shown in the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §§ 915, 916, in which all releases not made under the express terms of the Act are declared invalid.

The analogy suggested by Justice Story, in the paragraph quoted above, between seamen's contracts and those of fiduciaries and beneficiaries remains, under the prevailing rule treating seamen as wards of admiralty, a close one. Whether the transaction under consideration is a contract, sale, or gift between guardian and ward or between trustee and cestui, the burden of proving its validity is on the fiduciary. He must affirmatively show that no advantage has been taken; and his burden is particularly heavy where there has been inadequacy of consideration.[16]

The wardship theory has, as was recognized by the courts below, marked consequence on the treatment

---

[15] 46 U. S. C. § 597. See *Pacific Mail S. S. Co.* v. *Lucas*, 258 U. S. 266; *ibid.*, 264 F. 938.

[16] *Michoud* v. *Girod*, 4 How. 503, 556; cf. *Magruder* v. *Drury*, 235 U. S. 106, 120; *Thorn Wire Co.* v. *Washburn & Moen Co.*, 159 U. S. 423, 443; *Klamath Indians* v. *United States*, 296 U. S. 244, 254; and *United States* v. *Dunn*, 268 U. S. 121, 131. The admiralty rule is well within the bounds put on these other relationships, since many trustee-cestui or guardian and ward contracts are voidable on the election of the beneficiary. See *Wade* v. *Pulsifer*, 54 Vt. 45, 62; *Hatch* v. *Hatch*, 9 Ves. 291 (1804); and cf. Madden, Domestic Relations, Ch. 12, and 3 Bogert, Trusts, § 493.

given seamen's releases. Such releases are subject to careful scrutiny. "One who claims that a seaman has signed away his rights to what in law is due him must be prepared to take the burden of sustaining the release as fairly made with and fully comprehended by the seaman." *Harmon* v. *United States,* 59 F. 2d 372, 373. We hold, therefore, that the burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights. The adequacy of the consideration and the nature of the medical and legal advice available to the seaman at the time of signing the release are relevant to an appraisal of this understanding.[17]

This general admiralty rule applies not only to actions for maintenance and cure but also to actions under § 33 of the Merchant Marine Act. That law is to be liberally construed to carry out its full purpose, which was to enlarge admiralty's protection to its wards. *Warner* v. *Goltra,* 293 U. S. 155, 156, 162; *The Arizona* v. *Anelich,* 298 U. S. 110, 123. Being an integral part of the maritime law, rights fashioned by it are to be implemented by admiralty rules not inconsistent with the Act. *Socony-Vacuum Co.* v. *Smith,* 305 U. S. 424, 430.

III. The Pennsylvania Supreme Court has concluded that in solving problems of procedural, as distinguished from substantive, law, the law court may apply its own doctrine; and that the locus of burden of proof presents a procedural rather than a substantive question.

---

[17] See the *Harmon* case, *supra,* and *The Standard,* 103 F. 2d 437; *Sitchon* v. *American Export Lines,* 113 F. 2d 830; *Hume* v. *Moore-McCormack Lines,* 121 F. 2d 336. For somewhat comparable cases involving releases for personal injuries arising from nonmaritime torts, see *Union Pacific Ry. Co.* v. *Harris,* 158 U. S. 326; *Chesapeake & Ohio Ry. Co.* v. *Howard,* 178 U. S. 153, 167; *Texas & Pacific Ry. Co.* v. *Dashiell,* 198 U. S. 521. Cf. *Duncan* v. *Thompson,* 315 U. S. 1.

Much of what we have said above concerning the necessity of preserving all of the substantial admiralty rights in an action at law is incompatible with the conclusion of the court below. The right of the petitioner to be free from the burden of proof imposed by the Pennsylvania local rule inhered in his cause of action. Deeply rooted in admiralty as that right is, it was a part of the very substance of his claim and cannot be considered a mere incident of a form of procedure. *Central Vermont Ry. Co.* v. *White,* 238 U. S. 507, 511, 512; *Cities Service Co.* v. *Dunlap,* 308 U. S. 208, 212; and cf. *The Ira M. Hedges,* 218 U. S. 264, 270. Pennsylvania having opened its courts to petitioner to enforce federally created rights, the petitioner was entitled to the benefit of the full scope of these rights. The cause is reversed for action not inconsistent with this opinion.

Reversed.

DAVIS *v.* DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 86. Argued November 18, 1942.—Decided December 14, 1942.

An employee of a construction company, which was a contributor to the workmen's compensation fund of the State, was employed in or about the dismantling of an abandoned bridge over a navigable stream, which involved cutting steel from the bridge, lowering it to a barge and towing or hauling the barge, when loaded, to a storage place. He had helped to cut some steel from the bridge and, at the time of the accident, was working on the barge, examining steel after it had been lowered and cutting the pieces to proper lengths, as necessary. While so employed he fell, or was knocked, into the stream, in which his body was found. *Held:*

1. That there is no constitutional objection to an award to the decedent's widow under the Washington Act, which provides compensation for employees, or dependents of employees, such as de-

cedent, if application of the Act can be made "within the legislative jurisdiction of the State," and which expressly covers "all employers or workmen . . . engaged in maritime occupations for whom no right or obligation exists under the maritime laws"; and that the Federal Longshoremen's and Harbor Workers' Act, under which no administrative action had been taken, did not exclude such application of the state law. P. 255.

2. Certain employees such as decedent are in a twilight zone of jurisdiction; and the determination as to whether they are subject to a state act or to the Federal Longshoremen's and Harbor Workers' Act is largely a question of fact. P. 256.

3. Faced with this factual problem, courts will give presumptive weight to the conclusions of the appropriate federal authorities and to state statutes. P. 256.

4. Not only does the state Act in this case appear to cover the employee, aside from the constitutional consideration, but no conflicting process of federal administration is apparent. Under all the circumstances of the case, the Court relies on the presumption of constitutionality in favor of the state enactment. Giving full weight to the presumption, and resolving all doubts in favor of the Act, the Court holds that the Constitution is no obstacle to the petitioner's recovery. P. 258.

12 Wash. 2d 349, 121 P. 2d 365, reversed.

CERTIORARI, 316 U. S. 657, to review a judgment rejecting a claim made under the state workmen's compensation law.

Mr. Alfred J. Schweppe, with whom *Messrs. Maurice P. McMicken* and *Otto B. Rupp* were on the brief, for petitioner.

Mr. Edward S. Franklin, Assistant Attorney General of the State of Washington, with whom *Messrs. Smith Troy,* Attorney General, and *T. H. Little,* Assistant Attorney General, were on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

In this case the Washington Supreme Court held that the State could not, consistently with the Federal Constitution, make an award under its state compensation law to

the widow of a workman drowned in a navigable river. The circumstances which caused the court to reach this conclusion were these:

The petitioner's husband, a structural steelworker, was drowned in the Snohomish River while working as an employee of the Manson Construction and Engineering Company, a contributor to the Workmen's Compensation Fund of the State of Washington. Contributions of Washington employers to this Fund are compulsory in certain types of occupations, including the job for which the deceased had been employed. Rem. Rev. Stat. (1932) § 7674. That job was to dismantle an abandoned drawbridge which spanned the river. A part of the task was to cut steel from the bridge with oxyacetylene torches and move it about 250 feet away for storage there to await delivery to a local purchaser. The steel when cut from the bridge was lowered to a barge by a derrick; and when loaded, the barge was to be towed by a tug, hauled by cable, or, if the the current made it necessary, both towed and hauled to the storage point. Three vessels which had been brought there along the stream, for use by the employer in the work—a tug, derrick barge, and a barge,—were all licensed by the U. S. Bureau of Navigation. The derrick barge was fastened to the bridge; the barge was tied to the derrick barge. Deceased had helped to cut some steel from the bridge and, at the time of the accident, was working on the barge, which had not yet been completely loaded for its first carriage of steel to the place of storage. His duty appears to have been to examine the steel after it was lowered to the barge and, when necessary, to cut the pieces to proper lengths. From this barge he fell or was knocked into the stream in which his body was found.

The Washington statute provides compensation for employees and dependents of employees, such as decedent, if its application can be made "within the legislative jurisdiction of the state." A further statement of coverage

applies the Act to "all employers or workmen . . . engaged in maritime occupations for whom no right or obligation exists under the maritime laws." Rem. Rev. Stat., §§ 7674, 7693a. A line of opinions of this Court, beginning with *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 216, held that under some circumstances states could, but under others could not, consistently with Article III, Par. 2 of the Federal Constitution,[1] apply their compensation laws to maritime employees. State legislation was declared to be invalid only when it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." When a state could, and when it could not, grant protection under a compensation act was left as a perplexing problem, for it was held "difficult, if not impossible," to define this boundary with exactness.

With the manifest desire of removing this uncertainty so that workers whose duties were partly on land and partly on navigable waters might be compensated for injuries, Congress on October 6, 1917, five months after the *Jensen* decision, passed an Act attempting to give such injured persons "the rights and remedies under the workmen's compensation law of any state." 40 Stat. 395. May 17, 1920, this Court declared the Act unconstitutional. *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149. June 10, 1922, 42 Stat. 634, Congress made another effort to permit state compensation laws to protect these waterfront employees, but this second effort was also held invalid. *State of Washington* v. *W. C. Dawson & Co.,* 264 U. S. 219. March 4, 1927, came the federal Longshoremen's and Harbor Workers' Act, 33 U. S. C. § 901 *et seq.* Here again, however, Congress made clear its purpose to

[1] This Article extends the jurisdiction of federal courts "to all cases of admiralty and maritime Jurisdiction."

permit state compensation protection whenever possible, by making the federal law applicable only "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law."

Harbor workers and longshoremen employed "in whole or in part upon the navigable waters" are clearly protected by this federal act; but employees such as decedent here, occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation. This Court has been unable to give any guiding, definite rule to determine the extent of state power in advance of litigation, and has held that the margins of state authority must "be determined in view of surrounding circumstances as cases arise." *Baizley Iron Works* v. *Span,* 281 U. S. 222, 230. The determination of particular cases, of which there have been a great many, has become extremely difficult. It is fair to say that a number of cases can be cited both in behalf of and in opposition to recovery here.[2]

---

[2] Cases which lend strength to petitioner's position are: *Sultan Railway & Timber Co.* v. *Dept. of Labor,* 277 U. S. 135; *Grant Smith-Porter Co.* v. *Rohde,* 257 U. S. 469; *Millers' Underwriters* v. *Braud,* 270 U. S. 59; *Ex parte Rosengrant,* 213 Ala. 202, 104 So. 409, affirmed 273 U. S. 664; *State Industrial Board of N. Y.* v. *Terry & Tench Co.,* 273 U. S. 639, reported as *Lahti* v. *Terry & Tench Co.,* 240 N. Y. 292, 148 N. E. 527; *Alaska Packers Assn.* v. *Industrial Accident Commission,* 276 U. S. 467. And note the dissenting view in *Baizley Iron Works* v. *Span, supra; U. S. Casualty Co.* v. *Taylor,* 64 F. 2d 521, cert. den. 290 U. S. 639; *New Amsterdam Casualty Co.* v. *McManigal,* 87 F. 2d 332; *In re Herbert,* 283 Mass. 348, 186 N. E. 554. Cases aiding respondent's view: *Baizley Iron Works* v. *Span,* 281 U. S. 222; *Gonsalves* v. *Morse Dry Dock Co.,* 266 U. S. 171; *Nogueira* v. *N. Y., N. H. & H. R. Co.,* 281 U. S. 128; *Northern Coal Co.* v. *Strand,* 278 U. S. 142; *Employers' Liability Assurance Co.* v. *Cook,* 281 U. S. 233. For a number of state cases supporting each position, see the Circuit Court opinion in *Motor Boat Sales* v. *Parker,* 116 F. 2d 789. For discussion of the problem, see Morrison, Workmen's Compensation and the Maritime Law, 38 Yale L. J. 472.

The very closeness of the cases cited above, and others raising related points of interpretation, has caused much serious confusion.[3] It must be remembered that under the *Jensen* hypothesis, basic conditions are factual: Does the state law "interfere with the proper harmony and uniformity of" maritime law? Yet, employees are asked to determine with certainty before bringing their actions that factual question over which courts regularly divide among themselves and within their own membership. As penalty for error, the injured individual may not only suffer serious financial loss through the delay and expense of litigation, but discover that his claim has been barred by the statute of limitations in the proper forum while he was erroneously pursuing it elsewhere. See e. g., *Ayres* v. *Parker,* 15 F. Supp. 447. Such a result defeats the purpose of the federal act, which seeks to give "to these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation," and the state Acts such as the one before us, which aims at "sure and certain relief for workmen." [4]

---

[3] State industrial commissions have found real difficulty in determining their proper function in respect to maritime accidents. See the discussion of this problem at the 19th Annual Meeting of the International Association of Industrial Accident Boards and Commissions, Bull. 577 of the Bureau of Labor Statistics, p. 119 (1933). A question not mentioned above which has been considered in several cases is that of the jurisdiction to which are to be assigned accidents affecting persons loading boats while on the wharf; accidents affecting persons loading vessels while on the vessel; accidents affecting persons standing on either the vessel or the wharf who are knocked into the water. *Smith & Son* v. *Taylor,* 276 U. S. 179; *Vancouver S. S. Co.* v. *Rice,* 288 U. S. 445; *Minnie* v. *Port Huron Terminal Co.,* 295 U. S. 647.

[4] For this expression of federal policy, see the report of the Senate Committee on the Judiciary on the Longshoremen's and Harbor Workers' Compensation Act, S. R. 973, 69th Cong., 1st Sess., 16. For the expression of public policy of the Washington Act, see Rem. Rev. Stat. (1932) § 7673.

The horns of the jurisdictional dilemma press as sharply on employers as on employees. In the face of the cases referred to above, the most competent counsel may be unable to predict on which side of the line particular employment will fall. The employer's contribution to a state insurance fund may therefore wholly fail to protect him against the liabilities for which it was specifically planned. If this very case is affirmed, for example, the employer will not only lose the benefit of the state insurance to which he has been compelled to contribute and by which he has thought himself secured against loss for accidents to his employees; he must also, by virtue of the conclusion that the employee was subject to the federal act at the time of the accident, become liable for substantial additional payments. He will also be subject to fine and imprisonment for the misdemeanor of having failed, as is apparently the case, to secure payment for the employee under the federal act. 33 U. S. C. §§ 938, 932.

We are not asked here to review and reconsider the constitutional implications of the *Jensen* line of decisions. On the contrary, even the petitioner argues that such action might bring about still worse confusion in an already uncertain field, and points out that state and federal agencies have made real progress toward closing the gap. There is much force in this argument. Since 1917, Congress and the states have sought to restore order out of the confusion which resulted from the *Jensen* decision. That success has not finally been achieved is illustrated by the present case. The Longshoremen's Act, passed with specific reference to the *Jensen* rule, provided a partial solution. The Washington statute represents a state effort to clarify the situation. Both of these laws show clearly that neither was intended to encroach on the field occupied by the other. But the line separating the scope of the two being undefined and undefinable with exact

precision, marginal employment may, by reason of particular facts, fall on either side. Overruling the *Jensen* case would not solve this problem. In our decision in *Parker* v. *Motor Boat Sales,* 314 U. S. 244, we held that Congress has by the Longshoremen's Act accepted the *Jensen* line of demarcation between state and federal jurisdiction. Obviously, the determination of the margin becomes no simpler because the standard applied is considered to be embedded in a statute rather than in the Constitution. Nor can we gain assistance in this circumstance from the clause in the federal act which makes that act exclusive. 33 U. S. C. § 905. That section gains meaning only after a litigant has been found to occupy one side or the other of the doubtful jurisdictional line, and is no assistance in discovering on which side he can properly be placed.

There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the state compensation act.

Faced with this factual problem we must give great—indeed, presumptive—weight to the conclusions of the appropriate federal authorities and to the state statutes themselves. Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy. There, we are aided by the provision of the federal act, 33 U. S. C. § 920, which provides that, in proceedings under that act, jurisdiction is to be "presumed, in the absence of substantial evidence to the contrary." Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore

entitled to great weight and will be rejected only in cases of apparent error. It was under these circumstances that we sustained the Commissioner's findings in *Parker* v. *Motor Boat Sales, supra.*

In the instant case, we do not enjoy the benefit of federal administrative findings and must therefore look solely to state sources for guidance. We find here a state statute which purports to cover these persons, and which indeed does cover them if the doubtful and difficult factual questions to which we have referred are decided on the side of the constitutional power of the state. The problem here is comparable to that in another field of constitutional law in which courts are called upon to determine whether particular state acts unduly burden interstate commerce. In making the factual judgment there, we have relied heavily on the presumption of constitutionality in favor of the state statute. *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 188, 191.[5]

The benefit of a presumption is also given in cases of conflict of state or state and territorial workmen's compensation acts under the Full Faith and Credit clause. There, as here, the issue is a factual one arising from a clash of interest of two jurisdictions. In such a case, involving the question of whether the California or the Alaska Workmen's Compensation Act should apply to a

[5] See for other examples of our application of this principle, *Southern Ry. Co.* v. *King*, 217 U. S. 524 (statute regulating operation of interstate train at crossings); *Pure Oil Co.* v. *Minnesota*, 248 U. S. 158 (statute requiring the inspection of certain petroleum products while in interstate commerce); *Interstate Busses Corp.* v. *Holyoke Ry. Co.*, 273 U. S. 45 (requirement of certificate of convenience and necessity for interstate carrier); *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245 (state statute taxing interstate carrier); *Railway Express Agency* v. *Virginia*, 282 U. S. 440 (statute requiring corporation to hold local charter). For state commerce regulations approved by this Court, see the *Barnwell* case, *supra*, p. 188, n. 5.

503873—43——24

resident of California injured in Alaska who brought suit in California, this Court has said: "The enactment of the present statute of California was within state power and infringes no constitutional provision. *Prima facie* every state is entitled to enforce in its own courts its own statutes, lawfully enacted." *Alaska Packers Assn.* v. *Industrial Commission,* 294 U. S. 532, 547. And see *Pacific Ins. Co.* v. *Industrial Commission,* 306 U. S. 493, 503.

Not only does the state act in the instant case appear to cover this employee, aside from the constitutional consideration, but no conflicting process of administration is apparent. The federal authorities have taken no action under the Longshoremen's Act, and it does not appear that the employer has either made the special payments required or controverted payment in the manner prescribed in the Act. 33 U. S. C. § 914 (b) and (d). Under all the circumstances of this case, we will rely on the presumption of constitutionality in favor of this state enactment; for any contrary decision results in our holding the Washington act unconstitutional as applied to this petitioner. A conclusion of unconstitutionality of a state statute can not be rested on so hazardous a factual foundation here, any more than in the other cases cited.

Giving the full weight to the presumption, and resolving all doubts in favor of the Act, we hold that the Constitution is no obstacle to the petitioner's recovery. The case is remanded for proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE FRANKFURTER, concurring:

Any legislative scheme that compensates workmen or their families for industrial mishaps should be capable of simple and dependable enforcement. That was the aim of Congress when, with due regard for the diverse conditions in the several States, it afforded to harbor-workers the

benefits of state workmen's compensation laws. Act of October 6, 1917, c. 97, 40 Stat. 395, as amended by the Act of June 10, 1922, c. 216, 42 Stat. 634. But *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, and cases following, frustrated this purpose.

Such a desirable end cannot now be achieved merely by judicial repudiation of the *Jensen* doctrine. Too much has happened in the twenty-five years since that ill-starred decision. Federal and state enactments have so accommodated themselves to the complexity and confusion introduced by the *Jensen* rulings that the resources of adjudication can no longer bring relief from the difficulties which the judicial process itself brought into being. Therefore, until Congress sees fit to attempt another comprehensive solution of the problem, this Court can do no more than bring some order out of the remaining judicial chaos as marginal situations come before us. Because it contributes to that end, I join in the Court's opinion.

Theoretic illogic is inevitable so long as the employee in a situation like the present is permitted to recover either under the federal act (cf. *Parker* v. *Motor Boat Sales,* 314 U. S. 244; *Northern Coal Co.* v. *Strand,* 278 U. S. 142; *Nogueira* v. *N. Y., N. H. & H. R. Co.,* 281 U. S. 128; *Employers' Liability Assurance Co.* v. *Cook,* 281 U. S. 233) or under a state statute (cf. *Millers' Underwriters* v. *Braud,* 270 U. S. 59; *Alaska Packers Assn.* v. *Accident Comm'n,* 276 U. S. 467). That is the practical result, whether it be reached by the Court's path or that apparently left open under the Chief Justice's views. It is scant comfort to an employer that he may find he has committed a misdemeanor in not posting a bond as required by the federal act because he may have been advised, not unnaturally, that under the prior rulings of this Court the activities of his employees were local in nature and hence he could be sued only under state law.

MR. CHIEF JUSTICE STONE:

Any effort to lessen the uncertainties and complexities which have followed in the wake of the *Jensen* decision and its successors during the past twenty-five years deserves sympathetic consideration. But in the present state of the law, the Court's attempt to remove them by construing state workmen's compensation acts and the Longshoremen's and Harbor Workers' Act so that their coverages overlap, can hardly be deemed to be within judicial competence.

Section 3 of the Longshoremen's Act, 33 U. S. C. § 903, authorizes payment of compensation "only . . . if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." In *Parker* v. *Motor Boat Sales,* 314 U. S. 244, 250, we held, as a matter of construction of this clause of the statute, that it had adopted the rationale of *Jensen* and its followers, regardless of their constitutional validity, as "the measure by which Congress intended to mark the scope of the Act they brought into existence." We thus decided that, if by the application of the *Jensen* doctrine recovery could not constitutionally be had under state laws, the federal act conferred a right of recovery whether or not the *Jensen* decision was sound.

The Court's opinion in the present case seems to proceed upon the assumption that, if petitioner had filed a claim under the federal act, and the federal commissioner had awarded compensation, we would sustain his ruling, although the Court now holds that the state authorities erroneously concluded they were without constitutional power to make the award. Indeed, after our decision in *Parker* v. *Motor Boat Sales, supra,* petitioner's right of recovery under the federal act can hardly be doubted: not only could a federal commissioner properly decide

in favor of jurisdiction, but any candid application of the *Jensen* rule would seem to compel reversal of a federal commissioner who declined jurisdiction. See *Northern Coal Co.* v. *Strand,* 278 U. S. 142, and *Employers' Liability Assurance Co.* v. *Cook,* 281 U. S. 233, both cited to justify the federal award in the *Motor Boat* case, 314 U. S. at 247.

Congress by the enactment of the Longshoremen's and Harbor Workers' Act has left no room for an overlapping dual system of the sort which the Court now espouses by placing its decision on a new doctrine that recovery under either the state or the federal act is to be sustained if the case is thought a close one. Section 5 of the Act, 33 U. S. C. § 905, provides that the employer's liability under it "shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . ." See *Nogueira* v. *N. Y., N. H. & H. R. Co.,* 281 U. S. 128, 137. I cannot say that this section does not mean what it says. If there is liability under the federal act, that liability is exclusive. It follows that, in any case in which compensation might have been awarded under the federal act, a recovery under state law is in plain derogation of the terms of the federal statute, as construed in the *Motor Boat* case, *supra.*[1] Congress has made it our duty, before we sanction a recovery under state law, to ascertain that an award under the federal act can not be had.

[1] The Washington statute explicitly recognizes the exclusiveness of the federal statute, for in its coverage of employees engaged in maritime occupations it is made applicable only to those "for whom no right or obligation exists under the maritime laws." § 7693a.

The proposition that an employee in a "twilight zone" (where it is doubtful whether the federal or a state act applies) can recover under either act, not only controverts the words of the statute but also imposes an unauthorized burden on the employer. Besides being subjected to a liability which the statute forbids, he is compelled, in order to protect himself in the large number of cases in which the Court apparently would allow recovery under either act, to comply with both. Under the federal act, the employer must post security for compensation in a manner specified in § 32, 33 U. S. C. § 932, and failure to do so is a misdemeanor, § 38, 33 U. S. C. § 938, punishable by fine and imprisonment. Under state acts, there is an obligation to contribute insurance premiums, or take some comparable step, to say nothing of penal sanctions which a state may impose.

Congress has directed that if the case is within the federal statute, the employer shall be relieved of all other obligation. But in order to relieve the employee in a doubtful case of the necessity of filing two claims, one under each act, a double burden is imposed on the employer by an inadmissible construction of the federal act. The dual system of presumptions, which are to operate in favor of the employee, but apparently never against him, will serve to sustain an exercise of either state of federal jurisdiction in every case within the so-called "twilight zone." But this is accomplished only by depriving employers of the immunity which Congress sought to confer when it set up a system in which federal and state acts are made mutually exclusive.

Although the basic question in these cases is said to be "factual," the twilight zone doctrine does not reveal how—in view of the great weight which is to be given the federal commissioner's finding, as in the *Motor Boat* case—we can in this case disregard the findings of four state

tribunals,[2] or what the function of this Court is to be in cases where the federal and the state commissioners both find against jurisdiction, or how the line which marks the doubtful case is to be drawn more readily than that which, under the *Jensen* doctrine, separates state from federal power.

Notwithstanding the ruling in the *Motor Boat* case that Congress had adopted the *Jensen* boundary of federal jurisdiction, there are in the present case special circumstances which take it out of that ruling and leave us free to reconsider *Jensen's* constitutional basis. The exclusive liability section of the federal statute contains a proviso that if the employer fails to give security for payment of compensation, as required, then the employee may elect to claim compensation under the federal statute, "or to maintain an action at law or in admiralty." The purpose of this proviso seems to be to preserve to the employee all remedies which he might otherwise have had, in the event that the employer does not give the prescribed security. Since this record does not show that the employer complied, petitioner is free to pursue any available remedy which the Constitution permits and which the state may choose to afford.

Only if the Court were to overrule the *Jensen* case in its constitutional aspects could I join in a reversal of the judgment here. If we are to continue to apply the *Jensen*

---

[2] The state supervisor found that "after thorough investigation it has been determined that the work which the claimant was doing at the time of the said fatal accident does not come under the jurisdiction of the workmen's compensation act, but is maritime in character" and "that the alleged injury was sustained on board a vessel in navigable waters and was therefore under admiralty jurisdiction." His finding and decision were sustained by the joint board of the state department of labor and industries, the state superior court, and the state supreme court.

doctrine, even when not required to do so by the federal act, then our own decisions, including the recent *Motor Boat* case, preclude a reversal of the Washington courts. Escape from *Jensen's* embarrassments by the adoption of the twilight zone doctrine, in disregard of the jurisdictional command of the federal statute, is plainly not permissible. I am not persuaded that it is practicable.

DEPARTMENT OF BANKING OF NEBRASKA, RECEIVER, *v.* PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 466. Decided December 21, 1942.

1. After a final judgment by the New York Court of Appeals, entered in the lower court upon remittitur, an amendment merely certifying that a federal question was presented and decided does not extend the time—three months from the rendition of the judgment of the higher court—within which petition for certiorari can be filed in this Court. P. 266.
2. Although a writ of certiorari to review a judgment of the highest court of a State may properly run to a lower court where the record is physically lodged, and where under New York practice a judgment is entered upon the remittitur of the Court of Appeals, it is nevertheless immaterial whether the record is physically lodged in the one court or the other, since this Court has ample power to obtain it from either. P. 267.
3. The time within which application to review a final judgment of the New York Court of Appeals may be made to this Court runs from the date of the rendition of the judgment in that court, and not from the date when, under the local practice, judgment was entered on remittitur in the lower state court. P. 267.
4. A judgment or order of the Court of Appeals of New York is final for purposes of review by this Court when the record reveals that it leaves nothing to be done by the lower court except the ministerial act of entering judgment on the remittitur. P. 267.

5. The test of the finality prerequisite to a review in this Court is not whether under local rules of practice the judgment is denominated final, but is whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court. P. 268.
6. Where the judgment is final in this sense, the time for applying to this Court runs from the date of the judgment. P. 268.

Petition denied.

PETITION for certiorari to review a judgment entered in the Supreme Court of New York as directed by remittitur from the Court of Appeals of the State. For report below, see 288 N. Y. 712, 43 N. E. 2d 93; 289 N. Y. 624, 43 N. E. 2d 840; 289 N. Y. 841, 47 N. E. 2d 441.

Messrs. Walter R. Johnson, Attorney General of Nebraska, *Morris Amchan* and *Howard Saxton* were on the brief for petitioner.

Mr. Edward F. Keenan was on the brief for respondent.

The States of Colorado, Connecticut, Florida, Georgia, Indiana, Kentucky, Missouri, North Dakota, Ohio, Texas, Utah, and Wyoming, by their respective Attorneys General, filed a brief, as *amici curiae,* in support of petitioner, and urging reversal.

PER CURIAM.

This case is here on a petition for certiorari to the Supreme Court of New York. It appears from the record that a judgment of that court was affirmed by an order of the Appellate Division, which was on June 18, 1942 ordered affirmed by the Court of Appeals, whose remittitur to the Supreme Court was issued the same day. On June 25 the order and judgment of the Court of Appeals were made the order and judgment of the Supreme Court.

A motion was afterwards filed in the Court of Appeals to amend its remittitur by adding to it the statement that a federal question, on which the petition for certiorari relies, was presented and necessarily passed upon in that court. So far as appears, the motion did not seek a reargument or rehearing of any part of the case; it was no more than a request that the Court of Appeals declare what had in fact occurred upon its previous decision of the case. On July 29 the Court of Appeals granted the motion and amended its remittitur accordingly. On September 16, the Supreme Court directed that the order amending the remittitur be made the order of the Supreme Court. The petition for certiorari was filed in this Court on October 20.

Under the three-months limitation imposed by the statute, 28 U. S. C. § 350, the petition for certiorari is timely only if the amendment of the remittitur extended the time within which to apply for certiorari. We are unable to conclude that it had such effect. Unlike a motion for reargument or rehearing, it did not seek to have the Court of Appeals reconsider any question decided in the case. The final judgment already rendered was not challenged; what was sought was merely the court's certification that a federal question had been presented to it for decision, and this could have no different effect on the finality of the judgment than a like amendment of the court's opinion.

A timely petition for rehearing tolls the running of the three-months period because it operates to suspend the finality of the state court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties. Here no such alteration of the rights adjudicated was asked, and the finality of the court's first order was never suspended. Accordingly we must deny the petition

for certiorari on the ground that it was not filed within the time provided by law.

Certain questions with respect to the timeliness of applications for review of state court judgments, which are now pending before us in petitions for rehearing in two cases, have recurred so frequently that we think it appropriate to add a word for the guidance of the Bar. It is true that our writ to review a judgment of the highest court of a state may properly run to a lower court where the record is physically lodged, and where under New York practice a judgment is entered upon the remittitur of the Court of Appeals. It is nevertheless immaterial whether the record is physically lodged in the one court or the other, since we have ample power to obtain it from either. *Atherton* v. *Fowler,* 91 U. S. 143, 146. In reliance upon the early decision in *Green* v. *Van Buskerk,* 3 Wall. 448, the period for appeal or application for certiorari has on occasion been computed not from the judgment or order of the New York Court of Appeals, but from the judgment subsequently entered by the lower court upon the Court of Appeals' remittitur. This practice, which is a departure from the rule applied to cases from other states, is inconsistent with our many decisions on the nature of a final judgment under § 237 of the Judicial Code, 28 U. S. C. § 344, and cannot be sanctioned. See especially Chief Justice Waite's opinion in *Mower* v. *Fletcher,* 114 U. S. 127, where a state appellate court's judgment was held to be final and reviewable when it ended the litigation by fully determining the rights of the parties, so that nothing remained to be done by the lower court except the ministerial act of entering the judgment which the appellate court had directed. See also *Wurts* v. *Hoagland,* 105 U. S. 701, 702, and *Clark* v. *Williard,* 292 U. S. 112, 117–118. This rule applies with equal force to cases from New York.

in which the judgment or order of the Court of Appeals is reviewable here as a final judgment when the record reveals that it leaves nothing to be done by the lower court except the ministerial act of entering judgment on the remittitur. Such an order is, within the meaning of § 237 of the Judicial Code, a final judgment reviewable here.

For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final (*Wick* v. *Superior Court,* 278 U. S. 575; *Cheltenham & Abington Sewerage Co.* v. *Pennsylvania Public Utility Comm'n, post,* p. 588), but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court (see *Gorman* v. *Washington University,* 316 U. S. 98). Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established.

It was for this reason that we recently held that the three-months requirement had not been complied with in *Monks* v. *Lee, post,* p. 590, and *Bunn* v. *Atlanta, post,* p. 666, in which cases judgments were brought here for review from the courts of California and Georgia, and in each of which a petition for rehearing is today denied, *post,* p. 711. The petition for certiorari in this case must likewise be denied for want of jurisdiction.

So ordered.

Counsel for Parties.

ADAMS, WARDEN, ET AL. *v.* UNITED STATES EX REL. McCANN.

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

No. 79. Argued November 17, 18, 1942.—Decided December 21, 1942.

1. A Circuit Court of Appeals has power to issue a writ of habeas corpus as an incident to an appeal pending before it. P. 272.
2. The rule that a writ of habeas corpus will not serve as an appeal must be strictly observed. P. 274.
3. Upon an appeal to the Circuit Court of Appeals from a conviction of felony, the appellant assigned several errors, including the insufficiency of the evidence; but the preparation of a bill of exceptions was obstructed by peculiar difficulties, including the indigence of the appellant and his incarceration in jail. The appellate court having raised the question whether the trial was void because the defense had been conducted by the accused, and a jury had been waived by him, without the help or advice of counsel:

   Held that for its aid in deciding this question the Circuit Court of Appeals had jurisdiction under Judicial Code § 262 to issue a writ of habeas corpus. P. 274.
4. In a criminal prosecution in a federal court, an accused, in the exercise of a free and intelligent choice and with the considered approval of the court, may waive trial by jury, and so, likewise, may waive his constitutional right to the assistance of counsel. P. 275.

126 F. 2d 774, reversed.

CERTIORARI, 316 U. S. 655, to review a judgment reversing a conviction and sentence in a prosecution for using the mails to defraud in violation of Criminal Code, § 215.

Solicitor General Fahy, with whom *Assistant Attorney General Berge* and *Messrs. Archibald Cox* and *Richard S. Salant* were on the brief, for petitioners.

Mr. Robert G. Page for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a review of an order by the Circuit Court of Appeals for the Second Circuit discharging the relator McCann from custody. We accept as facts, as did the court below, those set forth in the untraversed return to the writ of *habeas corpus* in that court.

McCann was indicted on six counts for using the mails to defraud, in violation of § 215 of the Criminal Code, 18 U. S. C. § 338. From the time of his arraignment on February 18, 1941, to the prosecution of his appeal in the court below, McCann insisted on conducting his case without the assistance of a lawyer. When called upon to plead to the indictment, he refused to do so; a plea of not guilty was entered on his behalf. The District Court at that time advised McCann to retain counsel. He refused, however, "stating in substance that he desired to represent himself, that the case was very complicated, and that he was so familiar with its details that no attorney would be able to give him as competent representation as he would be able to give himself."

When the case came on for trial on July 7, 1941, McCann repeated, in reply to the judge's inquiry whether he had counsel, that he wished to represent himself. In response to the court's further inquiry whether he was admitted to the bar, McCann "replied that he was not, but that he had studied law, and was sufficiently familiar therewith adequately to defend himself, and was more familiar with the complicated facts of his case than any attorney could ever be." [1] McCann "then moved to have

[1] McCann had brought suit in 1933 against the New York Stock Exchange, its officers and members, the Better Business Bureau of New York, and a large number of other persons, seeking thirty million dollars damages for conspiracy in restraint of trade. He represented himself in this extensive litigation, and personally brought appeals to

the case tried without a jury by the judge alone. There was a brief discussion between the Court, the petitioner, and the Assistant United States Attorney," after which McCann submitted the following over his signature: "I, Gene McCann, the defendant herein, appearing personally, do hereby waive a trial by jury in the above entitled case, having been advised by the Court of my constitutional right." The Assistant United States Attorney consented, and the judge (one of long trial experience and tested solicitude for the civilized administration of criminal justice) entered an order approving this "waiver."

The trial then got under way. It lasted for two weeks and a half, and throughout the entire proceedings McCann represented himself. He was convicted on July 22, 1941, and was sentenced to imprisonment for six years and to pay a fine of $600. He took an appeal, and the trial judge fixed bail at $10,000. Being unable to procure this sum, he remained in custody. Then followed applications to the Circuit Court of Appeals, likewise pressed by McCann himself, for extending the time for filing a bill of exceptions. In these proceedings both the trial and appellate courts again suggested to McCann the advisability of being represented by counsel. After having personally made these numerous applications, McCann finally secured the assistance of an attorney. The latter applied to the Circuit Court of Appeals for reduction of bail. It was so reduced. But at the same time the court suggested that McCann take out a writ of *habeas corpus*, returnable to the court, to raise the question whether, in the circumstances of the case, "the judge had jurisdiction to try him."

As is pointed out in the opinion of the Circuit Court of Appeals, "At no time did he [McCann] indicate that

---

the Circuit Court of Appeals and to this Court. See *McCann* v. *New York Stock Exchange*, 80 F. 2d 211; 107 F. 2d 908; 309 U. S. 684.

he wished a jury or that he repented of his consent—either while the cause was in the District Court or in this court—until the attorney, who now represents him, in March, 1942, raised the point" at the court's invitation. The "point" thus projected into the case by the Circuit Court of Appeals was presented, in its own words, "in the barest possible form: Has an accused, who is without counsel, the power at his own instance to surrender his right of trial by jury when indicted for felony?" [2] The Circuit Court of Appeals, with one judge dissenting, answered this question in the negative. It held that no person accused of a felony—who is himself not a lawyer—can waive trial by a jury, no matter how capable he is of making an intelligent, informed choice and how strenuously he insists upon such a choice, unless he does so upon the advice of an attorney. 126 F. 2d 774. The obvious importance of this question to the administration of criminal justice in the federal courts led us to bring the case here. 316 U. S. 655.

A jurisdictional obstacle to a consideration of this issue is pressed before us. It is urged that the Circuit Court of Appeals had no jurisdiction to issue the writ of *habeas corpus* in this case. The discussion of this question took an extended range in the arguments at the bar, but in the circumstances of this case the matter lies within a narrow compass. Uninterruptedly from the first Judiciary Act (§ 14 of the Act of September 24, 1789, 1 Stat. 73, 81) to the present day (§ 262 of the Judicial Code, 28 U. S. C. § 377), the courts of the United States have had powers of an auxiliary nature "to issue all writs not specifically provided for by statute, which may be necessary for the

[2] Felony, it may not be irrelevant to note, is a verbal survival which has been emptied of its historic content. Under the federal Criminal Code all offenses punishable by death or imprisonment for more than a year are felonies. § 335 of the Criminal Code, 18 U. S. C. § 541.

exercise of their respective jurisdictions, and agreeable to the usages and principles of law." In *Whitney* v. *Dick*, 202 U. S. 132, this Court held that where no proceeding of an appellate character is pending in a Circuit Court of Appeals, the authority to issue auxiliary writs does not come into operation. A circuit court of appeals cannot issue the writ of *habeas corpus* as "an independent and original proceeding challenging *in toto* the validity of a judgment rendered in another court." But the Court also recognized that there was power to issue the writ "where it may be necessary for the exercise of a jurisdiction already existing." 202 U. S. at 136–37. In the case at bar, a proceeding of an appellate character was pending in the Circuit Court of Appeals, for McCann had already filed an appeal from the judgment of conviction. There was, therefore, "a jurisdiction already existing" in the Circuit Court of Appeals. But could the issuance of the writ be deemed "necessary for the exercise" of that jurisdiction?

Procedural instruments are means for achieving the rational ends of law. A Circuit Court of Appeals is not limited to issuing a writ of *habeas corpus* only when it finds that it is "necessary" in the sense that the court could not otherwise physically discharge its appellate duties. Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it. Undoubtedly, therefore, the Circuit Court of Appeals had "jurisdiction," in the sense that it had the power, to issue the writ as an incident to the appeal then pending before it. The real question is whether the Circuit Court of Appeals abused its power in exercising that jurisdiction in the situation that confronted it.

Of course the writ of *habeas corpus* should not do service for an appeal. *Glasgow* v. *Moyer,* 225 U. S. 420, 428; *Matter of Gregory,* 219 U. S. 210, 213. This rule must be strictly observed if orderly appellate procedure is to be maintained. Mere convenience cannot justify use of the writ as a substitute for an appeal. But dry formalism should not sterilize procedural resources which Congress has made available to the federal courts. In exceptional cases where, because of special circumstances, its use as an aid to an appeal over which the court has jurisdiction may fairly be said to be reasonably necessary in the interest of justice, the writ of *habeas corpus* is available to a circuit court of appeals.

The circumstances that moved the court below to the exercise of its jurisdiction were the peculiar difficulties involved in preparing a bill of exceptions. The stenographic minutes had never been typed. The relator claimed that he was without funds. Since he was unable to raise the bail fixed by the trial judge, he had been in custody since sentence and therefore had no opportunity to prepare a bill of exceptions. The court doubted "whether any [bill] can ever be made up on which the appeal can be heard . . . In the particular circumstances of the case at bar, it seems to us that the writ is 'necessary to the complete exercise' of our appellate jurisdiction because . . . there is a danger that it cannot be otherwise exercised at all and a certainty that it must in any event be a good deal hampered."

The court below recognized, however, that a bill of exceptions might be prepared which would be confined to the single point raised by the writ of *habeas corpus.* This is the basis for the contention that the writ of *habeas corpus* in this case performs the function of an appeal. But inasmuch as McCann was urging a number of grounds for the reversal of his conviction, including the sufficiency of the evidence, the Circuit Court of Appeals was justified

in concluding that it would not be fair to make him stake his whole appeal on the single point raised by this writ. We cannot say that the court was unreasonable in the view it took of the situation with which it was presented and with which it was more familiar than the printed record alone can reveal. The writ of *habeas corpus* was not a substitute for the pending appeal, and was therefore not improvidently entertained by the court below.

This brings us to the merits. They are controlled in principle by *Patton* v. *United States,* 281 U. S. 276, and *Johnson* v. *Zerbst,* 304 U. S. 458. The short of the matter is that an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently and intelligently waive his Constitutional right to assistance of counsel. There is nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer. In taking a contrary view, the court below appears to have been largely influenced by the radiations of this Court's opinion in *Glasser* v. *United States,* 315 U. S. 60. But *Patton* v. *United States, supra,* and *Johnson* v. *Zerbst, supra,* were left wholly unimpaired by the ruling in the *Glasser* case.

Certain safeguards are essential to criminal justice. The court must be uncoerced, *Moore* v. *Dempsey,* 261 U. S. 86, and it must have no interest other than the pursuit of justice, *Tumey* v. *Ohio,* 273 U. S. 510. The accused must have ample opportunity to meet the case of the prosecution. To that end, the Sixth Amendment of the Constitution abolished the rigors of the common law by affording one charged with crime the assistance of counsel for his defense, *Johnson* v. *Zerbst,* 304 U. S. 458. Such assistance "in the particular situation" of "ignorant de-

fendants in a capital case" led to recognition that "the benefit of counsel was essential to the substance of a hearing," as guaranteed by the Due Process Clause of the Fourteenth Amendment, in criminal prosecutions in the state courts. *Palko* v. *Connecticut,* 302 U. S. 319, 327. Compare *Powell* v. *Alabama,* 287 U. S. 45, and *Betts* v. *Brady,* 316 U. S. 455. The relation of trial by jury to civil rights—especially in criminal cases—is fully revealed by the history which gave rise to the provisions of the Constitution which guarantee that right. Article III, § 2, paragraph 3; Sixth Amendment; Seventh Amendment. That history is succinctly summarized in the Declaration of Independence, in which complaint was made that the Colonies were deprived, "in many cases, of the benefits of Trial by Jury." But procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of "life, liberty or property."

It hardly occurred to the framers of the original Constitution and of the Bill of Rights that an accused, acting in obedience to the dictates of self-interest or the promptings of conscience, should be prevented from surrendering his liberty by admitting his guilt. The Constitution does not compel an accused who admits his guilt to stand trial against his own wishes. Legislation apart, no social policy calls for the adoption by the courts of an inexorable rule that guilt must be determined only by trial and not by admission. A plea of guilt expresses the defendant's belief that his acts were proscribed by law and that he cannot successfully be defended. It is true, of course, that guilt under § 215 of the Criminal Code, which makes it a crime to use the mails to defraud, depends upon answers to questions of law raised by application of the

statute to particular facts. It is equally true that prosecutions under other provisions of the Criminal Code may raise even more difficult and complex questions of law. But such questions are no less absent when a man pleads guilty than when he resists an accusation of crime. And not even now is it suggested that a layman cannot plead guilty unless he has the opinion of a lawyer on the questions of law that might arise if he did not admit his guilt. Plainly, the engrafting of such a requirement upon the Constitution would be a gratuitous dislocation of the processes of justice. The task of judging the competence of a particular accused cannot be escaped by announcing delusively simple rules of trial procedure which judges must mechanically follow. The question in each case is whether the accused was competent to exercise an intelligent, informed judgment—and for determination of this question it is of course relevant whether he had the advice of counsel. But it is quite another matter to suggest that the Constitution unqualifiedly deems an accused incompetent unless he does have the advice of counsel. If a layman is to be precluded from defending himself because the Constitution is said to make him helpless without a lawyer's assistance on questions of law which abstractly underlie all federal criminal prosecutions, it ought not to matter whether the decision he is called upon to make is that of pleading guilty or of waiving a particular mode of trial. Every conviction, including the considerable number based upon pleas of guilty, presupposes at least a tacit disposition of the legal questions involved.

We have already held that one charged with a serious federal crime may dispense with his Constitutional right to jury trial, where this action is taken with his express, intelligent consent, where the Government also consents, and where such action is approved by the responsible judg-

ment of the trial court. *Patton* v. *United States*, 281 U.S. 276.[3] And whether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case. The less rigorous enforcement of the rules of evidence, the greater informality in trial procedure—these are not the only advantages that the absence of a jury may afford to a layman who prefers to make his own defense. In a variety of subtle ways trial by jury may be restrictive of a layman's opportunities to present his case as freely as he wishes. And since trial by jury confers burdens as well as benefits, an accused should be permitted to forego its privileges when his competent judgment counsels him that his interests are safer in the keeping of the judge than of the jury.

But we are asked here to hold that an accused person cannot waive trial by jury, no matter how freely and understandingly he surrenders that right, unless he acts on a lawyer's advice. In other words, although a shrewd and experienced layman may, for his own sufficient reasons, conduct his own defense if he prefers to do so, nevertheless if he does do so the Constitution requires that he must defend himself before a jury and not before a judge. But we find nothing in the Constitution, or in the great historic events which gave rise to it, or the history to which it has given rise, to justify such interpolation into the Consti-

[3] The ruling of the *Patton* case, namely, that the provisions of the Constitution dealing with trial by jury in the federal courts were "meant to confer a right upon the accused which he may forego at his election," 281 U.S. at 298, was expressly recognized and acted upon by Congress in the Act of March 8, 1934, c. 49, 48 Stat. 399, which empowered the Supreme Court to prescribe rules of practice and procedure with respect to "proceedings after verdict, *or finding of guilt by the court if a jury has been waived*, or plea of guilty, in criminal cases in district courts of the United States. . . ." (Italics added.) Compare H. Rep. No. 858, Sen. Rep. No. 257, 73d Cong., 2d Sess.

tution and such restriction upon the rational administration of criminal justice.

The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in court. But the Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open. *Johnson* v. *Zerbst,* 304 U. S. 458, 468–69.

Referring to jury trials, Mr. Justice Cardozo, speaking for the Court, had occasion to say, "Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them." *Palko* v. *Connecticut,* 302 U. S. at 325. Putting this thought in more generalized form, the procedural safeguards of the Bill of Rights are not to be treated as mechanical rigidities. What were contrived as protections for the accused should not be turned into fetters. To assert as an absolute that a layman, no matter how wise or experienced he may be, is incompetent to choose between judge and jury as the tribunal for determining his guilt or innocence, simply because a lawyer has not advised him on the choice, is to dogmatize beyond the bounds of learning or experience. Were we so to hold, we would impliedly condemn the administration of criminal justice in States deemed otherwise enlightened, merely

because in their courts the vast majority of criminal cases are tried before a judge without a jury. To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.

Underlying such dogmatism is distrust of the ability of courts to accommodate judgment to the varying circumstances of individual cases. But this is to express want of faith in the very tribunals which are charged with enforcement of the Constitution. "Universal distrust," Mr. Justice Holmes admonished us, "creates universal incompetence." *Graham* v. *United States,* 231 U. S. 474, 480. When the administration of the criminal law in the federal courts is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards (when such surrenders are as jealously guarded as they are by our rulings in *Patton* v. *United States, supra,* and *Johnson* v. *Zerbst, supra*), and to base such denial on an arbitrary rule that a man cannot choose to conduct his defense before a judge rather than a jury unless, against his will, he has a lawyer to advise him, although he reasonably deems himself the best advisor for his own needs, is to imprison a man in his privileges and call it the Constitution. For it is neither obnoxious to humane standards for the administration of justice as these have been written into the Constitution, nor violative of the rights of any person accused of crime who is capable of weighing his own best interest, to permit him to conduct his own defense in a trial before a judge without a jury, subject as such trial is to public scrutiny and amenable as it is to the corrective oversight of an appellate tribunal and ultimately of the Supreme Court of the Nation.

Once we reject such a doctrinaire view of criminal justice and of the Constitution, there is an end to this case. The *Patton* decision left no room for doubt that a determination of guilt by a court after waiver of jury trial could not be set aside and a new trial ordered except upon a plain showing that such waiver was not freely and intelligently made. If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality. Simply because a result that was insistently invited, namely, a verdict by a court without a jury, disappointed the hopes of the accused, ought not to be sufficient for rejecting it. And if the record before us does not show an intelligent and competent waiver of the right to the assistance of counsel by a defendant who demanded again and again that the judge try him, and who in his persistence of such a choice knew what he was about, it would be difficult to conceive of a set of circumstances in which there was such a free choice by a self-determining individual.

The order of the Circuit Court of Appeals must therefore be set aside and the cause remanded to that court for such further proceedings, not inconsistent with this opinion, as may be appropriate.

So ordered.

MR. JUSTICE DOUGLAS, dissenting:

The *Patton* case (281 U. S. 276) held that a defendant represented by counsel might waive under certain circumstances trial by a jury of twelve and submit to trial by a jury of only eleven. In view of the strictness of the constitutional mandates, I am by no means convinced that it follows that an entire jury may be waived. But assuming

arguendo that it may be, I think the respondent should have had the benefit of legal advice before his waiver of a jury trial was accepted by the District Court. For I do not believe that we can safely assume that in absence of legal advice a waiver by a layman of his constitutional right to a jury trial was intelligent and competent in such a case as this.

Respondent was indicted under the mail fraud statute. 35 Stat. 1130, 18 U. S. C. § 338. It subjects to fine or imprisonment one who "having devised or intending to devise any scheme or artifice to defraud . . . shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement . . . in any post-office . . . or other letter box of the United States." It would be unlikely that a layman without the benefit of legal advice would understand the limited nature of the defenses available under that statute or the scope of the ultimate issues on which the question of guilt usually turns. Without that understanding I do not see how an intelligent choice between trial by judge or trial by jury could be made.

The broad sweep of the statute has not been restricted by judicial construction. What might appear to a layman as a complete defense has commonly been denied by the courts in keeping with the policy of Congress to draw tight the net around those who tax ingenuity in devising fraudulent schemes. Thus an indictment will be upheld or a conviction sustained though the defendant did not intend to use the mails at the time the scheme was designed,[1] though no one was defrauded or suffered any loss,[2] though

---

[1] *United States* v. *Young*, 232 U. S. 155.

[2] *Cowl* v. *United States*, 35 F. 2d 794; *United States* v. *Rowe*, 56 F. 2d 747.

the defendant did not intend to receive [3] or did not receive [4] any benefit from the scheme, though the defendant actually believed that his plan would in the end benefit the persons solicited,[5] though the means were ineffective for carrying out the scheme,[6] and, perhaps, even though the mails were used not for solicitation but only in collection of checks received pursuant to the plan.[7] In other words, the defenses in law are few and far between. As a practical matter, if the mails were employed at any stage, the question of guilt turns on whether the defendant had a fraudulent intent. That is the significant fact. *Durland* v. *United States,* 161 U. S. 306, 313.

I think a layman normally would need legal advice to know that much. And it seems to me unlikely that he would be capable of appraising his chances as between judge and jury without such advice. Without it he might well conclude that he had adequate defenses on which a judge could better pass than a jury. With such advice he might well pause to entrust the question of his intent to a particular judge, rather than to a jury of his peers drawn from the community where most of the transactions took place and instructed to acquit if they had a reasonable doubt. On the other hand, if he had a full understanding of the issues, he might conceivably deem it a matter of large importance that he be tried by the judge rather than a jury. The point is that we should not leave to sheer speculation the question whether his waiver of a jury trial

---

[3] *Kellogg* v. *United States,* 126 F. 323.

[4] *Calnay* v. *United States,* 1 F. 2d 926; *Chew* v. *United States,* 9 F. 2d 348.

[5] *Pandolfo* v. *United States,* 286 F. 8; *Foshay* v. *United States,* 68 F. 2d 205.

[6] See *Durland* v. *United States,* 161 U. S. 306, 315.

[7] *Tincher* v. *United States,* 11 F. 2d 18; *Bradford* v. *United States,* 129 F. 2d 274.

But see *Dyhre* v. *Hudspeth,* 106 F. 2d 286; *Stapp* v. *United States,* 120 F. 2d 898.

was intelligent and competent. Yet, on this record we can only speculate, since all we know is that respondent professed to have "studied law" and that he lost a civil suit which he had prosecuted *pro se*. *McCann* v. *New York Stock Exchange*, 107 F. 2d 908. Furthermore, the right to trial by jury, like 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." *Glasser* v. *United States*, 315 U. S. 60, 76. Moreover, as Judge Learned Hand stated in the court below, the answer to the question whether the waiver was intelligent should hardly be made to depend on "the outcome of a preliminary inquiry as to the competency" of the particular layman. If this constitutional right is to be jealously protected, there should be a reliable objective standard by which the trial court satisfies itself that the layman who waives trial by jury in a case like this has a full understanding of the consequences. *Dillingham* v. *United States*, 76 F. 2d 36, 39. At least, where the trial judge fails to inform him, the only safe and practical alternative in a case like the present one is to require the appointment of counsel. Only then should we say that the trial judge has exercised that "sound and advised discretion" which the *Patton* case required even before a waiver of one juror was accepted. 281 U. S. p. 312.

The question for us is not whether a judge should be trusted as much as a jury to determine the question of guilt. We are dealing here with one of the great historic civil liberties—the right to trial by jury. Article III, § 2 and the Sixth Amendment, which grant that right, contain no exception, though a few have been implied. See *Ex parte Quirin, ante*, p. 1. We should not permit the exceptions to be enlarged by waiver unless it is plain and beyond doubt that the waiver was freely and intelli-

gently made. The *Patton* case surrounds such a waiver with numerous safeguards even where, as in that case, the waiver was made by one who was represented by counsel. We should be even more strict and exacting in case the waiver is made by a layman acting on his own. Then the reasons for indulging every reasonable presumption against a waiver of "fundamental constitutional rights" (*Johnson* v. *Zerbst,* 304 U. S. 458, 464) become even more compelling.

The fact that a defendant ordinarily may dispense with a trial by admitting his guilt is no reason for accepting this layman's waiver of a jury trial. What the Constitution requires is that the "trial" of a crime "shall be by jury." Art. III, § 2. And it specifies the machinery which shall be employed if a plea of not guilty is entered and the prosecution is put to its proof. Moreover, we are not dealing here with absolutes. Normally, admission of guilt could properly be accepted without more, since ordinarily a defendant would know whether or not he was guilty of the crime charged. But there might conceivably be an exception, where, for example, the issue of guilt turned not only on the admitted facts but upon the construction of a statute. Each case of necessity turns on its own facts. Nor is it a sufficient answer to say that if legal advice is required for a waiver of trial by jury, then by the same token a layman representing himself could not exercise his own judgment concerning any matter during the trial with respect to which a lawyer might have superior knowledge. Whether the waiver of counsel for purposes of the trial meets the exacting standards of *Johnson* v. *Zerbst* is one thing. Whether that dilution of constitutional rights may be compounded by a waiver of trial by jury is quite another. It is the cumulative effect of the several waivers of constitutional rights in a given case which must be gauged. Nor can I accede to the suggestion of

the prosecution that a layman's right to waive trial by jury is such an important part of his high privilege to manage his own case that its exercise should be freely accorded. That argument is faintly reminiscent of those notions of freedom of choice and liberty of contract which long denied protection to the individual in other fields.

MR. JUSTICE BLACK and MR. JUSTICE MURPHY join in this dissent.

MR. JUSTICE MURPHY:

I join my brother DOUGLAS, but desire to add the following views in dissent.

The Constitution provides: "The Trial of all Crimes, . . . shall be by Jury; . . ." (Article III, § 2), and: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ." (Amendment VI). Because of these provisions, the fundamental nature of jury trial,[1] and its beneficial effects as a means of leavening justice with the spirit of the times,[2] I do not concede that the right to a jury trial can be waived in criminal proceedings in the federal courts. Whatever may be the logic of the matter, there is a considerable practical difference between trial by eleven jurors, the situation in *Patton* v. *United States*, 281 U. S. 276, and trial to the court, and practicality is a sturdy guide to the preservation of Constitutional guaranties.

But if it is assumed that jury trial, the prized product of the travail of the past, can be waived by an accused,

---

[1] Compare *Glasser* v. *United States*, 315 U. S. 60, 84–85, and *Jacob* v. *New York City*, 315 U. S. 752.

[2] This is admirably stated by Judge Learned Hand below, 126 F. 2d at 775–776.

there should be compliance with rigorous standards, adequately designed to insure that an accused fully understands his rights and intelligently appreciates the effects of his step, before a court should accept such a waiver. Among those requirements in the case of a layman defendant in a criminal proceeding where the punishment may be substantial, as in the instant case, should be the right to have the benefit of the advice of counsel on the desirability of waiver. Of course the capacity of individuals to appraise their interests varies, but such a uniform general rule will protect the rights of all much better than a rule depending upon the fluctuating factual variables of the individual case which are often difficult to evaluate on the basis of the cold record. In my opinion the Constitution requires this general rule as an absolute right if a jury is to be waived at all.

WILLIAMS ET AL. *v.* NORTH CAROLINA.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 29. Argued October 20, 1942.—Decided December 21, 1942.

1. Where a conviction in a criminal prosecution is based upon a general verdict that does not specify the ground on which it rests, and one of the grounds upon which it may rest is invalid under the Federal Constitution, the judgment can not be sustained. *Stromberg* v. *California,* 283 U. S. 359. P. 292.
2. A man and a woman went from North Carolina to Nevada and, after residing there for a time sufficient to meet the requirement of a Nevada statute, secured decrees from a Nevada court, divorcing them from their respective spouses in North Carolina, the State in which they had been married and domiciled. They then married each other in Nevada, returned to North Carolina and cohabited there as man and wife. Prosecuted under a North Carolina statute for bigamous cohabitation, they set up in defense the Nevada decrees. A general verdict was returned, after instructions permitting that the decrees be disregarded upon either of two grounds, (1) that

a Nevada divorce decree based on substituted service, where the defendant made no appearance, could not be recognized in North Carolina, and (2) that the defendants went to Nevada, not to establish *bona fide* residence, but solely for the purpose of taking advantage of the laws of that State to obtain a divorce through a fraud upon the Nevada court. *Held* that, as it could not be determined on the record that the verdict was not based solely upon the first ground—involving a construction and application of the Federal Constitution,—the review in this Court must be of that ground, leaving the other out of consideration. Pp. 289, 292.

3. It seems clear that § 9460, Nevada Comp. L. 1929, in requiring that the plaintiff in a suit for divorce shall have "resided" in the State for a designated period, means a domicil as distinguished from a mere residence. P. 298.
4. Decrees of divorce are more than *in personam* judgments, involving, as they do, the marital status of the parties. P. 298.
5. Each State, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse be absent. There is no constitutional barrier if the form and nature of the substituted service meet the requirements of due process. P. 298.
6. Under the Full Faith and Credit Clause and the Act of May 26, 1790, where a decree of divorce, granted by a State to one who is at the time *bona fide* domiciled therein, is rendered in a proceeding complying with due process, such decree, if valid under the laws of that State, is binding upon the courts of other States, including the State in which the marriage was performed, and where the other party to the marriage was still domiciled when the divorce was decreed. *Haddock* v. *Haddock,* 201 U. S. 562, overruled. P. 299.
7. In this case the Court must assume that petitioners each had a *bona fide* domicil in Nevada, not that their Nevada domicil was a sham. P. 302.
8. The case does not present the question whether North Carolina has power to refuse full faith and credit to the Nevada divorce decrees because they were based on residence rather than domicil, or because, contrary to the findings of the Nevada court, North Carolina finds that no *bona fide* domicil was acquired in Nevada. P. 302.

220 N. C. 445, 17 S. E. 2d 769, reversed.

CERTIORARI, 315 U. S. 795, to review judgments affirming sentences for bigamous cohabitation.

Mr. W. H. Strickland for petitioners.

Mr. Hughes J. Rhodes, Assistant Attorney General of North Carolina, with whom *Messrs. Harry McMullan,* Attorney General, and *M. B. Gillam, Jr.* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioners were tried and convicted of bigamous cohabitation under § 4342 of the North Carolina Code,[1] 1939, and each was sentenced for a term of years to a state prison. The judgment of conviction was affirmed by the Supreme Court of North Carolina. 220 N. C. 445, 17 S. E. 2d 769. The case is here on certiorari.

Petitioner Williams was married to Carrie Wyke in 1916 in North Carolina and lived with her there until May, 1940. Petitioner Hendrix was married to Thomas Hendrix in 1920 in North Carolina and lived with him there until May, 1940. At that time petitioners went to Las Vegas, Nevada, and on June 26, 1940, each filed a divorce action in the Nevada court. The defendants in those divorce actions entered no appearance nor were they served with process in Nevada. In the case of defendant Thomas Hendrix, service by publication was had by publication of the summons in a Las Vegas newspaper and by mailing a copy of the summons and complaint to his last post-office address.[2] In the case of defendant Carrie Wil-

[1] Sec. 4342 provides in part: "If any person, being married, shall contract a marriage with any other person outside of this state, which marriage would be punishable as bigamous if contracted within this state, and shall thereafter cohabit with such person in this state, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend . . . to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage . . ."

[2] Defendant Hendrix had written his wife's Nevada attorney, "Upon receipt of the original appearance, I will sign the same." But no ap-

liams, a North Carolina sheriff delivered to her in North Carolina a copy of the summons and complaint. A decree of divorce was granted petitioner Williams by the Nevada court on August 26, 1940, on the ground of extreme cruelty, the court finding that "the plaintiff has been and now is a *bona fide* and continuous resident of the County of Clark, State of Nevada, and had been such resident for more than six weeks immediately preceding the commencement of this action in the manner prescribed by law." [3] The Nevada court granted petitioner Hendrix a divorce on October 4, 1940, on the grounds of wilful neglect and extreme cruelty, and made the same finding as to this petitioner's *bona fide* residence in Nevada as it made in the case of Williams. Petitioners were married to each other in Nevada on October 4, 1940. Thereafter they returned to North Carolina where they lived together until the indictment was returned. Petitioners pleaded not guilty and offered in evidence exemplified copies of the Nevada proceedings, contending that the divorce decrees and the Nevada marriage were valid in North Carolina as well as in Nevada. The State contended that since neither of the defendants in the Nevada actions was served in Nevada nor entered an appearance there, the Nevada decrees would not be recognized as valid in North Carolina. On this issue the court charged the jury in substance that

---

pearance was entered and the North Carolina court charged the jury that a promise to make an appearance does not constitute one.

[3] Sec. 9460, Nev. Comp. L. 1929, as amended L. 1931, p. 161, provides in part: "Divorce from the bonds of matrimony may be obtained by complaint, under oath, to the district court of any county in which the cause therefor shall have accrued, or in which the defendant shall reside or be found, or in which the plaintiff shall reside, or in which the parties last cohabited, or if plaintiff shall have resided six weeks in the state before suit be brought, for the following causes, or any other causes provided by law . . ." Sec. 9467.02 provides that "In all civil cases where the jurisdiction of the court depends upon the residence of one of the parties to the action, the court shall require corroboration of the evidence of such residence." L. 1931, p. 277.

a Nevada divorce decree based on substituted service where the defendant made no appearance would not be recognized in North Carolina, under the rule of *Pridgen* v. *Pridgen,* 203 N. C. 533, 166 S. E. 591. The State further contended that petitioners went to Nevada not to establish a *bona fide* residence but solely for the purpose of taking advantage of the laws of that State to obtain a divorce through fraud upon that court. On that issue the court charged the jury that, under the rule of *State* v. *Herron,* 175 N. C. 754, 94 S. E. 698, the defendants had the burden of satisfying the jury, but not beyond a reasonable doubt, of the *bona fides* of their residence in Nevada for the required time. Petitioners excepted to these charges. The Supreme Court of North Carolina in affirming the judgment held that North Carolina was not required to recognize the Nevada decrees under the full faith and credit clause of the Constitution (Art. IV, § 1) by reason of *Haddock* v. *Haddock,* 201 U. S. 562. The intimation in the majority opinion (220 N. C. pp. 460–464) that the Nevada divorces were collusive suggests that the second theory on which the State tried the case may have been an alternative ground for the decision below, adequate to sustain the judgment under the rule of *Bell* v. *Bell,* 181 U. S. 175—a case in which this Court held that a decree of divorce was not entitled to full faith and credit when it had been granted on constructive service by the courts of a state in which neither spouse was domiciled. But there are two reasons why we do not reach that issue in this case. In the first place, North Carolina does not seek to sustain the judgment below on that ground. Moreover it admits that there probably is enough evidence in the record to require that petitioners be considered "to have been actually domiciled in Nevada." In the second place, the verdict against petitioners was a general one. Hence, even though the doctrine of *Bell* v. *Bell, supra,* were to be deemed applicable here, we cannot determine on this rec-

ord that petitioners were not convicted on the other theory on which the case was tried and submitted, *viz.* the invalidity of the Nevada decrees because of Nevada's lack of jurisdiction over the defendants in the divorce suits. That is to say, the verdict of the jury for all we know may have been rendered on that ground alone, since it did not specify the basis on which it rested. It therefore follows here as in *Stromberg* v. *California,* 283 U. S. 359, 368, that if one of the grounds for conviction is invalid under the Federal Constitution, the judgment cannot be sustained. No reason has been suggested why the rule of the *Stromberg* case is inapplicable here. Nor has any reason been advanced why the rule of the *Stromberg* case is not both appropriate and necessary for the protection of rights of the accused. To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights. Accordingly, we cannot avoid meeting the *Haddock* v. *Haddock* issue in this case by saying that the petitioners acquired no *bona fide* domicil in Nevada. If the case had been tried and submitted on that issue only, we would have quite a different problem, as *Bell* v. *Bell* indicates. We have no occasion to meet that issue now and we intimate no opinion on it. However it might be resolved in another proceeding, we cannot evade the constitutional issue in this case on the easy assumption that petitioners' domicil in Nevada was a sham and a fraud. Rather, we must treat the present case for the purpose of the limited issue before us precisely the same as if petitioners had resided in Nevada for a term of years and had long ago acquired a permanent abode there. In other words, we would reach the question whether North Carolina could refuse to recognize the Nevada decrees because, in its view and contrary to

the findings of the Nevada court, petitioners had no actual, *bona fide* domicil in Nevada, if and only if we concluded that *Haddock* v. *Haddock* was correctly decided. But we do not think it was.

The *Haddock* case involved a suit for separation and alimony, brought in New York by the wife on personal service of the husband. The husband pleaded in defense a divorce decree obtained by him in Connecticut where he had established a separate domicil. This Court held that New York, the matrimonial domicil where the wife still resided, need not give full faith and credit to the Connecticut decree, since it was obtained by the husband who wrongfully left his wife in the matrimonial domicil, service on her having been obtained by publication and she not having entered an appearance in the action. But we do not agree with the theory of the *Haddock* case that, so far as the marital status of the parties is concerned,[4] a decree of divorce granted under such circumstances by one state need not be given full faith and credit in another.

Article IV, § 1 of the Constitution not only directs that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State" but also provides that "Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Congress has exercised that power. By the Act of May 26, 1790, c. 11, 28 U. S. C. 687, Congress has provided that judgments "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." Chief Justice Marshall stated in *Hampton* v. *M'Connel,* 3 Wheat. 234, 235, that "the judgment of a state court should have the same credit,

[4] Thus we have here no question as to extraterritorial effect of a divorce decree insofar as it affects property in another State. See the cases cited, *infra,* note 5.

validity, and effect, in every other court in the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States." That view has survived substantially intact. *Fauntleroy* v. *Lum,* 210 U. S. 230. This Court only recently stated that Art. IV, § 1 and the Act of May 26, 1790 require that "not some, but full" faith and credit be given judgments of a state court. *Davis* v. *Davis,* 305 U. S. 32, 40. Thus, even though the cause of action could not be entertained in the state of the forum, either because it had been barred by the local statute of limitations or contravened local policy, the judgment thereon obtained in a sister state is entitled to full faith and credit. See *Christmas* v. *Russell,* 5 Wall. 290; *Fauntleroy* v. *Lum, supra; Kenney* v. *Supreme Lodge,* 252 U. S. 411; *Titus* v. *Wallick,* 306 U. S. 282, 291. Some exceptions have been engrafted on the rule laid down by Chief Justice Marshall. But as stated by Mr. Justice Brandeis in *Broderick* v. *Rosner,* 294 U. S. 629, 642, "the room left for the play of conflicting policies is a narrow one." So far as *judgments* are concerned, the decisions,[5] as distinguished from dicta,[6] show that the

[5] *Fall* v. *Eastin,* 215 U. S. 1; *Olmsted* v. *Olmsted,* 216 U. S. 386; *Hood* v. *McGehee,* 237 U. S. 611. These decisions refuse to require courts of one state to allow acts or judgments of another to control the disposition or devolution of realty in the former. They seem to rest on the doctrine that the state where the land is located is "sole mistress" of its rules of real property. See *Hood* v. *McGehee, supra,* p. 615; and the concurring opinion of Mr. Justice Holmes in *Fall* v. *Eastin, supra,* p. 14.

That the case of *Anglo-American Provision Co.* v. *Davis Provision Co.,* 191 U. S. 373, is not an exception but only an appropriate application of the doctrine of *forum non conveniens,* see *Broderick* v. *Rosner,* 294 U. S. 629, 642–643.

[6] It has been repeatedly stated that the full faith and credit clause does not require one state to enforce the penal laws of another. See, for example, *Huntington* v. *Attrill,* 146 U. S. 657, 666; *Converse*

actual exceptions have been few and far between, apart from *Haddock* v. *Haddock*. For this Court has been reluctant to admit exceptions in case of *judgments* rendered by the courts of a sister state, since the "very purpose" of Art. IV, § 1 was "to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation." *Milwaukee County* v. *White Co.*, *supra*, pp. 276–277.

This Court, to be sure, has recognized that in case of *statutes*, "the extra-state effect of which Congress has not prescribed," some "accommodation of the conflicting interests of the two states" is necessary. *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, 294 U. S. 532, 547. But that principle would come into play only in case the Nevada decrees were assailed on the ground that Nevada must give full faith and credit in its divorce proceedings to the divorce statutes of North Carolina. Even then, it would be of no avail here. For as stated in the *Alaska Packers* case, "*Prima facie* every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the

---

v. *Hamilton*, 224 U. S. 243, 260; *Bradford Electric Co.* v. *Clapper*, 286 U. S. 145, 160.

But the question of whether a judgment based on a penalty is entitled to full faith and credit was reserved in *Milwaukee County* v. *White Co.*, 296 U. S. 268, 279.

For other dicta that the application of the full faith and credit clause may be limited by the policy of the law of the forum, see *Bradford Electric Co.* v. *Clapper*, *supra*, p. 160; *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, 294 U. S. 532, 546; *Broderick* v. *Rosner*, *supra*, note 5, p. 642.

forum." *Id.*, pp. 547–548. It is difficult to perceive how North Carolina could be said to have an interest in Nevada's domiciliaries superior to the interest of Nevada. Nor is there any authority which lends support to the view that the full faith and credit clause compels the courts of one state to subordinate the local policy of that state, as respects its domiciliaries, to the statutes of any other state. Certainly *Bradford Electric Co.* v. *Clapper*, 286 U. S. 145, did not so hold. Indeed, the recent case of *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U. S. 493, 502, held that in the case of statutes "the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events."

Moreover, *Haddock* v. *Haddock* is not based on the contrary theory. Nor did it hold that a decree of divorce granted by the courts of one state need not be given full faith and credit in another if the grounds for the divorce would not be recognized by the courts of the forum. It does not purport to challenge or disturb the rule, earlier established by *Christmas* v. *Russell, supra,* and subsequently fortified by *Fauntleroy* v. *Lum, supra,* that, even though the cause of action could not have been entertained in the state of the forum, a judgment obtained thereon in a sister state is entitled to full faith and credit. For the majority opinion in the *Haddock* case accepted both *Cheever* v. *Wilson,* 9 Wall. 108, and *Atherton* v. *Atherton,* 181 U. S. 155. *Cheever* v. *Wilson* held that a decree of divorce granted by a state in which one spouse was domiciled and which had personal jurisdiction over the other was as conclusive in other states as it was in the state where it was obtained. *Atherton* v. *Atherton* held that full faith and credit must be given a decree of divorce granted by

the state of the matrimonial domicil on constructive service against the other spouse who was a non-resident of that state. The decisive difference between those cases and *Haddock* v. *Haddock* was said to be that, in the latter, the state granting the divorce had no jurisdiction over the absent spouse, since it was not the state of the matrimonial domicil, but the place where the husband had acquired a separate domicil after having wrongfully left his wife. This Court accordingly classified *Haddock* v. *Haddock* with that group of cases which hold that when the courts of one state do not have jurisdiction either of the subject matter or of the person of the defendant, the courts of another state are not required by virtue of the full faith and credit clause to enforce the judgment.[7] But such differences in result between *Haddock* v. *Haddock* and the cases which preceded it rest on distinctions which in our view are immaterial, so far as the full faith and credit clause and the supporting legislation are concerned.

The historical view that a proceeding for a divorce was a proceeding *in rem* (2 Bishop, Marriage & Divorce, 4th ed., § 164) was rejected by the *Haddock* case. We likewise agree that it does not aid in the solution of the problem presented by this case to label these proceedings as proceedings *in rem*. Such a suit, however, is not a mere *in personam* action. Domicil of the plaintiff, immaterial to jurisdiction in a personal action, is recognized in the *Haddock* case and elsewhere (Beale, Conflict of Laws, § 110.1) as essential in order to give the court jurisdiction which will entitle the divorce decree to extraterritorial effect, at least when the defendant has neither been personally served nor entered an appearance. The findings

[7] *Grover & Baker Machine Co.* v. *Radcliffe*, 137 U. S. 287; *National Exchange Bank* v. *Wiley*, 195 U. S. 257; *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394; *Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25, 29; *Flexner* v. *Farson*, 248 U. S. 289.

made in the divorce decrees in the instant case must be treated on the issue before us as meeting those requirements. For it seems clear that the provision of the Nevada statute that a plaintiff in this type of case must "reside" in the State for the required period [8] requires him to have a domicil,[9] as distinguished from a mere residence, in the state. *Latterner* v. *Latterner,* 51 Nev. 285, 274 P. 194; *Lamb* v. *Lamb,* 57 Nev. 421, 65 P. 2d 872. Hence, the decrees in this case, like other divorce decrees, are more than *in personam* judgments. They involve the marital status of the parties. Domicil creates a relationship to the state which is adequate for numerous exercises of state power. See *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 279; *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308, 313; *Milliken* v. *Meyer,* 311 U. S. 457, 463–464; *Skiriotes* v. *Florida,* 313 U. S. 69. Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal. Thus it is plain that each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its

[8] Sec. 9460, Nev. Comp. L. 1929, as amended L. 1931, p. 161, *supra,* note 3.

[9] The fact that a stay in a state is not for long is not necessarily fatal to the existence of a domicil. As stated in *Williamson* v. *Osenton,* 232 U. S. 619, 624, the "essential fact that raises a change of abode to a change of domicil is the absence of any intention to live elsewhere." The intention to stay for a time to which a person "did not then contemplate an end" was held sufficient. *Id.,* p. 625. And see *District of Columbia* v. *Murphy,* 314 U. S. 441. Nor is there any doubt that a married woman may acquire in this country a domicil separate from her husband. *Williamson* v. *Osenton, supra,* pp. 625–626, and cases cited.

own borders the marriage status of the spouse domiciled there, even though the other spouse is absent. There is no constitutional barrier if the form and nature of the substituted service (see *Milliken* v. *Meyer, supra,* p. 463) meet the requirements of due process. *Atherton* v. *Atherton, supra,* p. 172. Accordingly, it was admitted in the *Haddock* case that the divorce decree, though not recognized in New York, was binding on both spouses in Connecticut where granted. 201 U. S. 569, 572, 575, 579. And this Court in *Maynard* v. *Hill,* 125 U. S. 190, upheld the validity within the Territory of Oregon of a divorce decree granted by the legislature to a husband domiciled there, even though the wife resided in Ohio where the husband had deserted her. It therefore follows that, if the Nevada decrees are taken at their full face value (as they must be on the phase of the case with which we are presently concerned), they were wholly effective to change in that state the marital status of the petitioners and each of the other spouses by the North Carolina marriages. Apart from the requirements of procedural due process (*Atherton* v. *Atherton, supra,* p. 172) not challenged here by North Carolina, no reason based on the Federal Constitution has been advanced for the contrary conclusion. But the concession that the decrees were effective in Nevada makes more compelling the reasons for rejection of the theory and result of the *Haddock* case.

This Court stated in *Atherton* v. *Atherton, supra,* p. 162, that "A husband without a wife, or a wife without a husband, is unknown to the law." But if one is lawfully divorced and remarried in Nevada and still married to the first spouse in North Carolina, an even more complicated and serious condition would be realized. We would then have what the Supreme Court of Illinois declared to be the "most perplexing and distressing complications in the domestic relations of many citizens in the different States." *Dunham* v. *Dunham,* 162 Ill. 589, 607. Under the cir-

cumstances of this case, a man would have two wives, a wife two husbands. The reality of a sentence to prison proves that that is no mere play on words. Each would be a bigamist for living in one state with the only one with whom the other state would permit him lawfully to live. Children of the second marriage would be bastards in one state but legitimate in the other. And all that would flow from the legalistic notion that where one spouse is wrongfully deserted he retains power over the matrimonial domicil so that the domicil of the other spouse follows him wherever he may go, while, if he is to blame, he retains no such power. But such considerations are inapposite. As stated by Mr. Justice Holmes in his dissent in the *Haddock* case (201 U. S. p. 630), they constitute a "pure fiction, and fiction always is a poor ground for changing substantial rights." Furthermore, the fault or wrong of one spouse in leaving the other becomes under that view a jurisdictional fact on which this Court would ultimately have to pass. Whatever may be said as to the practical effect which such a rule would have in clouding divorce decrees, the question as to where the fault lies has no relevancy to the existence of state power in such circumstances. See Bingham, *In the Matter of Haddock* v. *Haddock,* 21 Corn. L. Q. 393, 426. The existence of the power of a state to alter the marital status of its domiciliaries, as distinguished from the wisdom of its exercise, is not dependent on the underlying causes of the domestic rift. As we have said, it is dependent on the relationship which domicil creates and the pervasive control which a state has over marriage and divorce within its own borders. *Atherton* v. *Atherton,* which preceded *Haddock* v. *Haddock,* and *Thompson* v. *Thompson,* 226 U. S. 551, which followed it, recognized that the power of the state of the matrimonial domicil to grant a divorce from the absent spouse did not depend on whether his departure from the state was or was not

justified. As stated above, we see no reason, and none has here been advanced, for making the existence of state power depend on an inquiry as to where the fault in each domestic dispute lies. And it is difficult to prick out any such line of distinction in the generality of the words of the full faith and credit clause. Moreover, so far as state power is concerned, no distinction between a matrimonial domicil and a domicil later acquired has been suggested or is apparent. See Mr. Justice Holmes dissenting, *Haddock* v. *Haddock, supra,* p. 631; Goodrich, *Matrimonial Domicile,* 27 Yale L. Journ. 49. It is one thing to say as a matter of state law that jurisdiction to grant a divorce from an absent spouse should depend on whether by consent or by conduct the latter has subjected his interest in the marriage status to the law of the separate domicil acquired by the other spouse. Beale, Conflict of Laws, § 113.11; Restatement, Conflict of Laws, § 113. But where a state adopts, as it has the power to do, a less strict rule, it is quite another thing to say that its decrees affecting the marital status of its domiciliaries are not entitled to full faith and credit in sister states. Certainly if decrees of a state altering the marital status of its domiciliaries are not valid throughout the Union even though the requirements of procedural due process are wholly met, a rule would be fostered which could not help but bring "considerable disaster to innocent persons" and "bastardize children hitherto supposed to be the offspring of lawful marriage" (Mr. Justice Holmes dissenting in *Haddock* v. *Haddock, supra,* p. 628), or else encourage collusive divorces. Beale, *Constitutional Protection of Decrees for Divorce,* 19 Harv. L. Rev. 586, 596. These intensely practical considerations emphasize for us the essential function of the full faith and credit clause in substituting a command for the former principles of comity (*Broderick* v. *Rosner, supra,* p. 643) and in altering the "status of the several states as independent foreign

sovereignties" by making them "integral parts of a single nation." *Milwaukee County* v. *White Co., supra,* p. 277.

It is objected, however, that if such divorce decrees must be given full faith and credit, a substantial dilution of the sovereignty of other states will be effected. For it is pointed out that under such a rule one state's policy of strict control over the institution of marriage could be thwarted by the decree of a more lax state. But such an objection goes to the application of the full faith and credit clause to many situations. It is an objection in varying degrees of intensity to the enforcement of a judgment of a sister state based on a cause of action which could not be enforced in the state of the forum. Mississippi's policy against gambling transactions was overridden in *Fauntleroy* v. *Lum, supra,* when a Missouri judgment based on such a Mississippi contract was enforced by this Court. Such is part of the price of our federal system.

This Court, of course, is the final arbiter when the question is raised as to what is a permissible limitation on the full faith and credit clause. *Alaska Packers Assn.* v. *Industrial Accident Comm'n, supra,* p. 547; *Milwaukee County* v. *White Co., supra,* p. 274. But the question for us is a limited one. In the first place, we repeat that in this case we must assume that petitioners had a *bona fide* domicil in Nevada, not that the Nevada domicil was a sham. We thus have no question on the present record whether a divorce decree granted by the courts of one state to a resident, as distinguished from a domiciliary, is entitled to full faith and credit in another state. Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no *bona fide* domicil was acquired in Nevada. In the second place, the question as to what is a permissible limitation on the full faith and

credit clause does not involve a decision on our part as to which state policy on divorce is the most desirable one. It does not involve selection of a rule which will encourage on the one hand or discourage on the other the practice of divorce. That choice in the realm of morals and religion rests with the legislatures of the states. Our own views as to the marriage institution and the avenues of escape which some states have created are immaterial. It is a Constitution which we are expounding—a Constitution which in no small measure brings separate sovereign states into an integrated whole through the medium of the full faith and credit clause. Within the limits of her political power North Carolina may, of course, enforce her own policy regarding the marriage relation—an institution more basic in our civilization than any other. But society also has an interest in the avoidance of polygamous marriages (*Loughran* v. *Loughran,* 292 U. S. 216, 223) and in the protection of innocent offspring of marriages deemed legitimate in other jurisdictions. And other states have an equally legitimate concern in the status of persons domiciled there as respects the institution of marriage. So, when a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter. Whether Congress has the power to create exceptions (see *Yarborough* v. *Yarborough,* 290 U. S. 202, 215, nt. 2, dissenting opinion) is a question on which we express no view. It is sufficient here to note that Congress, in its sweeping requirement that judgments of the courts of one state be given full faith and credit in the courts of another, has not done so. And the considerable interests involved, and the substantial and far-reaching effects which the

allowance of an exception would have on innocent persons, indicate that the purpose of the full faith and credit clause and of the supporting legislation would be thwarted to a substantial degree if the rule of *Haddock* v. *Haddock* were perpetuated.

Haddock v. *Haddock* is overruled. The judgment is reversed and the cause is remanded to the Supreme Court of North Carolina for proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE FRANKFURTER, concurring:

I join in the opinion of the Court but think it appropriate to add a few words.

Article 91 of the British North America Act (1867) gives the Parliament of Canada exclusive legislative authority to deal with marriage and divorce. Similarly, Article 51 of the Australia Constitution Act (1900) empowers the Commonwealth Parliament to make laws with respect to marriage and divorce. The Constitution of the United States, however, reserves authority over marriage and divorce to each of the forty-eight states. That is our starting-point. In a country like ours where each state has the constitutional power to translate into law its own notions of policy concerning the family institution, and where citizens pass freely from one state to another, tangled marital situations, like the one immediately before us, inevitably arise. They arose before and after the decision in the *Haddock* case, 201 U. S. 562, and will, I daresay, continue to arise no matter what we do today. For these complications cannot be removed by any decisions this Court can make—neither the crudest nor the subtlest juggling of legal concepts could enable us to bring forth a uniform national law of marriage and divorce.

We are not authorized nor are we qualified to formulate a national code of domestic relations. We cannot, by

making "jurisdiction" depend upon a determination of who is the deserter and who the deserted, or upon the shifting notions of policy concealed by the cloudy abstraction of "matrimonial domicile," turn this into a divorce and probate court for the United States. There may be some who think our modern social life is such that there is today a need, as there was not when the Constitution was framed, for vesting national authority over marriage and divorce in Congress, just as the national legislatures of Canada and Australia have been vested with such powers. Beginning in 1884,[1] numerous proposals to amend the Constitution to confer such authority have been introduced in Congress. But those whose business it is to amend the Constitution have not seen fit to amend it in this way. The need for securing national uniformity in dealing with divorce, either through constitutional amendment or by some other means, has long been the concern of the Conference of Governors and of special bodies convened to consider this problem. See, *e. g.*, Proceedings of Governors' Conference (1910) 185–98; Proceedings of National Congress on Uniform Divorce Laws (1906). This Court should abstain from trying to reach the same end by indirection. We should not feel challenged by a task that is not ours, even though it is difficult. Judicial attempts to solve problems that are intrinsically legislative—because their elements do not lend themselves to judicial judgment or because the necessary remedies are of a sort which judges cannot prescribe—are apt to be as futile in their achievement as they are presumptuous in their undertaking.

[1] See Ames, Proposed Amendments to the Constitution of the United States during the First Century of its History, contained in the Annual Report of the American Historical Association, 1896, vol. II, p. 190; Sen. Doc. No. 93, 69th Cong., 1st Sess., and the successive compilations prepared by the Legislative Reference Service of the Library of Congress.

There is but one respect in which this Court can, within its traditional authority and professional competence, contribute uniformity to the law of marriage and divorce, and that is to enforce respect for the judgment of a state by its sister states when the judgment was rendered in accordance with settled procedural standards. As the Court's opinion shows, it is clearly settled that if a judgment is binding in the state where it was rendered, it is equally binding in every other state. This rule of law was not created by the federal courts. It comes from the Constitution and the Act of May 26, 1790, c. 11, 1 Stat. 122. Congress has not exercised its power under the Full Faith and Credit Clause to meet the special problems raised by divorce decrees. There will be time enough to consider the scope of its power in this regard when Congress chooses to exercise it.

The duty of a state to respect the judgments of a sister state arises only where such judgments meet the tests of justice and fair dealing that are embodied in the historic phrase, "due process of law." But in this case all talk about due process is beside the mark. If the actions of the Nevada court had been taken "without due process of law," the divorces which it purported to decree would have been without legal sanction in every state, including Nevada. There would be no occasion to consider the applicability of the Full Faith and Credit Clause. It is precisely because the Nevada decrees do satisfy the requirements of the Due Process Clause and are binding in Nevada upon the absent spouses that we are called upon to decide whether these judgments, unassailable in the state which rendered them, are, despite the commands of the Full Faith and Credit Clause, null and void elsewhere.

North Carolina did not base its disregard of the Nevada decrees on the claim that they were a fraud and a sham, and no claim was made here on behalf of North Carolina

that the decrees were not valid in Nevada. It is indisputable that the Nevada decrees here, like the Connecticut decree in the *Haddock* case, were valid and binding in the state where they were rendered. *Haddock* v. *Haddock,* 201 U. S. 562, 569–70; *Maynard* v. *Hill,* 125 U. S. 190; *Atherton* v. *Atherton,* 181 U. S. 155. In denying constitutional sanction to such a valid judgment outside the state which rendered it, the *Haddock* decision made an arbitrary break with the past and created distinctions incompatible with the rôle of this Court in enforcing the Full Faith and Credit Clause. Freed from the hopeless refinements introduced by that case, the question before us is simply whether the Nevada decrees were rendered under circumstances that would make them binding against the absent spouses in the state where they were rendered. North Carolina did not challenge the power of Nevada to declare the marital status of persons found to be Nevada residents. North Carolina chose instead to disrespect the consequences of Nevada's exertion of such power. It is therefore no more rhetorical to say that Nevada is seeking to impose its policy upon North Carolina than it is to say that North Carolina is seeking to impose its policy upon Nevada.

For all but a very small fraction of the community the niceties of resolving such conflicts among the laws of the states are, in all likelihood, matters of complete indifference. Our occasional pronouncements upon the requirements of the Full Faith and Credit Clause doubtless have little effect upon divorces. Be this as it may, a court is likely to lose its way if it strays outside the modest bounds of its own special competence and turns the duty of adjudicating only the legal phases of a broad social problem into an opportunity for formulating judgments of social policy quite beyond its competence as well as its authority.

MR. JUSTICE MURPHY:

I dissent because the Court today introduces an undesirable rigidity in the application of the Full Faith and Credit Clause to a problem which is of acute interest to all the states of the Union and on which they hold varying and sharply divergent views, the problem of how they shall treat the marriage relation.

This case cannot be considered as one involving the Constitution alone; rather the case involves the interaction of public policy upon the Constitution. This is not to say that our function is to become censors of public morals and decide this case in accordance with what we may think is the wisest rule for society with respect to divorce. But the question of public policy enters to this degree—marriage and the family have generally been regarded as basic components of our national life, and the solution of the problems engendered by the marital relation, the formulation of standards of public morality in connection therewith, and the supervision of domestic (in the sense of family) affairs, have been left to the individual states. Each state has the deepest concern for its citizens in those matters, and, concomitantly with that concern, it exercises the widest control over marriage, determining how it is to be solemnized, the attendant obligations, and how it may be dissolved. When a conflict arises between the divergent policies of two states in this area of legitimate governmental concern, as here, this Court should give appropriate consideration to the interests of each state.

In recognition of the paramount interest of the state of domicile over the marital status of its citizens, this Court has held that actual good faith domicile of at least one party is essential to confer authority and jurisdiction on the courts of a state to render a decree of divorce that will be entitled to extraterritorial effect under the

Full Faith and Credit Clause, *Bell* v. *Bell,* 181 U. S. 175, even though both parties personally appear, *Andrews* v. *Andrews,* 188 U. S. 14. When the doctrine of those cases is applied to the facts of this one, the question becomes a simple one: Did petitioners acquire a bona fide domicile in Nevada? I agree with my brother Jackson that the only proper answer on the record is, no. North Carolina is the state in which petitioners have their roots, the state to which they immediately returned after a brief absence just sufficient to achieve their purpose under Nevada's requirements. It follows that the Nevada decrees are entitled to no extraterritorial effect when challenged in another state. *Bell* v. *Bell, supra; Andrews* v. *Andrews, supra.*

This is not to say that the Nevada decrees are without any legal effect in the State of Nevada. That question is not before us. It may be that for the purposes of that state the petitioners have been released from their marital vows, consistently with the procedural requirements of the Fourteenth Amendment, on the basis of compliance with its residential requirements and constructive service of process on the non-resident spouses. But conceding the validity in Nevada of its decrees dissolving the marriages, it does not mechanically follow that the Full Faith and Credit Clause compels North Carolina to accept them.

We have recognized an area of flexibility in the application of the Clause to preserve and protect state policies in matters of vital public concern. We have said that conflicts between such state policies should be resolved, "not by giving automatic effect to the full faith and credit clause, . . . but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight." *Alaska Packers Assn.* v. *Comm'n,* 294 U. S. 532, 547. (See also *Milwaukee County* v. *White Co.,* 296 U. S. 268, 273–274, and compare the dissenting opinion in *Yarborough* v. *Yarborough,* 290 U. S.

202, 213–227.) That Clause should no more be read "with literal exactness like a mathematical formula" than are other great and general clauses of the Constitution placing limitations upon the States to weld us into a Nation. Cf. *Home Bldg. & L. Assn.* v. *Blaisdell,* 290 U. S. 398, 428. Rather it should be construed to harmonize its direction "with the necessary residuum of state power." *Id.,* at p. 435.

Prominent in the residuum of state power, as pointed out above, is the right of a state to deal with the marriage relations of its citizens and to pursue its chosen domestic policy of public morality in that connection. Both Nevada and North Carolina have rights in this regard which are entitled to recognition. The conflict between those rights here should not be resolved by extending into North Carolina the effects of Nevada's action through a perfunctory application of the literal language of the Full Faith and Credit Clause, with the result that measures which North Carolina has adopted to safeguard the welfare of her citizens in this area of legitimate governmental concern are undermined. When the interests are considered, those of North Carolina are of sufficient validity that they should as clearly free her of the compulsions of the Full Faith and Credit Clause as did the interest of the state in the devolution of property within its boundaries in *Fall* v. *Eastin,* 215 U. S. 1; *Olmsted* v. *Olmsted,* 216 U. S. 386, and *Hood* v. *McGehee,* 237 U. S. 611, or the interests of a state in the application of its own workmen's compensation statute in *Alaska Packers Assn.* v. *Comm'n, supra,* or its interest in declining to enforce the penal laws of another jurisdiction, cf. *Huntington* v. *Attrill,* 146 U. S. 657, 666, all of which seem to be matters of far less concern to a state than the untrammeled enforcement within its borders of those standards of public morality with regard to the marriage relation which it considers to be in the best interests of its citizens.

There is an element of tragic incongruity in the fact that an individual may be validly divorced in one state but not in another. But our dual system of government and the fact that we have no uniform laws on many subjects give rise to other incongruities as well—for example, the common law took the logical position that an individual could have but one domicile at a time, but this Court has nevertheless said that the Full Faith and Credit Clause does not prevent conflicting state decisions on the question of an individual's domicile. Cf. *Worcester County Co.* v. *Riley*, 302 U. S. 292, 299. In the absence of a uniform law on the subject of divorce, this Court is not so limited in its application of the Full Faith and Credit Clause that it must force Nevada's policy upon North Carolina, any more than it must compel Nevada to accept North Carolina's requirements. The fair result is to leave each free to regulate within its own area the rights of its own citizens.

MR. JUSTICE JACKSON, dissenting:

I cannot join in exerting the judicial power of the Federal Government to compel the State of North Carolina to subordinate its own law to the Nevada divorce decrees. The Court's decision to do so reaches far beyond the immediate case. It subjects matrimonial laws of each state to important limitations and exceptions that it must recognize within its own borders and as to its own permanent population. It nullifies the power of each state to protect its own citizens against dissolution of their marriages by the courts of other states which have an easier system of divorce. It subjects every marriage to a new infirmity, in that one dissatisfied spouse may choose a state of easy divorce, in which neither party has ever lived, and there commence proceedings without personal service of process. The spouse remaining within the state of domicile need never know of the proceedings. Or, if they

come to one's knowledge, the choice is between equally useless alternatives: one is to ignore the foreign proceedings, in which case the marriage is quite certain to be dissolved; the other is to follow the complaining spouse to the state of his choice and there defend under the laws which grant the dissolution on relatively trivial grounds. To declare that a state is powerless to protect either its own policy or the family rights of its people against such consequences has serious constitutional implications. It is not an exaggeration to say that this decision repeals the divorce laws of all the states and substitutes the law of Nevada as to all marriages one of the parties to which can afford a short trip there. The significance of this decision is best appraised by orienting its facts with reference to the States involved, for the court approves this concrete case as a pattern which anybody in any state may henceforth follow under the protection of the federal courts.

From the viewpoint of North Carolina, this is the situation: The Williamses, North Carolina people, were married in North Carolina, lived there twenty-five years, and have four children. The Hendrixes were also married in North Carolina and resided there some twenty years. In May of 1940, Mr. Williams and Mrs. Hendrix left their homes and respective spouses, departed the state, but after an absence of a few weeks reappeared and set up housekeeping as husband and wife. North Carolina then had on its hands three marriages among four people in the form of two broken families, and one going concern. What problems were thereby created as to property or support and maintenance, we do not know. North Carolina, for good or ill, has a strict policy as to divorce. The situation is contrary to its laws, and it has attempted to vindicate its own law by convicting the parties of bigamy.

The petitioners assert that North Carolina is made powerless in the matter, however, because of proceedings

carried on in Nevada during their brief absence from North Carolina. We turn to Nevada for that part of the episode.

Williams and Mrs. Hendrix appear in the State of Nevada on May 15, 1940. For barely six weeks they made their residences at the Alamo Auto Court on the Las Vegas-Los Angeles Road. On June 26, 1940, both filed bills of complaint for divorce through the same lawyer, and alleging almost identical grounds. No personal service was made on the home-staying spouse in either case; and service was had only by publication and substituted service. Both obtained divorce decrees. The Nevada policy of divorce is reflected in Mrs. Hendrix's case. Her grounds were "extreme mental cruelty." She sustained them by testifying that her husband was "moody"; did not talk or speak to her "often"; when she spoke to him he answered most of the time by a nod or shake of the head and "there was nothing cheerful about him at all." The latter of the two divorces was granted on October 4, 1940, and on that day in Nevada they had benefit of clergy and emerged as man and wife. Nevada having served its purpose in their affairs, they at once returned to North Carolina to live.

The question is whether this court will now prohibit North Carolina from enforcing its own policy within that State against these North Carolinians on the ground that the law of Nevada under which they lived a few weeks is in some way projected into North Carolina to give them immunity.

I.

OUR FUNCTION IN THE MATTER.

There is confided to the Court only the power to resolve constitutional questions raised by these divorce procedures, and not moral, religious, or social questions as to divorce itself. I do not know with any certainty whether

in the long run strict or easy divorce is best for society or whether either has much effect on moral conduct. It is enough for judicial purposes that to each state is reserved constitutional power to determine its own divorce policy. It follows that a federal court should uphold impartially the right of Nevada to adopt easy divorce laws and the right of North Carolina to enact severe ones. No difficulties arise so long as each state applies its laws to its own permanent inhabitants. The complications begin when one state opens its courts and extends the privileges of its laws to persons who never were domiciled there and attempts to visit disadvantages therefrom upon persons who have never lived there, have never submitted to the jurisdiction of its courts, and have never been lawfully summoned by personal service of process. This strikes at the orderly functioning of our federal constitutional system, and raises questions for us.

The prevailing opinion rests upon a line of cases of which *Christmas* v. *Russell*, 5 Wall. 290, is typical. There it was said that "If a judgment is conclusive in the state where it was pronounced, it is equally conclusive everywhere." *Id.* at 302. This rule was uttered long ago in very different circumstances. The judgment there in question was on a promissory note, and the Court also said that: "Nothing can be plainer than the proposition is, that the judgment . . . was a valid judgment in the State where it was rendered. Jurisdiction of the case was undeniable, and the defendant being found in that jurisdiction, was duly served with process, and appeared and made full defense." *Id.* at 301. But the same defendant tried to relitigate his lost cause when it was sought to give that judgment effect in his home state. This Court properly held that it was not competent for the courts of any other state to reopen the merits of the cause. This very wise rule against collateral impeachment of an ordinary judgment based upon personal jurisdiction is now

made to support the theory that we must enforce these very different Nevada judgments without more than formal inquiry into the jurisdiction of the court that rendered them.

The effect of the Court's decision today—that we must give extraterritorial effect to any judgment that a state honors for its own purposes—is to deprive this Court of control over the operation of the full faith and credit and the due process clauses of the Federal Constitution in cases of contested jurisdiction and to vest it in the first state to pass on the facts necessary to jurisdiction. It is for this Court, I think, not for state courts, to implement these great but general clauses by defining those judgments which are to be forced upon other states.

Conflict between policies, laws, and judgments of constituent states of our federal system is an old, persistent, and increasingly complex problem. The right of each state to experiment with rules of its own choice for governing matrimonial and social life is greatly impaired if its own authority is overlapped and its own policy is overridden by judgments of other states forced on it by the power of this Federal Court. If we are to extend protection to the orderly exercise of the right of each state to make its own policy, we must find some way of confining each state's authority to matters and persons that are by some standard its own.

The framers of the Constitution did not lay down rules to guide us in selecting which of two conflicting state judgments or public acts would receive federal aid in its extraterritorial enforcement. Nor was it necessary. There was, and is, an adequate body of law, if we do not reject it, by which to test jurisdiction or power to render the judgments in question so far as faith and credit by federal command is concerned. By the application of well established rules these judgments fail to merit enforcement for two reasons.

II.

LACK OF DUE PROCESS OF LAW.

Thirty-seven years ago this Court decided that a state court, even of the plaintiff's domicile, could not render a judgment of divorce that would be entitled to federal enforcement in other states against a nonresident who did not appear, and was not personally served with process. *Haddock* v. *Haddock,* 201 U. S. 562 (1905 Term). The opinion was much criticized, particularly in academic circles.[1] Until today, however, it has been regarded as law, to be accepted and applied, for good or ill, depending on one's view of the matter. The theoretical reasons for the change are not convincing.

The opinion concedes that Nevada's judgment could not be forced upon North Carolina in absence of personal service if a divorce proceeding were an action *in personam.* In other words, settled family relationships may be destroyed by a procedure that we would not recognize if the suit were one to collect a grocery bill.[2]

We have been told that this is because divorce is a proceeding *in rem.* The marriage relation is to be reified and treated as a *res.* Then it seems that this *res* follows a fugitive from matrimony into a state of easy divorce, although the other party to it remains at home where the *res* was contracted and where years of cohabitation would seem to give it local situs. Would it be less logical to hold that the continued presence of one party to a marriage

[1] It was twenty years before Professor Beale could justify the decision to his satisfaction. Compare Haddock Revisited, 39 Harvard Law Review 417, with Beale, Constitutional Protection of Decrees for Divorce, 19 Harvard Law Review 586. Others seem to lack his capacity for quick adjustment.

[2] *Pennoyer* v. *Neff,* 95 U. S. 714; *Riverside & Dan River Cotton Mills* v. *Meneffee,* 237 U. S. 189; cf. *McDonald* v. *Mabee,* 243 U. S. 90; *Flexner* v. *Farson,* 248 U. S. 289; *Doherty & Co.* v. *Goodman,* 294 U. S. 623; *Milliken* v. *Meyer,* 311 U. S. 457.

gives North Carolina power to protect the *res,* the marriage relation, than to hold that the transitory presence of one gives Nevada power to destroy it? Counsel at the bar met this dilemma by suggesting that the *res* exists in duplicate—one for each party to the marriage. But this seems fatal to the decree, for if that is true the dissolution of the *res* in transit would hardly operate to dissolve the *res* that stayed in North Carolina. Of course this discussion is only to reveal the artificial and fictional character of the whole doctrine of a *res* as applied to a divorce action.

I doubt that it promotes clarity of thinking to deal with marriage in terms of a *res,* like a piece of land or a chattel. It might be more helpful to think of marriage as just marriage—a relationship out of which spring duties to both spouse and society and from which are derived rights,—such as the right to society and services and to conjugal love and affection—rights which generally prove to be either priceless or worthless, but which none the less the law sometimes attempts to evaluate in terms of money when one is deprived of them by the negligence or design of a third party.

It does not seem consistent with our legal system that one who has these continuing rights should be deprived of them without a hearing. Neither does it seem that he or she should be summoned by mail, publication, or otherwise to a remote jurisdiction chosen by the other party and there be obliged to submit marital rights to adjudication under a state policy at odds with that of the state under which the marriage was contracted and the matrimonial domicile was established.

Marriage is often dealt with as a contract. Of course a personal judgment could not be rendered against an absent party on a cause of action arising out of an ordinary commercial contract, without personal service of process. I see no reason why the marriage contract, if such it be

considered, should be discriminated against, nor why a party to a marriage contract should be more vulnerable to a foreign judgment without process than a party to any other contract. I agree that the marriage contract is different, but I should think the difference would be in its favor.

The Court thinks the difference is the other way: we are told that divorce is not a "mere *in personam* action" since *Haddock* v. *Haddock, supra,* held that domicile is necessary to jurisdiction for divorce. But to hold that a state cannot have divorce jurisdiction unless it is the domicile is not to hold that it must have such jurisdiction if it is the domicile, as *Haddock* v. *Haddock* itself demonstrates. Further support for this view seems to be seen in *Maynard* v. *Hill,* 125 U. S. 190, and in the Court's subsequent approval of that case in *Haddock* v. *Haddock, supra,* at 569, 572, 574, 575, 579. All that *Maynard* v. *Hill* decided was that the Territory of Washington had jurisdiction to cut off any interest of an absent spouse in land within its borders. But protection of land in the jurisdiction and protection against bigamy prosecutions out of the jurisdiction are plainly different matters.[3]

Although the Court concedes that its present decision would be insupportable if divorce were a "mere *in personam* action," it relies for support on opinions that the state where one is domiciled has the power to enter valid criminal, tax, and simple money judgments *against*—not *for*—him.[4] Those opinions are wholly inapposite unless

---

[3] Cf. *Arndt* v. *Griggs,* 134 U. S. 316; *Dewey* v. *Des Moines,* 173 U. S. 193; *Fall* v. *Eastin,* 215 U. S. 1; *Olmsted* v. *Olmsted,* 216 U. S. 386; *Hood* v. *McGehee,* 237 U. S. 611; *Grannis* v. *Ordean,* 234 U. S. 385; *Clark* v. *Williard,* 294 U. S. 211; *Pink* v. *A. A. A. Highway Express Co.,* 314 U. S. 201.

[4] *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 279; *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308, 313; *Milliken* v. *Meyer,* 311 U. S. 457, 463–464; *Skiriotes* v. *Florida,* 313 U. S. 69.

they mean that Nevada has jurisdiction to nullify contract rights of a person never in the state or to declare that he is not liable for the commission of crime, payment of taxes, or the breach of a contract, in another state; and I am sure that nobody has ever supposed they meant that.

To hold that the Nevada judgments were not binding in North Carolina because they were rendered without jurisdiction over the North Carolina spouses, it is not necessary to hold that they were without any conceivable validity. It may be, and probably is, true that Nevada has sufficient interest in the lives of those who sojourn there to free them and their spouses to take new spouses without incurring criminal penalties under Nevada law. I know of nothing in our Constitution that requires Nevada to adhere to traditional concepts of bigamous unions or the legitimacy of the fruit thereof. And the control of a state over property within its borders is so complete that I suppose that Nevada could effectively deal with it in the name of divorce as completely as in any other.[5] But it is quite a different thing to say that Nevada can dissolve the marriages of North Carolinians and dictate the incidence of the bigamy statutes of North Carolina by which North Carolina has sought to protect her own interests as well as theirs. In this case there is no conceivable basis of jurisdiction in the Nevada court over the absent spouses,[6] and, *a fortiori*, over North Carolina herself. I

[5] Cf. *Arndt* v. *Griggs; Dewey* v. *Des Moines; Grannis* v. *Ordean; Clark* v. *Williard, supra,* note 3.

[6] A spouse who appears and contests the jurisdiction of the court of another state to grant a divorce may not collaterally attack its findings of domicile and jurisdiction made after such appearance. *Davis* v. *Davis,* 305 U. S. 32. So also, a deserter from the matrimonial domicile may be bound by a divorce granted by a court of the state where the matrimonial domicile is situated. Whether fault on the part of the deserter is an essential seems on the basis of our cases on jurisdiction

cannot but think that in its preoccupation with the full faith and credit clause the Court has slighted the due process clause.

III.

LACK OF DOMICILE.

We should, I think, require that divorce judgments asking our enforcement under the full faith and credit clause, unlike judgments arising out of commercial transactions and the like, must also be supported by good-faith domicile of one of the parties within the judgment state.[7] Such is certainly a reasonable requirement. A state can have no legitimate concern with the matrimonial status of two persons, neither of whom lives within its territory.

The Court would seem, indeed, to pay lip service to this principle. I understand the holding to be that it is domicile in Nevada that gave power to proceed without personal service of process. That being the course of reasoning, I do not see how we avoid the issue concerning the existence of the domicile which the facts on the face of this record put to us. Certainly we cannot, as the Court would, by-pass the matter by saying that "we must treat the present case for the purpose of the limited issue before us precisely the same as if petitioners had resided in Ne-

---

for divorce to be an open question; *Atherton* v. *Atherton,* 181 U. S. 155; *Haddock* v. *Haddock, supra,* at 570, 572, 583; and *Thompson* v. *Thompson,* 226 U. S. 551; but our decisions on analogous problems might be found to afford adequate support for a decision that it is not. Cf. *Washington ex rel. Bond & Goodwin & Tucker* v. *Superior Court,* 289 U. S. 361; *Doherty & Co.* v. *Goodman,* 294 U. S. 623. See, further, Restatement, Conflict of Laws, §§ 112, 113.

[7] This was the decision in *Bell* v. *Bell,* 181 U. S. 175; and *Andrews* v. *Andrews,* 188 U. S. 14. *Davis* v. *Davis, supra,* note 6, in no way indicates that a finding of domicile after appearance of the absent spouse and litigation of the question would be conclusive upon the state of his domicile in litigation involving its interests and not merely those of the parties. Cf. *Stoll* v. *Gottlieb,* 305 U. S. 165, 172, n. 13.

vada for a term of years and had long ago acquired a permanent abode there." I think we should treat it as if they had done just what they have done.

The only suggestion of a domicile within Nevada was a stay of about six weeks at the Alamo Auto Court, an address hardly suggestive of permanence. Mrs. Hendrix testified in her case (the evidence in Williams' case is not before us) that her residence in Nevada was "indefinite permanent" in character. The Nevada court made no finding that the parties had a "domicile" there. It only found a residence—sometimes, but not necessarily, an equivalent.[8] It is this Court that accepts these facts as enough to establish domicile.

While a state can no doubt set up its own standards of domicile as to its internal concerns, I do not think it can require us to accept and in the name of the Constitution impose them on other states. If Nevada may prescribe six weeks of indefinite-permanent abode in a motor court as constituting domicile, she may as readily prescribe six days. Indeed, if the Court's opinion is carried to its logical conclusion, a state could grant a constructive domicile for divorce purposes upon the filing of some sort of declaration of intention. Then it would follow that we would be required to accept it as sufficient and to force all states to recognize mail-order divorces as well as tourist divorces. Indeed, the difference is in the bother and expense—not in the principle of the thing.

The concept of domicile as a controlling factor in choice of law to govern many relations of the individual was well known to the framers of the Constitution. It was hardly contemplated that a person should be subject at once to two conflicting state policies, such as those of Nevada and North Carolina. It was undoubtedly expected that the Court would in many cases of conflict use one's domicile

[8] 1 Beale, Conflict of Laws (1935) § 10.3.

as an appropriate guide in selecting the law to govern his controversies.

Domicile means a relationship between a person and a locality. It is the place, and the one place, where he has his roots and his real, permanent home. The Fourteenth Amendment, in providing that one by residence in a state becomes a citizen thereof, probably used "residence" as synonymous with domicile. Thus domicile fixes the place where one belongs in our federal system. In some instances the existence of this relationship between the state and an individual may be a federal question, although this Court has been reluctant to accept that view.[9]

If in testing this judgment to determine whether it qualifies for federal enforcement we should apply the doctrine of domicile to interpretation of the full faith and credit clause, Nevada would be held to a duty to respect the statutes of North Carolina and not to interfere with their application to those whose individual as well as matrimonial domicile is within that State unless and until that domicile has been terminated. And North Carolina would not be required to yield its policy as to persons resident there except upon a showing that Nevada had acquired a domiciliary right to redefine the matrimonial status.

However, the trend of recent decision has been to break down the rigid concept of domicile as a test of the right of a state to deal with important relations of life. This trend

---

[9] Compare *Texas* v. *Florida*, 306 U. S. 398, with *Massachusetts* v. *Missouri*, 308 U. S. 1. And see Tweed and Sargent, Death and Taxation are Certain—But What of Domicile?, 53 Harvard Law Review 68, 76; "*Texas* v. *Florida* does not help the situation in the ordinary case because at the rates of tax prevailing in most of the states a controversy between the states of which the Supreme Court has jurisdiction can arise only if at least four states claim a tax and the estate consists of intangible property having a value of at least $30,000,000. On no other state of facts will the assets be insufficient to meet the claims of all of the claimant states."

has been particularly apparent in cases where the Court has authorized, if not indeed encouraged, the several states to set up their own standards of domicile and to make conflicting findings of domicile for the purpose of taxing the right of succession. *Worcester County Trust Co.* v. *Riley,* 302 U. S. 292. The Court has completely repudiated domicile as the measure of a state's right to tax intangible property. *State Tax Commission* v. *Aldrich,* 316 U. S. 174, 185. The present decision extends the trend to the field of matrimonial legislation. This direction is contrary to what I believe to be the purpose of our Constitution to prevent overlapping and conflict of authority between the states.

In the application of the full faith and credit clause to the variety of circumstances that arise when families break up and separate domiciles are established, there are, I grant, many areas of great difficulty. But I cannot believe that we are justified in making a demoralizing decision in order to avoid making difficult ones.

IV.

PRACTICAL CONSIDERATIONS.

The Court says that its judgment is "part of the price of our federal system." It is a price that we did not have to pay yesterday and that we will have to pay tomorrow, only because this Court has willed it to be so today. This Court may follow precedents, irrespective of their merits, as a matter of obedience to the rule of *stare decisis.* Consistency and stability may be so served. They are ends desirable in themselves, for only thereby can the law be predictable to those who must shape their conduct by it and to lower courts which must apply it. But we can break with established law, overrule precedents, and start a new cluster of leading cases to define what we mean, only as a matter of deliberate policy. We therefore search a

judicial pronouncement that ushers in a new order of matrimonial confusion and irresponsibility for some hint of the countervailing public good that is believed to be served by the change. Little justification is offered. And it is difficult to believe that what is offered is intended seriously.

The Court advances two "intensely practical considerations" in support of its present decision. One is the "complicated and serious condition" if "one is lawfully divorced and remarried in Nevada and still married to the first spouse in North Carolina." This of course begs the question, for the divorces were completely ineffectual for any purpose relevant to this case. I agree that it is serious if a Nevada court without jurisdiction for divorce purports to say that the sojourn of two spouses gives four spouses rights to acquire four more, but I think it far more serious to force North Carolina to acquiesce in any such proposition. The other consideration advanced is that if the Court doesn't enforce divorces such as these it will, as it puts it, "bastardize" children of the divorcees. When thirty-seven years ago Mr. Justice Holmes perpetrated this quip, it had point, for the Court was then holding divorces invalid which many, due to the confused state of the law, had thought to be good. It is difficult to find that it has point now that the shoe is on the other foot. In any event, I had supposed that our judicial responsibility is for the regularity of the law, not for the regularity of pedigrees.

WRAGG *v.* FEDERAL LAND BANK OF NEW ORLEANS.

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

No. 172. Argued December 10, 1942.—Decided January 4, 1943.

1. A farmer-debtor, whose petition under § 75 of the Bankruptcy Act has been dismissed and whose application to reopen the proceeding has been denied, may initiate a new proceeding under § 75 where he retains a property interest which could be administered in such a proceeding. P. 327.
2. The statutory right of a farmer-debtor, in Alabama, to redeem after foreclosure of a mortgage, whether it be denominated a property right or a privilege, is an interest within the jurisdiction of the bankruptcy court and capable of administration under § 75 of the Bankruptcy Act. Pp. 328–329.
3. Section 75 of the Bankruptcy Act prescribes its own criteria for determining what property interests may be brought within the jurisdiction of the court. In the interpretation and application of the Bankruptcy Act as in the case of other federal statutes, federal not local law applies. P. 328.

125 F. 2d 1003, reversed.

CERTIORARI, *post,* p. 608, to review the affirmance of a judgment of the bankruptcy court (34 F. Supp. 374) which denied an application to reopen a proceeding under § 75 of the Bankruptcy Act or for permission to begin a new proceeding under that Section.

Mr. Jack Crenshaw, with whom *Messrs. Walter J. Knabe* and *Elmer McClain* were on the brief, for petitioner.

Mr. Thomas Harvey Hedgepeth for respondent.

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

After her petition for a composition or extension of her debts in a farmer-debtor proceeding under § 75 of the

Bankruptcy Act, 11 U. S. C. § 203, had been dismissed, petitioner applied to reopen the proceeding or, in the alternative, to be permitted to institute a new proceeding under § 75. The questions for our decision are whether the courts below erred in denying her application and whether, at the time of her application, her right as mortgagor to redeem Alabama real estate after its sale on foreclosure of the mortgage was such that it can be administered by the court in a § 75 proceeding.

In 1937, after respondent mortgagee had obtained a decree of foreclosure, but before foreclosure sale, petitioner filed a petition under § 75 seeking a composition or extension of her debts. The bankruptcy court referred the proceeding to a conciliation commissioner; petitioner filed proposed terms of composition or extension to which respondent filed objections; the conciliation commissioner then recommended that the offer be not approved, on the ground that it did not contain an equitable and feasible method of liquidating respondent's claim and of securing petitioner's financial rehabilitation.

The court confirmed the report of the conciliation commissioner, holding that petitioner was not entitled to amend her petition so as to proceed under § 75 (s), and directed that the proceeding be dismissed as of January 19, 1938. Petitioner's motion for leave to appeal to the Circuit Court of Appeals in forma pauperis and her petition for certiorari to this Court were denied. 95 F. 2d 252; 305 U. S. 596. After the farmer-debtor proceeding was dismissed respondent purchased the mortgaged property at a foreclosure sale, which was confirmed in April, 1938. Nearly a year later, respondent contracted to sell the property to a third party, the contract stipulating that it was "subject to the statutory right of redemption following foreclosure if any exists."

Alabama law allows to the mortgagor a two-year redemption period after foreclosure sale. Title 7, § 727,

Code of Alabama, 1940. On March 11, 1940, one day before the expiration of this period,[1] petitioner filed her application in the bankruptcy court. It referred to her prior § 75 proceeding, alleging that her property had not been fully administered in that proceeding and that she was entitled to further relief, especially in the light of the changed conditions and interpretation of the Act (obviously a reference to the decision in *John Hancock Ins. Co.* v. *Bartels,* 308 U. S. 180, decided December 4, 1939). She accordingly prayed that the case be reopened and reinstated. In the alternative she asked that, if she were entitled only to file a new petition, then her former schedules should be deemed a part of her petition, and she offered to pay such filing fees as the statute requires.

The district court thought that even though the dismissal of the original proceeding was erroneous under the rule subsequently announced in the *Bartels* case, there were no circumstances sufficient to persuade the court, in the exercise of its discretion, that the proceeding should be reopened upon an application filed more than two years after it had been dismissed. The court accordingly denied the application. 34 F. Supp. 374. The Circuit Court of Appeals for the Fifth Circuit affirmed. 125 F. 2d 1003. We granted certiorari, *post,* p. 608, the questions raised being of importance in the administration of the Bankruptcy Act.

We do not differ with the conclusion of both courts below that it was within the sound discretion of the bankruptcy court to decline to reopen the original order of dismissal. A motion to reopen a proceeding may not properly be substituted for an appeal from its decision. See *Wayne Gas Co.* v. *Owens Co.,* 300 U. S. 131, 135; *Pfister* v. *Northern Illinois Finance Corp., ante,* pp. 153–

[1] Petitioner contends that on March 11, 1940, nearly six weeks of the period of redemption remained. We find it unnecessary to determine the correctness of this contention.

154. But the dismissal of the original proceeding and denial of the application to reopen it were not bars to a new proceeding under § 75 to secure whatever relief the Act would afford with respect to petitioner's remaining interest in the mortgaged property. We find no intimation in the language and purposes of the Act that an unsuccessful earlier proceeding would preclude a new petition so long as the farmer retains an interest which could be administered in a proceeding under § 75.

Respondent argues that under Alabama statutes and decisions the statutory right of redemption after foreclosure is defined as a "personal privilege" rather than as "property or property rights" (Title 7, § 743), and hence is not within the jurisdiction of the bankruptcy court in a farmer-debtor proceeding. But § 75 prescribes its own criteria for determining what property interests may be brought within the jurisdiction of the court. In the interpretation and application of the Bankruptcy Act as in the case of other federal statutes, federal not local law applies. *Prudence Corp.* v. *Geist,* 316 U. S. 89, 95 and cases cited. It is for the bankruptcy court to determine, by reference to the provisions of the bankruptcy statute, what rights created by state law—regardless of the characterization which may be applied to them by state statutes and decisions—are within the jurisdiction of the bankruptcy court. *United States* v. *Pelzer,* 312 U. S. 399, 402–03.

Under § 168 of Title 47 of the Alabama Code of 1940, the purchaser at foreclosure sale is entitled to a deed immediately upon making the purchase and the deed conveys to him full legal title subject only to the right of redemption. By §§ 727 and 743 of Title 7, the mortgagor retains a right of redemption, which is "not subject to alienation," save as it may be transferred or assigned to an assignee who may redeem. *Estes* v. *Johnson,* 234 Ala. 191, 174 So. 632; *Crawford* v. *Horton,* 234 Ala. 439, 444, 175 So. 310. Section 75 (n) of the Bankruptcy Act confers jurisdiction

over the debtor's "right or the equity of redemption where the period of redemption has not or had not expired." *Wright* v. *Logan,* 315 U. S. 139, 142; and see *State Bank of Hardinsburg* v. *Brown, ante,* pp. 138–140. Looking at the scope and purpose of § 75, we think petitioner's interest in the mortgaged property, whether it be denominated a property right or a privilege of redemption, is an interest intended to be subject to the court's jurisdiction and is capable of administration in a farmer-debtor proceeding. See *Mangus* v. *Miller, ante,* p. 178.

It follows that petitioner's right of redemption was within the jurisdiction of the court; that she was entitled to initiate a new proceeding for the administration of the property in farmer-debtor proceedings, and to ask that her petition and schedules be allowed to stand as the petition and schedules in such a proceeding.

Reversed.

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

DETROIT BANK (FORMERLY DETROIT SAVINGS BANK) *v.* UNITED STATES.

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

No. 156. Argued December 9, 10, 1942.—Decided January 4, 1943.

1. The tax lien imposed by § 315 (a) of the Revenue Act of 1936 for federal estate taxes attaches at the date of the decedent's death without assessment or demand. P. 332.
2. The lien extends to an interest of the decedent as a tenant by the entirety. P. 332.
3. The lien need not be recorded under the provisions of R. S. § 3186, as amended, in order to give it superiority to the lien of a mortgagee who acquired his mortgage for value in good faith without knowledge of the tax lien. P. 333.

The differences between R. S. § 3186 and § 315 (a), and their legislative history as separate enactments, indicate that each was intended to operate independently of the other. P. 334.

4. In authorizing an unrecorded estate tax lien superior to the lien of a subsequent mortgage, while withholding such tax lien against innocent purchasers of property which a decedent had transferred *inter vivos* in contemplation of death, the statute does not violate the Fifth Amendment. P. 337.

Unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress. P. 337.

127 F. 2d 64, affirmed.

CERTIORARI, *post*, p. 607, to review the affirmance of a judgment of the District Court, 41 F. Supp. 41, enforcing at the suit of the Government an unrecorded tax lien on real property assessed as part of a decedent's estate.

Messrs. Edward S. Reid, Jr. and *Emmett E. Eagan,* with whom *Messrs. Ferris D. Stone* and *Cleveland Thurber* were on the brief, for petitioner.

Mr. J. Louis Monarch, with whom *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Alvin J. Rockwell,* and *Valentine Brookes* were on the brief, for the United States.

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

The questions for decision are:

(1) Whether the lien for federal estate taxes authorized by § 315 (a) of the Revenue Act of 1926, 44 Stat. 9, 80, attaches to the interest of the decedent in an estate by the entirety.

(2) Whether the lien is required to be recorded under the provisions of R. S. § 3186, as amended, in order to give it superiority to the lien of a mortgagee who acquired his mortgage for value in good faith without knowledge of the tax lien.

(3) Whether § 315 (a), so applied as to give the lien superiority over such subsequent mortgages, offends the Fifth Amendment.

The Government brought the present suit in the district court pursuant to R. S. § 3207, to foreclose an asserted lien for estate taxes assessed under § 302 (e) upon certain parcels of real estate. The real estate had been owned at the time of his death by decedent and his wife as tenants by the entirety. Following his death the real estate was not included as a part of his estate in computing the federal estate tax. Prior to assessment or payment of the tax, the parcels of real estate in question were mortgaged, some by decedent's widow and others by his children, to petitioner who acted without knowledge of the Government's asserted lien or claim for taxes. Default in payment of the mortgage indebtedness having occurred, petitioner bought in the mortgaged property on foreclosure sale. The trial court found that petitioner acquired the mortgages in good faith and for value.

The Commissioner of Internal Revenue assessed an estate tax deficiency against decedent's estate by reason of the failure to include the value of the estate by the entirety in the computation of the tax, which the Board of Tax Appeals sustained. The Government then brought the present proceeding to enforce the lien. The district court held that the tax lien, although unrecorded, was superior to the mortgage lien and to local, state and county liens for taxes, which had accrued after the death of decedent. The Circuit Court of Appeals affirmed, 127 F. 2d 64. We were moved to grant certiorari, *post*, p. 607, by the importance of the questions presented to the administration of the revenue laws.

Section 315 (a) of the Revenue Act of 1926 provides in part that:

"Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except

that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any or all property of such estate from the lien herein imposed."

The lien attaches at the date of the decedent's death, since the gross estate is determined as of that date and the estate tax itself becomes an obligation of the estate at that time without assessment. See *Hertz* v. *Woodman,* 218 U. S. 205, 220; *Ithaca Trust Co.* v. *United States,* 279 U. S. 151, 155; *United States* v. *Ayer,* 12 F. 2d 194; *Rosenberg* v. *McLaughlin,* 66 F. 2d 271. That the lien attaches at the decedent's death without necessity for assessment or demand is implicit in the proviso that such part of the estate as is used for payment of charges against the estate and expenses of administration shall be "divested of the lien."

Petitioner urges that since the lien here asserted is "upon the gross estate of decedent" it does not attach to the land held by the entirety which passed to the decedent's widow, not as a part of his estate but by her right to survivorship. But this argument disregards the fact that the lien is for the particular tax imposed by § 302 of the Revenue Act of 1926 upon "the value of the gross estate of decedent" at the time of his death, including "the value at the time of his death of all property, real or personal, . . . (e) to the extent of the interest therein held . . . as tenants by the entirety by the decedent and spouse . . ."

Since the lien authorized by § 315 (a) is for the tax which in its computation includes as a part of the taxable estate the value of the estate by the entirety, see *Tyler* v. *United States,* 281 U. S. 497, we think it too plain for argument

that the lien extends to the estate as thus defined and made the base on which the tax is computed. The gross estate of decedent within the meaning of § 315 (a) is the estate or property on which the tax chargeable to decedent's estate is computed. Congress, in § 314 (b), similarly denominated the proceeds of insurance on the life of decedent payable to beneficiaries as "a part of the gross estate" in providing for recovery from the beneficiaries of their pro rata shares of the estate tax. We cannot impute to Congress an intention not disclosed by the statute or its legislative history to exclude from the tax lien property which it directs to be included in the decedent's gross estate for the purpose of computing the tax.

Nor can we conclude, as petitioner argues, that the lien for estate tax authorized by § 315 (a) is subject to the earlier provision for recording tax liens in R. S. § 3186. This section, so far as now relevant, provides,

"That if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the Collector, except when otherwise provided, until paid . . . upon all property and rights to property belonging to such person: *Provided, however,* that such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice of such lien shall be filed by the Collector in the office of the clerk of the district court of the district within which the property subject to such lien is situated . . ."

The section contains a further proviso that whenever any state, by appropriate legislation, makes provision for the filing of such notice in the office of a registrar or recorder of deeds, "then such liens shall not be valid in that state against any mortgagee, purchaser or judgment creditor until such notice shall be filed" in the appropriate office.

Michigan has made provision for filing notices of such tax liens in the offices of the registers of deeds in the counties of the state. § 3746, Compiled Laws of Michigan, 1929.

The part of R. S. § 3186 imposing the lien was enacted in 1866, 14 Stat. 107. The provision for filing notice of government tax liens was added by amendment of March 4, 1913, 37 Stat. 1016. Before the amendment this Court had held in *United States* v. *Snyder,* 149 U. S. 210; cf. *United States* v. *Curry,* 201 F. 371, 374, that in the absence of a federal statute requiring government tax liens to be recorded they are superior to subsequent mortgages.

Petitioner contends that Congress, in enacting § 209 of the Revenue Act of 1916, which, with amendments, became § 315 (a) of the Revenue Act of 1926, did not impose an independent lien but merely made expressly applicable to the federal estate tax the lien created by R. S. § 3186, modifying that lien in some respects as will be further noted. It urges that save where inconsistent with the express terms of § 315 (a), all provisions of R. S. § 3186 are made applicable to the estate tax lien by reason of § 211 of the Revenue Act of 1916, which provides:

"That all administrative, special, and general provisions of law, including the laws in relation to the assessment and collection of taxes not heretofore specifically repealed are hereby made to apply to this title so far as applicable and not inconsistent with its provisions."

But we think that the differences between R. S. § 3186 and § 315 (a), and their legislative history as separate enactments, indicate that each was intended to operate independently of the other.

Section 3186 refers only to liens which are made such by that section. Section 315 (a) authorizes the lien for estate taxes and makes no reference to R. S. § 3186 or to any requirement for recording notice of the lien. The lien of R. S. § 3186 is upon all the property of the person liable

for the tax, while the lien of § 315 (a) attaches only to the property included in and taxed as the gross estate not used to pay administration expenses. The lien of R. S. § 3186 continues until the tax liability is paid while the lien of § 315 (a) continues for ten years from the death of the decedent. Of particular significance is the difference in time when the liens attach under the two sections. Under R. S. § 3186 there is no lien and no notice can be recorded until there has been a demand by the collector and a refusal to pay it by the taxpayer. Under § 315 (a), as has been stated, the lien arises on the death of the decedent and becomes effective against purchasers and mortgagees without assessment or demand and obviously before it would be possible to record a notice of lien under the provisions of R. S. § 3186.

Since the enactment of the Revenue Act of 1916, R. S. § 3186 has been amended four times,[1] and § 209 of the Revenue Act of 1916 (which became § 315 (a) of the 1926 Act) has been amended twice and twice reënacted without amendment.[2] With one exception, in none of the amendments or reënactments of the one section was any reference made to the other. Section 409 of the Revenue Act of 1921 added a provision to the estate tax lien section authorizing the Commissioner under certain circumstances to release the lien. A similar provision was not added to R. S. § 3186 until the Revenue Act of 1928. By § 613 of that Act, § 3186 was amended to provide for such release, the amendment, by subsection (f), being made applicable

[1] Act of Feb. 26, 1925, 43 Stat. 994; Revenue Act of 1928, § 613, 45 Stat. 875; Revenue Act of 1934, § 509, 48 Stat. 757; Revenue Act of 1939, § 401, 53 Stat. 882. The section is now §§ 3670–77 of the Internal Revenue Code.

[2] Revenue Act of 1919, § 409, 40 Stat. 1100; Revenue Act of 1921, § 409, 42 Stat. 283; Revenue Act of 1924, § 315 (a), 43 Stat. 312; Revenue Act of 1926, § 315 (a), 44 Stat. 80. The section is now § 827 of the Internal Revenue Code.

to "a lien in respect of any internal revenue tax, whether or not the lien was imposed by this section."

At the same time, the release provision of § 315 (a) was repealed. By § 809 of the Revenue Act of 1932, however, the latter was reënacted, it having been discovered that there was need for a provision authorizing release of the estate tax lien prior to assessment. H. Rep. No. 708, 72d Cong. 1st Sess. 50. Moreover it is not without significance that Congress, in enacting a gift tax in the Revenue Act of 1932, provided in § 510 of that Act that the gift tax should be a lien on the property passing to the donee, using words almost identical to these of § 315 (a). The Committee Reports state that "by this provision there is imposed a lien additional to that imposed by section 3186 of the Revised Statutes." H. Rep. No. 708, 72d Cong. 1st Sess. 30; Sen. Rep. No. 665, 72d Cong. 1st Sess. 42. This history and the differences between the provisions already noted, would seem to compel the conclusion that § 315 (a) was intended to operate independently of R. S. § 3186, and that the estate tax lien created by the former is not subject to the latter's requirement of recordation.

Sections 313 (b) and (c) lend support to this conclusion. Subsection (b) sets up a procedure whereby the Commissioner may be required to certify the amount of the tax due and in that event subsection (c) releases any part of the gross estate subsequently acquired by a bona fide purchaser, from any lien for a deficiency in the tax which may be thereafter assessed—a procedure which would have afforded adequate protection to petitioner from any deficiency lien in this case. These provisions not only recognize that the lien comes into existence before the tax is assessed or demanded, but they are unnecessary and inoperative if notice of the lien is required by R. S. § 3186 to be recorded.

It is evident from a comparison of the two sections that Congress, in providing for the estate tax lien, has proceeded on the assumption that in the case of the tax on property passing at death and which is distributed in consequence of the death, there is greater need of a lien in advance of assessment and demand for payment of the tax than in the case of other types of taxes; and that there is less need for protection of third persons by a recorded notice of the lien when the property passing at death is normally dealt with by probate and estate tax proceedings of public notoriety.

This is emphasized by the provisions of § 315 (b) which relieve bona fide purchasers of property transferred *inter vivos* by the decedent in contemplation of death, from the lien which in the case of property transferred at death is enforcible against such purchasers. This provision, like § 313 (c) would be unnecessary if R. S. § 3186 required notice of the lien to be recorded. The conclusion seems inescapable that the two sections apply independently, each of the other, at least to the extent that notice of the lien authorized by § 315 (a) is not required to be recorded under R. S. § 3186. Whether the lien created by § 315 (a) could be recorded by the procedures established by § 3186 and state statutes enacted in accordance with that section need not now be decided.

Petitioner also insists that the statute violates the Fifth Amendment by authorizing an unrecorded tax lien against the property mortgaged to it and withholding such a lien against innocent purchasers of property which a decedent had transferred *inter vivos* in contemplation of death. Unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress. *LaBelle Iron Works* v. *United States,* 256 U. S. 377, 392; *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 584–585; *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 400, 401; *Helvering* v.

Lerner Stores Co., 314 U. S. 463, 468. Even if discriminatory legislation may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment, see *Steward Machine Co.* v. *Davis, supra,* 585; *Currin* v. *Wallace,* 306 U. S. 1, 13, no such case is presented here.

For reasons already indicated we think there is adequate basis for the distinction made by the statute between innocent purchasers of property which passes at the decedent's death and those of property which he conveyed in his lifetime in anticipation of death. As we have pointed out, the estate tax status of property passing at decedent's death is more readily ascertained than that of property which he has conveyed away in his lifetime and which so far as normal probate and tax proceedings are concerned would not appear to be related to his estate or taxable as a part of it. We do not find in such a classification any basis for saying that the discrimination in the statute is so arbitrary as to violate due process.

Affirmed.

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

MICHIGAN ET AL. *v.* UNITED STATES.

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

No. 214. Argued December 9, 10, 1942.—Decided January 4, 1943.

A federal tax lien on private real estate, securing a federal estate tax, takes precedence over later liens securing state taxes. P. 340.
127 F. 2d 64, affirmed.

CERTIORARI, *post,* p. 607, to review a judgment affirming a judgment of the District Court, 41 F. Supp. 41, enforcing a federal estate tax lien.

Mr. John H. Witherspoon, with whom *Messrs. Herbert J. Rushton,* Attorney General of Michigan, *Daniel J. O'Hara,* Assistant Attorney General, *James H. Lee, William E. Dowling,* and *Samuel Brezner* were on the brief, for petitioners.

Mr. J. Louis Monarch, with whom *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Alvin J. Rockwell,* and *Valentine Brookes* were on the brief, for the United States.

Messrs. Francis P. Burns and *Charles S. Rhyne* filed a brief on behalf of the National Institute of Municipal Law Officers, as *amicus curiae,* urging reversal.

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

This is a companion case to *Detroit Bank* v. *United States, ante,* p. 329. It involves the lien for estate taxes asserted by the Government and considered in our opinion in that case.

Petitioners, the City of Detroit, the County of Wayne, and the State of Michigan, assert liens for city, county and state taxes on the real estate in question, accruing subsequent to the federal estate tax lien. As defendants in the suit brought by the Government to foreclose the lien, they attack it on all the grounds considered and rejected in our opinion in the *Detroit Bank* case. They also contend that the state liens are given superiority over the federal lien by virtue of state statutes. Section 3429 of the Compiled Laws of Michigan, 1929, as amended by Act No. 38 of the Extra Session of 1934, declares that taxes "shall become a lien upon such real property" on specified dates following their assessment and, as construed by petitioners, states that they shall be a "first lien, prior, superior, and paramount." Section 3746 authorizes the filing of notice of liens as provided in R. S. § 3186, in the offices of registers

of deeds in the counties of Michigan. Petitioners contend that these and other statutory provisions as construed by Michigan courts give superiority to state tax liens over other unrecorded liens, including the present estate tax lien of the federal Government.

We do not stop to inquire whether this construction of the state statutes is the correct one, for we think the argument ignores the effect of a lien for federal taxes under the supremacy clause of the Constitution. The establishment of a tax lien by Congress is an exercise of its constitutional power "to lay and collect taxes." Article I, § 8 of the Constitution. *United States* v. *Snyder,* 149 U. S. 210. And laws of Congress enacted pursuant to the Constitution are by Article VI of the Constitution declared to be "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

"It is of the very nature and essence of a lien, that no matter into whose hands the property goes, it passes *cum onere.*" *Burton* v. *Smith,* 13 Pet. 464, 483; *Rankin* v. *Scott,* 12 Wheat. 177, 179; *Howard* v. *Railway Co.,* 101 U. S. 837, 845. Hence it is not debatable that a tax lien imposed by a law of Congress, as we have held the present lien is imposed, cannot, without the consent of Congress, be displaced by later liens imposed by authority of any state law or judicial decision. *United States* v. *Snyder, supra; United States* v. *Greenville,* 118 F. 2d 963. Similarly we held that the priority of payment commanded by R. S. § 3466 could not be set aside by state legislation. *United States* v. *Texas,* 314 U. S. 480, 486; *Spokane County* v. *United States,* 279 U. S. 80; *New York* v. *Maclay,* 288 U. S. 290; cf. *Missouri* v. *Ross,* 299 U. S. 72.

As the federal lien with which we are here concerned attached to private property prior to the acquisition of

any interest in that property by the state, we need not consider the extent to which Congress may give, or intended by § 315 (a) to give, priority to a federal lien over a previously perfected state lien. Compare *New York* v. *Maclay, supra,* 292; *Spokane County* v. *United States, supra,* 95; *United States* v. *Texas, supra,* 484–6.

Affirmed.

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

PARKER, DIRECTOR OF AGRICULTURE, ET AL. *v.* BROWN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 46. Argued May 5, 1942 (No. 1040, 1941 Term). Reargued October 12, 13, 1942.—Decided January 4, 1943.

1. A suit in a federal court to enjoin enforcement of a state agricultural proration program, in which the validity of the program is challenged as in conflict with federal antitrust laws, is a suit "arising under" a "law regulating commerce" and is maintainable without regard to the amount in controversy. 28 U. S. C. § 41 (1), (8). P. 349.
2. A majority of the Court are of opinion that this suit to enjoin enforcement of a marketing plan adopted under the California Agricultural Prorate Act is within the equity jurisdiction of the district court, since the complaint alleges and the evidence shows threatened irreparable injury to the complainant's business and threatened prosecutions by reason of his having marketed his crop under the protection of the district court's injunction. P. 349.
3. A prorate marketing program under the California Agricultural Prorate Act, adopted by the State for regulating the handling, disposition, and prices of raisins produced in California, a large part of which go into interstate and foreign commerce, *held* not within the intended scope of, and not a violation of, the Sherman Act. P. 350.

4. A program pursuant to the California Agricultural Prorate Act for marketing the 1940 raisin crop, adopted with the collaboration of officials of the U. S. Department of Agriculture and aided by loans from the Commodity Credit Corporation recommended by the Secretary of Agriculture, *held* not in conflict with the federal Agricultural Marketing Agreement Act of 1937, where the Secretary had not proposed or promulgated any order under that Act applicable to the marketing of raisins. Pp. 352, 358.
5. The marketing program for the 1940 raisin crop, adopted pursuant to the California Agricultural Prorate Act, the declared purpose of which is to "conserve the agricultural wealth of the State" and to "prevent economic waste in the marketing of agricultural products" of the State, and which operates to eliminate competition among producers in respect of the terms of sale (including the price) of the crop and to impose restrictions on the sale and distribution to buyers who subsequently sell and ship in interstate commerce, *held* a regulation of state industry of local concern which, in the circumstances detailed in the opinion, is not prohibited by the commerce clause in the absence of Congressional legislation prohibiting or regulating transactions affected by the state program. Pp. 359, 368.

   (1) The restrictions which the state program imposes upon the intrastate sale of a commodity by its producer to a processor who contemplates doing, and in fact does, work upon the commodity before packing it and shipping it in interstate commerce, do not violate the Commerce Clause. P. 359.

   (2) *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, and *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, distinguished. P. 361.

   (3) When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of such power of Congress with that reserved to the State is to be attained by the accommodation of the competing demands of the state and national interests involved. P. 362.

   (4) State regulations affecting interstate commerce are to be sustained, not because they are "indirect" rather than "direct," not because they affect rather than command the operations of interstate commerce, but because, upon a consideration of all the relevant facts

and circumstances, the matter appears an appropriate one for local regulations, for which there may be wide scope without materially obstructing the free flow of commerce. P. 362.

(5) Examination of the evidence in this case and of available data of the raisin industry in California, of which the Court may take judicial notice, leaves no doubt that the evils attending the production and marketing of raisins in that State present a problem local in character and urgently demanding state action for the economic protection of those engaged in one of its important industries. P. 363.

(6) Where the Secretary of Agriculture, who could have adopted a marketing program for raisins under the federal Agricultural Marketing Agreement Act, has instead, as that Act authorizes, coöperated in promoting the state marketing program, the court cannot say that the effect of the state program on interstate commerce is one which the Commerce Clause forbids. And particularly should state regulation of local matters be sustained where its effect on commerce is one which it has been the policy of Congress, by its legislation, to encourage. P. 368.

39 F. Supp. 895, reversed.

APPEAL from a decree of a district court of three judges enjoining the enforcement, against the appellee, of a marketing program adopted pursuant to the California Agricultural Prorate Act.

Messrs. Walter L. Bowers, Deputy Attorney General of California, and *Strother P. Walton,* with whom *Messrs. Earl Warren,* Attorney General, and *W. R. Augustine,* Deputy Attorney General, were on the briefs, for appellants on the reargument. *Mr. Walter L. Bowers* argued the cause for appellants on the original argument.

Mr. G. Levin Aynesworth, with whom *Mr. Christian M. Ozias* was on the brief, for appellee.

By special leave of Court, *Mr. Robert L. Stern,* with whom *Solicitor General Fahy, Assistant Attorney General Arnold,* and *Messrs. Charles H. Weston* and *Robert H.*

Shields were on the brief, for the United States, as *amicus curiae*, asserting that the state program, though not inconsistent with federal agricultural legislation, was invalid under the Sherman Act and the Commerce Clause.

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

The questions for our consideration are whether the marketing program adopted for the 1940 raisin crop under the California Agricultural Prorate Act [1] is rendered invalid (1) by the Sherman Act, or (2) by the Agricultural Marketing Agreement Act of 1937, as amended, 7 U. S. C. §§ 601, *et seq.*, or (3) by the Commerce Clause of the Constitution.

Appellee, a producer and packer of raisins in California, brought this suit in the district court to enjoin appellants—the State Director of Agriculture, Raisin Proration Zone No. 1, the members of the State Agricultural Prorate Advisory Commission and of the Program Committee for Zone No. 1, and others charged by the statute with the administration of the Prorate Act—from enforcing, as to appellee, a program for marketing the 1940 crop of raisins produced in "Raisin Proration Zone No. 1." After a trial upon oral testimony, a stipulation of facts and certain exhibits, the district court held that the 1940 raisin marketing program was an illegal interference with and undue burden upon interstate commerce and gave judgment for appellee granting the injunction prayed for. 39 F. Supp. 895. The case was tried by a district court of three judges

[1] Act of June 5, 1933, ch. 754, Statutes of California of 1933, as amended by chs. 471 and 743, Statutes of 1935; ch. 6, Extra Session, 1938; chs. 363, 548 and 894, Statutes of 1939; and chs. 603, 1150 and 1186, Statutes of 1941. Its constitutionality under both Federal and State Constitutions was sustained by the California Supreme Court in *Agricultural Prorate Commission* v. *Superior Court*, 5 Cal. 2d 550, 55 P. 2d 495.

and comes here on appeal under §§ 266 and 238 of the Judicial Code as amended, 28 U. S. C. §§ 380, 345.

As appears from the evidence and from the findings of the district court, almost all the raisins consumed in the United States, and nearly one-half of the world crop, are produced in Raisin Proration Zone No. 1. Between 90 and 95 per cent of the raisins grown in California are ultimately shipped in interstate or foreign commerce.

The harvesting and marketing of the crop in California follows a uniform procedure. The grower of raisins picks the bunches of grapes and places them for drying on trays laid between the rows of vines. When the grapes have been sufficiently dried he places them in "sweat boxes" where their moisture content is equalized. At this point the curing process is complete. The growers sell the raisins and deliver them in the "sweat boxes" to handlers or packers whose plants are all located within the Zone. The packers process them at their plants and then ship them in interstate commerce. Those raisins which are to be marketed in clusters are sometimes merely packed, unstemmed, in suitable containers, but are more often cleaned, fumigated, and, when necessary, steamed to make the stems pliable. Most of the raisins are not sold in clusters; such raisins are stemmed before packing, and most packers also clean, grade and sort them. One variety is also seeded before packing.

The packers sell their raisins through agents, brokers, jobbers and other middlemen, principally located in other states or foreign countries. Until he is ready to ship the raisins the packer stores them in the form in which they have been received from producers. The length of time that the raisins remain at the packing plants before processing and shipping varies from a few days up to two years, depending upon the packer's current supply of raisins and the market demand. The packers frequently place orders with producers for fall delivery, before the

crop is harvested, and at the same time enter into contracts for the sale of raisins to their customers. In recent years most packers have had a substantial "carry over" of stored raisins at the end of each crop season, which are usually marketed before the raisins of the next year's crop are marketed.

The California Agricultural Prorate Act authorizes the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers. The declared purpose of the Act is to "conserve the agricultural wealth of the State" and to "prevent economic waste in the marketing of agricultural products" of the state. It authorizes (§ 3) the creation of an Agricultural Prorate Advisory Commission of nine members, of which a state official, the Director of Agriculture, is ex-officio a member. The other eight members are appointed for terms of four years by the Governor and confirmed by the Senate, and are required to take an oath of office. § 4.

Upon the petition of ten producers for the establishment of a prorate marketing plan for any commodity within a defined production zone (§ 8), and after a public hearing (§ 9), and after making prescribed economic findings (§ 10) showing that the institution of a program for the proposed zone will prevent agricultural waste and conserve agricultural wealth of the state without permitting unreasonable profits to producers, the Commission is authorized to grant the petition. The Director, with the approval of the Commission, is then required to select a program committee from among nominees chosen by the qualified producers within the zone, to which he may add not more than two handlers or packers who receive the regulated commodity from producers for marketing. §§ 11, 14, 15.

The program committee is required (§ 15) to formulate a proration marketing program for the commodity produced in the zone, which the Commission is authorized to approve after a public hearing and a "finding that the program is reasonably calculated to carry out the objectives of the Act." The Commission may, if so advised, modify the program and approve it as modified. If the proposed program, as approved by the Commission, is consented to by 65 per cent in number of producers in the zone owning 51 per cent of the acreage devoted to production of the regulated crop, the Director is required to declare the program instituted. § 16.

Authority to administer the program, subject to the approval of the Director of Agriculture, is conferred on the program committee. §§ 6, 18, 22. Section 22.5 declares that it shall be a misdemeanor, which is punishable by fine and imprisonment (Penal Code § 19), for any producer to sell or any handler to receive or possess without proper authority any commodity for which a proration program has been instituted. Like penalty is imposed upon any person who aids or abets in the commission of any of the acts specified in the section, and it is declared that each "infraction shall constitute a separate and distinct offense." Section 25 imposes a civil liability of $500 "for each and every violation" of any provision of a proration program.

The seasonal proration marketing program for raisins, with which we are now concerned, became effective on September 7, 1940. This provided that the program committee should classify raisins as "standard," "substandard," and "inferior"; "inferior" raisins are those which are unfit for human consumption, as defined in the Federal Food, Drug and Cosmetic Act, 21 U. S. C. §§ 301 *et seq.* The committee is required to establish receiving stations within the zone to which every producer must deliver all raisins which he desires to market. The raisins are graded at these stations. All inferior raisins are to be placed in the

"inferior raisin pool," to be disposed of by the committee "only for assured by-product and other diversion purposes." All substandard raisins, and at least 20 per cent of the total standard and substandard raisins produced, must be placed in a "surplus pool." Raisins in this pool may also be disposed of only for "assured by-product and other diversion purposes," except that under certain circumstances the program committee may transfer standard raisins from the surplus pool to the stabilization pool. Fifty per cent of the crop must be placed in a "stabilization pool."

Under the program the producer is permitted to sell the remaining 30 per cent of his standard raisins, denominated "free tonnage," through ordinary commercial channels, subject to the requirement that he obtain a "secondary certificate" authorizing such marketing and pay a certificate fee of $2.50 for each ton covered by the certificate. Certification is stated to be a device for controlling "the time and volume of movement" of free tonnage into such ordinary commercial channels. Raisins in the stabilization pool are to be disposed of by the committee "in such manner as to obtain stability in the market and to dispose of such raisins," but no raisins (other than those subject to special lending or pooling arrangements of the Federal Government) can be sold by the committee at less than the prevailing market price for raisins of the same variety and grade on the date of sale. Under the program the committee is to make advances to producers of from $25 to $27.50 a ton, depending upon the variety of raisins, for deliveries into the surplus pool, and from $50 to $55 a ton for deliveries into the stabilization pool. The committee is authorized to pledge the raisins held in those pools in order to secure funds to finance pool operations and make advances to growers.

Appellee's bill of complaint challenges the validity of the proration program as in violation of the Commerce

Clause and the Sherman Act; in support of the decree of the district court he also urges that it conflicts with and is superseded by the Federal Agricultural Marketing Agreement Act of 1937. The complaint alleges that he is engaged within the marketing zone both in producing and in purchasing and packing raisins for sale and shipment interstate; that before the adoption of the program he had entered into contracts for the sale of 1940 crop raisins; that, unless enjoined, appellants will enforce the program against appellee by criminal prosecutions and will prevent him from marketing his 1940 crop, from fulfilling his sales contracts, and from purchasing for sale and selling in interstate commerce raisins of that crop.

Appellee's allegations of irreparable injury are in general terms, but it appears from the evidence that he had produced 200 tons of 1940 crop raisins; that he had contracted to sell 762½ tons of the 1940 crop; that he had dealt in 2,000 tons of raisins of the 1939 crop, and expected to sell, if the challenged program were not in force, 3,000 tons of the 1940 crop at $60 a ton; that the pre-season price to growers of raisins of the 1940 crop, before the program became effective, was $45 per ton, and that immediately afterward it rose to $55 per ton or higher. It also appears that, the district court having awarded the final injunction prayed, appellee has proceeded with the marketing of his 1940 crop and has disposed of all except twelve tons, which remain on hand. Although the district court found that the amount in controversy exceeds $3,000, we are of opinion that as the complaint assails the validity of the program under the anti-trust laws, 15 U. S. C. §§ 1–33, the suit is one "arising under" a "law regulating commerce"; and allegation and proof of the jurisdictional amount are not required. 28 U. S. C. §§ 41 (1), (8); *Peyton* v. *Railway Express Agency,* 316 U. S. 350. The majority of the Court is also of opinion that the suit is within the equity jurisdiction of the court, since the com-

plaint alleges, and the evidence shows, threatened irreparable injury to respondent's business and threatened prosecutions by reason of his having marketed his crop under the protection of the district court's decree.

Validity of the Prorate Program under the Sherman Act.

Section 1 of the Sherman Act, 15 U. S. C. § 1, makes unlawful "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." And § 2, 15 U. S. C. § 2, makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." We may assume for present purposes that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate. We may assume also, without deciding, that Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce. Occupation of a legislative "field" by Congress in the exercise of a granted power is a familiar example of its constitutional power to suspend state laws. See *Adams Express Co.* v. *Croninger,* 226 U. S. 491, 505; *Napier* v. *Atlantic Coast Line,* 272 U. S. 605, 607; *Missouri Pacific R. Co.* v. *Porter,* 273 U. S. 341; *Illinois Gas Co.* v. *Public Service Co.,* 314 U. S. 498, 510.

But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its

legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The Act is applicable to "persons" including corporations (§ 7), and it authorizes suits under it by persons and corporations (§ 15). A state may maintain a suit for damages under it, *Georgia* v. *Evans,* 316 U. S. 159, but the United States may not, *United States* v. *Cooper Corp.,* 312 U. S. 600—conclusions derived not from the literal meaning of the words "person" and "corporation" but from the purpose, the subject matter, the context and the legislative history of the statute.

There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations." 21 Cong. Rec. 2562, 2457; see also at 2459, 2461. That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history. See *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 492–93 and n. 15; *United States* v. *Addyston Pipe & Steel Co.,* 85 F. 271, affirmed 175 U. S. 211; *Standard Oil Co.* v. *United States,* 221 U. S. 1, 54–58.

True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, *Northern Securities Co.* v. *United States,* 193 U. S. 197, 332, 344–47; and we have no question of the state or its municipality becoming a participant in a private agreement or combina-

tion by others for restraint of trade, cf. *Union Pacific R. Co.* v. *United States,* 313 U. S. 450. Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions. Compare *Currin* v. *Wallace,* 306 U. S. 1, 16; *Hampton & Co.* v. *United States,* 276 U. S. 394, 407; *Wickard* v. *Filburn, ante,* p. 111.

The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. *Olsen* v. *Smith,* 195 U. S. 332, 344–45; cf. *Lowenstein* v. *Evans,* 69 F. 908, 910.

Validity of the Program Under the Agricultural Marketing Agreement Act.

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. §§ 601 *et seq.*, authorizes the Secre-

tary of Agriculture to issue orders limiting the quantity of specified agricultural products, including fruits, which may be marketed "in the current of . . . or so as directly to burden, obstruct, or affect interstate or foreign commerce." Such orders may allot the amounts which handlers may purchase from any producer by means which equalize the amount marketed among producers; may provide for the control and elimination of surpluses and for the establishment of reserve pools of the regulated produce. § 8c (6). The federal statute differs from the California Prorate Act in that its sanction falls upon handlers alone while the state act (§ 22.5 (3)) applies to growers and extends also to handlers so far as they may unlawfully receive or have in their possession within the state any commodity subject to a prorate program.

We may assume that the powers conferred upon the Secretary would extend to the control of surpluses in the raisin industry through a pooling arrangement such as was promulgated under the California Prorate Act in the present case. See *United States* v. *Rock Royal Co-op.*, 307 U. S. 533; *Currin* v. *Wallace, supra.* We may assume also that a stabilization program adopted under the Agricultural Marketing Agreement Act would supersede the state act. But the federal act becomes effective only if a program is ordered by the Secretary. Section 8c (3) provides that whenever the Secretary of Agriculture "has reason to believe" that the issuance of an order will tend to effectuate the declared policy of the Act with respect to any commodity, he shall give due notice of an opportunity for a hearing upon a proposed order, and § 8c (4) provides that after the hearing he shall issue an order if he finds and sets forth in the order that its issuance will tend to effectuate the declared policy of the Act with respect to the commodity in question. Since the Secretary has not given notice of hearing and has not proposed or promulgated any order regulating raisins, it must be

taken that he has no reason to believe that issuance of an order will tend to effectuate the policy of the Act.

The Secretary, by § 10 (i), is authorized "in order to effectuate the declared policy" of the Act, and "in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities," to confer and coöperate with duly constituted authorities of any state. From this and the whole structure of the Act, it would seem that it contemplates that its policy may be effectuated by a state program either with or without the promulgation of a federal program by order of the Secretary. Cf. *United States* v. *Rock Royal Co-op., supra.* It follows that the adoption of an adequate program by the state may be deemed by the Secretary a sufficient ground for believing that the policies of the federal act will be effectuated without the promulgation of an order.

It is evident, therefore, that the Marketing Act contemplates the existence of state programs at least until such time as the Secretary shall establish a federal marketing program, unless the state program in some way conflicts with the policy of the federal act. The Act contemplates that each sovereign shall operate "in its own sphere but can exert its authority in conformity rather than in conflict with that of the other." H. Rep. No. 1241, 74th Cong., 1st Sess. pp. 22–23; S. Rep. 1011, 74th Cong., 1st Sess. p. 15.[2] The only suggested possibility of conflict is between the declared purposes of the two acts. The object of the federal statute is stated to be the establishment, by exercise

[2] See also 79 Cong. Rec. 9470, 11149–50, 11153; Hearings Before the Senate Committee on Agriculture and Forestry on S. 1807 (March, 1935) 29, 73; Hearings Before the House Committee on Agriculture (Feb.–March, 1935) 53, 178–9. The Agricultural Marketing Agreement Act of 1937 was for the most part a reënactment of certain provisions of the Agricultural Adjustment Act of 1933, 48 Stat. 31, as amended in 1935, 49 Stat. 753. Sec. 10 (i) was first introduced in 1935, and reënacted without change in 1937.

of the power conferred on the Secretary, of "orderly marketing conditions for agricultural commodities in interstate commerce" such as will tend to establish "parity prices" for farm products,[3] but with the further purpose that, in the interest of consumers, current consumptive demand is to be considered and that no action shall be taken for the purpose of maintaining prices above the parity level. § 2.

The declared objective of the California Act is to prevent excessive supplies of agricultural commodities from "adversely affecting" the market, and although the statute speaks in terms of "economic stability" and "agricultural waste" rather than of price, the evident purpose and effect of the regulation is to "conserve agricultural wealth of the state" by raising and maintaining prices, but "without permitting unreasonable profits to producers." § 10. The only possibility of conflict would seem to be if a state program were to raise prices beyond the parity price prescribed by the federal act, a condition which has not occurred.[4]

---

[3] A "parity" price is one which will "give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period." 7 U. S. C. § 602 (1). The parity price is computed by multiplying an index of prices paid by farmers for goods used in farm production, and for family living expenses, together with real estate taxes and interest on farm indebtedness, by the average price during the base period of the commodity in question. See Dept. of Agriculture, Parity Prices, What They Are and How They Are Calculated (1942). The base period for commodities other than tobacco and potatoes is August 1909–July 1914. However, by 7 U. S. C. § 608e the period of August 1919–July 1929 or a part thereof may be used for any commodity as to which the Secretary finds and proclaims that adequate statistics for the 1909–14 period are not available. By proclamation dated June 26, 1942, the Secretary designated the period 1919–1929 as the base period for raisins. 7 Fed. Reg. 4867.

[4] The parity price for raisins on June 15, 1942, as published by the Department of Agriculture was $100.51 per ton. Preliminary figures

That the Secretary has reason to believe that the state act will tend to effectuate the policies of the federal act so as not to require the issuance of an order under the latter is evidenced by the approval given by the Department of Agriculture to the state program by the loan agreement between the state and the Commodity Credit Corporation.[5] By § 302 of the Agricultural Adjustment Act of 1938, 52 Stat. 43, 7 U. S. C. § 1302 (a), the Commodity Credit Corporation is authorized "upon the recommendation of the Secretary and with the approval of the President, to make available loans on agricultural commodities . . ." The "amount, terms, and conditions" of such loans are to be "fixed by the Secretary, subject to the approval of the Corporation and the President." Under this authority the Commodity Credit Corporation made loans of $5,146,000 to Zone No. 1, secured by a

---

show the average price for the 1941–42 crop to be $80.60. Parity Prices, What They Are and How They Are Computed, *supra*, vii. Parity prices for raisins for previous years are not published. However they may be computed from the base period price of $105.80 and the indices of prices paid by farmers published by the Department of Agriculture in the statistical publications cited *infra*, note 9. Such computations for 1933 and subsequent years, supplied by the Department of Agriculture, indicate that while the price received by the farmer for the 1940 crop was $57.60 the parity price for 1940 was $80.41 and for 1941 was $86.76. They further indicate that raisin prices have not since 1933 equalled parity and that the field prices for all crops prior to that of 1941 have been from $15 to $40 per ton below parity.

[5] The Commodity Credit Corporation was created by Executive Order No. 6340, October 16, 1933. It has been continued in existence by Acts of Congress, 49 Stat. 4; 50 Stat. 5; 53 Stat. 510. By Reorganization Plan No. I, 53 Stat. 1429, approved by Act of Congress, 53 Stat. 813, and effective July 1, 1939, the Corporation was transferred to the Department of Agriculture, to be "administered in such department under the general direction and supervision of the Secretary of Agriculture." By Executive Order No. 8219, Aug. 7, 1939, 4 Fed. Reg. 3565, exclusive voting rights in its capital stock were vested in the Secretary.

pledge of 109,000 tons of 1940 crop raisins in the surplus and stabilization pools. These loans were ultimately liquidated by sales of 76,000 tons to packers and 33,000 tons to the Federal Surplus Marketing Administration, an agency of the Department of Agriculture,[6] for relief distribution and for export under the Lend-Lease program.[7] The loans were conditional upon the adoption by the state of the present seasonal marketing program. We are informed by the Government, which at our request filed a brief amicus curiae, that under the loan agreement prices and sales policies as to the pledged raisins were to be controlled by a committee appointed by the Secretary, and that officials of the Department of Agriculture collaborated in drafting the 1940 state raisin program.

---

[6] The Surplus Marketing Administration was created by Reorganization Plan No. III, 45 Stat. 1232, approved 54 Stat. 231, effective June 30, 1940, as a consolidation of the Division of Marketing and Marketing Agreements of the Agricultural Adjustment Administration, and the Federal Surplus Commodities Corporation. The Surplus Commodities Corporation was incorporated on October 4, 1933, under the name of the Federal Surplus Relief Corporation. Its existence as "an agency of the United States under the direction of the Secretary of Agriculture" was continued by Acts of Congress, 50 Stat. 323; 52 Stat. 38. The members of the Corporation are the Secretary of Agriculture, the Administrator of the Agricultural Adjustment Administration, and the Governor of the Farm Credit Administration.

As successor to the Corporation the Surplus Marketing Administration exercises the authority given by § 32 of the Agricultural Adjustment Act of 1935, 7 U. S. C. § 612c, to use 30% of annual gross customs receipts to encourage the exportation, and the domestic consumption by persons in low income groups, of agricultural commodities, and to reëstablish farmers' purchasing power. As successor to the Division of Markets and Marketing Agreements, the Administration is charged with the enforcement of the Agricultural Marketing Agreement Act of 1937.

[7] Report of the President of the Commodity Credit Corporation (1941) 14, 21; Wm. J. Cecil (Zone Agent, Raisin Proration Zone No. 1), The 1940 Raisin Program, 30 Calif. Dept. of Agriculture Bulletin 46.

Section 302 of the Agricultural Adjustment Act of 1938 requires the Commodity Credit Corporation to make nonrecourse loans to producers of certain agricultural products at specified percentages of the parity price, and authorizes loans on any agricultural commodity. The Government informs us that in making loans under the latter authority, § 302 has been construed by the Department of Agriculture as requiring the loans to be made only in order to effectuate the policy of federal agricultural legislation.[8] Section 2 of the Agricultural Adjustment Act of 1938 declares it to be the policy of Congress to achieve the statutory objectives through loans. The Agricultural Adjustment Act of 1938 and the Agricultural Marketing Agreement Act of 1937 were both derived from the Agricultural Adjustment Act of 1933, 48 Stat. 31, and are coördinate parts of a single plan for raising farm prices to parity levels. The conditions imposed by the Secretary of Agriculture in the loan agreement with the State of California, and the collaboration of federal officials in the drafting of the program, must be taken as an expression of opinion by the Department of Agriculture that the state program thus aided by the loan is consistent with the policies of the Agricultural Adjustment and Agricultural Marketing Agreement Acts. We find no conflict between the two acts and no such occupation of the legislative field by the mere adoption of the Agricultural Marketing Agreement Act, without the issuance of any order by the Secretary putting it into effect, as would preclude the effective operation of the state act.

We have no occasion to decide whether the same conclusion would follow if the state program had not been adopted with the collaboration of officials of the Department of Agriculture and aided by loans from the Com-

[8] See also Report of the President of the Commodity Credit Corporation (1940) 4, 6.

modity Credit Corporation recommended by the Secretary of Agriculture.

Validity of the Program under the Commerce Clause.

The court below found that approximately 95 per cent of the California raisin crop finds its way into interstate or foreign commerce. It is not denied that the proration program is so devised as to compel the delivery by each producer, including appellee, of over two-thirds of his 1940 raisin crop to the program committee, and to subject it to the marketing control of the committee. The program, adopted through the exercise of the legislative power delegated to state officials, has the force of law. It clothes the committee with power and imposes on it the duty to control marketing of the crop so as to enhance the price or at least to maintain prices by restraints on competition of producers in the sale of their crop. The program operates to eliminate competition of the producers in the terms of sale of the crop, including price. And since 95 per cent of the crop is marketed in interstate commerce, the program may be taken to have a substantial effect on the commerce, in placing restrictions on the sale and marketing of a product to buyers who eventually sell and ship it in interstate commerce.

The question is thus presented whether in the absence of Congressional legislation prohibiting or regulating the transactions affected by the state program, the restrictions which it imposes upon the sale within the state of a commodity by its producer to a processor who contemplates doing, and in fact does, work upon the commodity before packing and shipping it in interstate commerce, violate the Commerce Clause.

The governments of the states are sovereign within their territory save only as they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Govern-

ment, or with Congressional legislation enacted in the exercise of those powers. This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken. *Minnesota Rate Cases,* 230 U. S. 352, 399–400; *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 187, *et seq.; California* v. *Thompson,* 313 U. S. 109, 113–14 and cases cited; *Duckworth* v. *Arkansas,* 314 U. S. 390. *A fortiori* there are many subjects and transactions of local concern not themselves interstate commerce or a part of its operations which are within the regulatory and taxing power of the states, so long as state action serves local ends and does not discriminate against the commerce, even though the exercise of those powers may materially affect it. Whether we resort to the mechanical test sometimes applied by this Court in determining when interstate commerce begins with respect to a commodity grown or manufactured within a state and then sold and shipped out of it—or whether we consider only the power of the state in the absence of Congressional action to regulate matters of local concern, even though the regulation affects or in some measure restricts the commerce—we think the present regulation is within state power.

In applying the mechanical test to determine when interstate commerce begins and ends (see *Federal Compress Co.* v. *McLean,* 291 U. S. 17, 21 and cases cited; *Minnesota* v. *Blasius,* 290 U. S. 1 and cases cited) this Court has frequently held that for purposes of local taxation or regulation "manufacture" is not interstate commerce even though the manufacturing process is of slight extent. *Crescent Oil Co.* v. *Mississippi,* 257 U. S. 129; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165; *Hope Gas Co.* v. *Hall,* 274 U. S. 284; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Champlin Refining*

Co. v. *Commission,* 286 U. S. 210; *Bayside Fish Co.* v. *Gentry,* 297 U. S. 422. And such regulations of manufacture have been sustained where, aimed at matters of local concern, they had the effect of preventing commerce in the regulated article. *Kidd* v. *Pearson,* 128 U. S. 1; *Champlin Refining Co.* v. *Commission, supra; Sligh* v. *Kirkwood,* 237 U. S. 52; see *Capital City Dairy Co.* v. *Ohio,* 183 U. S. 238, 245; *Thompson* v. *Consolidated Gas Co.,* 300 U. S. 55, 77; cf. *Bayside Fish Co.* v. *Gentry, supra.* A state is also free to license and tax intrastate buying where the purchaser expects in the usual course of business to resell in interstate commerce. *Chassaniol* v. *Greenwood,* 291 U. S. 584. And no case has gone so far as to hold that a state could not license or otherwise regulate the sale of articles within the state because the buyer, after processing and packing them, will, in the normal course of business, sell and ship them in interstate commerce.

All of these cases proceed on the ground that the taxation or regulation involved, however drastically it may affect interstate commerce, is nevertheless not prohibited by the Commerce Clause where the regulation is imposed before any operation of interstate commerce occurs. Applying that test, the regulation here controls the disposition, including the sale and purchase, of raisins before they are processed and packed preparatory to interstate sale and shipment. The regulation is thus applied to transactions wholly intrastate before the raisins are ready for shipment in interstate commerce.

It is for this reason that the present case is to be distinguished from *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, and *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189, on which appellee relies. There the state regulation held invalid was of the business of those who purchased grain within the state for immediate shipment out of it. The Court was of opinion that the purchase of the wheat for shipment out of the state without resale or processing was a

part of the interstate commerce. Compare *Chassaniol* v. *Greenwood, supra.*

This distinction between local regulation of those who are not engaged in commerce, although the commodity which they produce and sell to local buyers is ultimately destined for interstate commerce, and the regulation of those who engage in the commerce by selling the product interstate, has in general served, and serves here, as a ready means of distinguishing those local activities which, under the Commerce Clause, are the appropriate subject of state regulation despite their effect on interstate commerce. But courts are not confined to so mechanical a test. When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. See *Di Santo* v. *Pennsylvania,* 273 U. S. 34, 44 (with which compare *California* v. *Thompson, supra*); *South Carolina Highway Dept.* v. *Barnwell Bros., supra; Milk Control Board* v. *Eisenberg Co.,* 306 U. S. 346; *Illinois Gas Co.* v. *Public Service Co.,* 314 U. S. 498, 504–5.

Such regulations by the state are to be sustained, not because they are "indirect" rather than "direct," see *Di Santo* v. *Pennsylvania, supra;* cf. *Wickard* v. *Filburn, supra,* not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with

by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause. See *Minnesota Rate Cases, supra,* 398–412; *California* v. *Thompson, supra,* 113. There may also be, as in the present case, local regulations whose effect upon the national commerce is such as not to conflict but to coincide with a policy which Congress has established with respect to it.

Examination of the evidence in this case and of available data of the raisin industry in California, of which we may take judicial notice, leaves no doubt that the evils attending the production and marketing of raisins in that state present a problem local in character and urgently demanding state action for the economic protection of those engaged in one of its important industries.[9] Between 1914 and 1920 there was a spectacular rise in price of all types of California grapes, including raisin grapes. The price of raisins reached its peak, $235 per ton, in 1921, and was followed by large increase in acreage with accompanying reduction in price. The price of raisins in most

[9] The principal statistical sources are U. S. Tariff Commission, Grapes, Raisins and Wines, Report No. 134, Second Series, issued pursuant to 19 U. S. C. § 1332, and the following publications of the U. S. Department of Agriculture: Yearbook of Agriculture (published annually until 1936); Agricultural Statistics (published annually since 1936); Crops and Markets (published quarterly); Season Average Prices and Value of Production, Principal Crops, 1940 and 1941 (Dec. 18, 1941). For general discussions of the economic status of the raisin industry, see Grapes, Raisins and Wines, *supra;* Shear and Gould, Economic Status of the Grape Industry, University of California, Agricultural Experiment Station Bulletin No. 429 (1927); Shear and Howe, Factors Affecting California Raisin Sales and Prices, 1922–29, Giannini Foundation of Agricultural Economics, Paper No. 20 (1931).

years since 1922 has ranged from $40 to $60 per ton but acreage continued to increase until 1926 and production reached its peak, 1,433,000 tons of raisin grapes and 290,000 tons of raisins, in 1938. Since 1920 there has been a substantial carry over of 30 to 50% of each year's crop. The result has been that at least since 1934 the industry, with a large increase in acreage and the attendant fall in price, has been unable to market its product and has been compelled to sell at less than parity prices and in some years at prices regarded by students of the industry as less than the cost of production.[10]

The history of the industry, at least since 1929, is a record of a continuous search for expedients which would stabilize the marketing of the raisin crop and maintain a price standard which would bring fair return to the producers.[11] It is significant of the relation of the local interest in maintaining this program to the national interest in interstate commerce, that throughout the period from 1929 until the adoption of the prorate program for

[10] Studies made under the auspices of the University of California indicate that the cost of production of Thompson Seedless raisins, including the growers' labor, a management charge, depreciation, and interest on investment, is $49.58 per ton on a farm yielding two tons per acre, and $72.07 per ton on a farm yielding one ton per acre. A two-ton yield is described as "good"; a one-ton yield as "usual." Adams, Farm Management Crop Manual, University of California Syllabus Series No. 278 (1941) 142–5. Another student has computed the cost of production at $53.96 for a two-ton per acre yield, about $65 for a 1.5 ton yield, and $90 for a one-ton yield. Shultis, Standards of Production, Labor, Material and other Costs for Selected Crops and Livestock Enterprises, University of California Extension Service (1938) 13. Field prices for Thompson Seedless raisins were below $49.50 in 1923, 1928, 1932, and 1938; since 1922 they have been at $65.00 or higher in only 5 years, and have only once been as high as $72.00. Grapes, Raisins and Wines, *supra*, 149.

For parity prices for raisins, see *supra*, note 4.

[11] For discussion of private efforts within the industry prior to 1929 to regulate the marketing of raisins, see Grapes, Raisins and Wines, *supra*, 153–5.

the 1940 raisin crop, the national government has contributed to these efforts either by its establishment of marketing programs pursuant to Act of Congress or by aiding programs sponsored by the state. Local coöperative market stabilization programs for raisins in 1929 and 1930 were approved by the Federal Farm Board which supported them with large loans.[12] In 1934 a marketing agreement for California raisins was put into effect under § 8 (2) of the Agricultural Adjustment Act of 1933, as amended, 48 Stat. 528, which authorized the Secretary of Agriculture, in order to effectuate the Act's declared policy of achieving parity prices, to enter into marketing agreements with processors, producers and others engaged in handling agricultural commodities "in the current of or in competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce." [13]

[12] See Annual Report of the Federal Farm Board (1930) 18, 73; *id.* (1931) 59–61, 91; Grapes, Raisins and Wines, *supra*, 62–64; S. W. Shear, The California Grape Control Plan, Giannini Foundation of Agricultural Economics, Paper No. 22 (1931); Stokdyk and West, The Farm Board (1930) 135–9. Loans of $4,500,000 in 1929 and $6,755,000 in 1930 were made by the Federal Farm Board. Shear, *supra*, states that the 1930 program, which provided for the formation of a single marketing agency, and the destruction or diversion to by-products use of surplus raisins, "was designed by the Federal Farm Board."

The Federal Farm Board was created by § 2 of the Agricultural Marketing Act of 1929, 46 Stat. 11, which authorized the Board to make loans to coöperative associations to aid in "the effective merchandising of agricultural commodities . . ." (§ 7) so as to achieve the statutory objective of placing agriculture on a "basis of economic equality with other industries" (§ 1).

[13] See U. S. Dept. of Agriculture, Agricultural Adjustment in 1934, 202. The marketing program adopted is published by the Agricultural Adjustment Administration, Department of Agriculture, as Marketing Agreement Series—Agreement No. 44, License Series—License No. 55. It was in effect from May 29, 1934 to Sept. 14, 1935. The agreement provided for the creation of a control board on which representatives of packers and growers should have an equal voice. Subject to the approval of the Secretary of Agriculture the control board could fix

Raisin Proration Zone No. 1 was organized in the latter part of 1937. No proration program was adopted for the 1937 crop, but loans of $1,244,000 were made on raisins of that crop by the Commodity Credit Corporation.[14] In aid of a proration program adopted under the California Act for the 1938 crop, a substantial part of that crop was pledged to the Commodity Credit Corporation as security for a loan of $2,688,000, and was ultimately sold to the Federal Surplus Commodities Corporation for relief distribution.[15] Substantial purchases of raisins of the 1939 crop were also made by Federal Surplus Commodities Corporation, although no proration program was adopted for that year.[16] In aid of the 1940 program, as we have already noted, the Commodity Credit Corporation made loans in excess of $5,000,000, and 33,000 tons of the raisins pledged to it were sold to the Federal Surplus Marketing Administration.[17]

---

minimum prices to be paid growers and require a percentage of the crop to be delivered to the control board. 15% of the 1934 crop was required to be delivered to the board, and prices for that crop were fixed at $60, $65 and $70 per ton for Muscat, Sultana, and Thompson Seedless raisins respectively.

[14] Report of the President of the Commodity Credit Corporation (1940) 16. These raisins were ultimately sold to the Federal Surplus Commodities Corporation for relief distribution. *Ibid.;* Report of the Federal Surplus Commodities Corporation (1938) 16.

[15] Report of the President of the Commodity Credit Corporation (1940) 16; Report of the Associate Administrator of the Agricultural Adjustment Administration in Charge of the Division of Marketing and Marketing Agreements, and the President of the Federal Surplus Commodities Corporation (1939) 52. The federal loan was conditioned upon the adoption of a state proration program by which 20% of the crop was delivered into a stabilization pool.

[16] Cecil, The 1940 Raisin Proration Program, *supra,* 48; Report of the Federal Surplus Commodities Corporation (1940) 6.

[17] The Commodity Credit Corporation similarly made loans on the 1937, 1938, and 1940 crops of dried prunes, the loans on the 1938 and 1940 crops being in aid of proration programs which were very similar to those adopted for raisins. Report of the President of the Commodity

This history shows clearly enough that the adoption of legislative measures to prevent the demoralization of the industry by stabilizing the marketing of the raisin crop is a matter of state as well as national concern and, in the absence of inconsistent Congressional action, is a problem whose solution is peculiarly within the province of the state. In the exercise of its power the state has adopted a measure appropriate to the end sought. The program was not aimed at nor did it discriminate against interstate commerce, although it undoubtedly affected the commerce by increasing the interstate price of raisins and curtailing interstate shipments to some undetermined extent. The effect on the commerce is not greater, and in some instances was far less, than that which this Court has held not to afford a basis for denying to the states the right to pursue a legitimate state end. Cf. *Kidd* v. *Pearson, supra; Sligh* v. *Kirkwood, supra; Champlin Refining Co.* v. *Commission, supra; South Carolina Highway Dept.* v. *Barnwell Bros., supra,* and cases cited at p. 189 and notes 4 and 5; *California* v. *Thompson, supra,* 113–15, and cases cited.

In comparing the relative weights of the conflicting local and national interests involved, it is significant that Congress, by its agricultural legislation, has recognized the distressed condition of much of the agricultural production of the United States, and has authorized marketing procedures, substantially like the California prorate program, for stabilizing the marketing of agricultural products. Acting under this legislation the Secretary of Agriculture has established a large number of market stabilization programs for agricultural commodities moving in interstate commerce in various parts of the country, including seven affecting California crops.[18] All involved at-

---

Credit Corporation (1940) 15, 21; *id.* (1941) 13–14, 21; Report of the Surplus Marketing Administration (1941) 33–4.

[18] Twenty-eight such programs affecting milk, and nineteen affecting other agricultural commodities, were in effect during the fiscal year

tempts in one way or another to prevent over-production of agricultural products and excessive competition in marketing them, with price stabilization as the ultimate objective. Most if not all had a like effect in restricting shipments and raising or maintaining prices of agricultural commodities moving in interstate commerce.

It thus appears that whatever effect the operation of the California program may have on interstate commerce, it is one which it has been the policy of Congress to aid and encourage through federal agencies in conformity to the Agricultural Marketing Agreement Act, and § 302 of the Agricultural Adjustment Act. Nor is the effect on the commerce greater than or substantially different in kind from that contemplated by the stabilization programs authorized by federal statutes. As we have seen, the Agricultural Marketing Agreement Act is applicable to raisins only on the direction of the Secretary of Agriculture who, instead of establishing a federal program has, as the statute authorizes, coöperated in promoting the state program and aided it by substantial federal loans. Hence we cannot say that the effect of the state program on interstate commerce is one which conflicts with Congressional policy or is such as to preclude the state from this exercise of its reserved power to regulate domestic agricultural production.

We conclude that the California prorate program for the 1940 raisin crop is a regulation of state industry of local concern which, in all the circumstances of this case which we have detailed, does not impair national control over the commerce in a manner or to a degree forbidden by the Constitution.

Reversed.

---

ending June 30, 1941. Report of the Surplus Marketing Administration (1941) pp. 7, 12. For discussions of the nature and purpose of these programs, see the annual reports of the Agricultural Adjustment Administration; Nourse, Marketing Agreements under the A. A. A. (1935).

Syllabus.

UNITED STATES v. MILLER ET AL.

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

No. 78. Argued November 16, 17, 1942.—Decided January 4, 1943.

1. Where, from the date of its authorization by Act of Congress, a federal reclamation project included the relocation of a line of railroad, and a probable route was marked out over certain lands subsequently taken in eminent domain proceedings, it is proper, in determining just compensation, to exclude from value as of the date of the taking such increase as occurred since the date of the authorization of the project and as a result thereof. P. 377.
2. The exclusion from value, as of the date of the taking, of any increase which occurred since the date of the authorization of the project and as a result thereof, is applicable also in the determination of severance damage. P. 379.
3. Although the federal court in eminent domain proceedings is required by federal statutes to follow the forms and methods of procedure prescribed by local law, it is not bound by the local law on questions of substantive right—such as the measure of compensation—which are governed by the Federal Constitution. P. 379.
4. The District Court's alleged disregard of the local practice in respect to the admission of opinion evidence as to value, did not in this case involve substantial or prejudicial error. P. 380.
5. Where, pursuant to the Act of February 26, 1931, the Government, in a proceeding in eminent domain, files a declaration of taking and deposits with the court the amount of estimated compensation, it is entitled to recover the excess of such amount over the amount of the award. P. 380.
6. The inclusion in a general judgment in condemnation proceedings of a judgment of restitution for the amount by which the sum deposited by the Government and paid to the landowners exceeded the amount subsequently awarded as just compensation, did not in this case deny due process in violation of the Fifth Amendment; for, upon defendants' motions to set aside the judgments, there was full opportunity for a hearing. P. 382.

125 F. 2d 75, reversed.

503873—43——31

CERTIORARI, 316 U. S. 657, to review the reversal of a judgment for the Government against certain landowners in eminent domain proceedings.

Assistant Attorney General Littell, with whom *Solicitor General Fahy* and *Messrs. Vernon L. Wilkinson* and *Roger P. Marquis* were on the brief, for the United States.

Mr. Laurence J. Kennedy argued the cause, and *Mr. Francis Carr* was on the brief, for respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case presents important questions respecting standards for valuing property taken for public use. For this reason, and because of an apparent conflict with one of our decisions, we granted certiorari.

The United States condemned a strip across the respondents' lands for tracks of the Central Pacific Railroad, relocation of which was necessary on account of the prospective flooding of the old right-of-way by waters to be impounded by the Central Valley Reclamation Project in California. For many years a proposal to initiate state reclamation works in this vicinity had been before the people of the state. In 1932 they voted approval and authorization of the project. It was, however, subsequently adopted by the United States as a federal project.

April 6, 1934, the Chief of Engineers of the Army recommended that the Government contribute twelve million dollars towards the project.[1] Congress authorized the appropriation in the following year.[2] December 22, 1935, the President approved construction of the entire improvement. In 1936 Congress appropriated $6,900,000

[1] Rivers and Harbors Committee Document No. 35, 73d Cong., 2d Sess., p. 5.

[2] Act Aug. 30, 1935, 49 Stat. 1028, 1038.

for it and in 1937 $12,500,000.[3] In August 1937 the project was again authorized by Congress.[4]

In his report for the fiscal year ending June 30, 1937, the Secretary of the Interior stated that Shasta, California, had been selected for the site of the Sacramento River dam. Its construction involved relocation of some thirty miles of the line of the railroad.

Portions of respondents' lands were required for the relocated right-of-way. Alternate routes were surveyed by March 1936 and staked at intervals of 100 feet. Prior to the authorization of the project, the area of which respondents' tracts form a part was largely uncleared brush land. In the years 1936 and 1937 certain parcels were purchased with the intention of subdividing them and, in 1937, subdivisions were plotted and there grew up a settlement known as Boomtown, in which the respondents' lands lie. Two of the respondents were realtors interested in developing the neighborhood. By December 1938 the town had been built up for business and residential purposes.

December 14, 1938, the United States filed in the District Court for Northern California a complaint in eminent domain against the respondents and others whose lands were needed for the relocation of the railroad. On that day the Government also filed a declaration of taking.[5] In this declaration the estimate of just compensation to be paid for a tract belonging to three of the respondents as co-tenants was estimated at $2,550, and that sum was deposited in court. On the application of these owners, the court directed the Clerk to pay each of them one-third

[3] Act June 22, 1936, 49 Stat. 1597, 1622; Act Aug. 9, 1937, 50 Stat. 564, 597. An additional appropriation of $9,000,000 was made by Act of May 9, 1938, 52 Stat. 291, 324.

[4] Act Aug. 26, 1937, § 2, 50 Stat. 844, 850.

[5] Pursuant to Act of Feb. 26, 1931, 46 Stat. 1421, 40 U. S. C. §§ 258a–258e.

of the deposit, or $850, on account of the compensation they were entitled to receive.

The action in eminent domain was tried to a jury. The respondents offered opinion evidence as to the fair market value of the tracts involved and also as to severance damage to lots of which portions were taken. Each witness was asked to state his opinion as to market value of the land taken as at December 14, 1938, the date of the filing of the complaint. Government counsel objected to the form of the question on the ground that, as the United States was definitely committed to the project August 26, 1937, the respondents were not entitled to have included in an estimate of value, as of the date the lands were taken, any increment of value due to the Government's authorization of, and commitment to, the project. The trial court sustained the objection and required the question to be reframed so as to call for market value at the date of the taking, excluding therefrom any increment of value accruing after August 26, 1937, due to the authorization of the project. Under stress of the ruling, and over objection and exception, questions calling for opinion evidence were phrased to comply with the court's decision. The jury rendered verdicts in favor of various respondents.

The three respondents who had received $850 each on account of compensation were awarded less than the total paid them. The court entered judgment that title to the lands was in the United States and judgment in favor of respondents respectively for the amounts awarded them. Judgment was entered against the three respondents and in favor of the United States for the amounts they had received in excess of the verdicts with interest. They moved to set aside the money judgments against them on the ground that the court had no jurisdiction to enter them. The motions were overruled. All of the respondents appealed, assigning error to the trial judge's ruling

with respect to the questions to be asked the witnesses, to his charge which had instructed the jury that, in arriving at market value as of the date of taking, they should disregard increment of value *due to the initiation of the project*[6] and arising after August 26, 1937, and three of them to his entry of money judgments for the United States.

The Circuit Court of Appeals reversed the judgment, holding, by a divided court, that the trial judge erred in his rulings and in his charge, and unanimously that the District Court was without jurisdiction to award the United States a judgment for amounts overpaid.[7] A majority of the court were of opinion the witnesses should have been asked to state the fair market value of the lands as of the date of taking, without qualification, and the judge should have charged that this value measured the compensation to which the respondents were entitled.

1. The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken.[8] The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.[9]

It is conceivable that an owner's indemnity should be measured in various ways depending upon the circum-

[6] The majority of the court below were in error in characterizing the ruling of the trial judge. They said: "To put it simply, the Court ruled that no evidence could come in as to sales of similar properties after August 26, 1937, and that qualified witnesses testifying as to the value of the land on the date of the taking must subtract from this valuation *any increment in value* after August 26, 1937." 125 F. 2d 78.

[7] 125 F. 2d 75.

[8] *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 326.

[9] *Seaboard Air Line Ry. Co.* v. *United States,* 261 U. S. 299, 304; *United States* v. *New River Collieries Co.,* 262 U. S. 341, 343.

stances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value. The owner has been said to be entitled to the "value," [10] the "market value," [11] and the "fair market value" [12] of what is taken. The term "fair" hardly adds anything to the phrase "market value," which denotes what "it fairly may be believed that a purchaser in fair market conditions would have given," [13] or, more concisely, "market value fairly determined." [14]

Respondents correctly say that value is to be ascertained as of the date of taking.[15] But they insist that no element which goes to make up value as at that moment is to be discarded or eliminated. We think the proposition is too broadly stated. Where, for any reason, property has no market, resort must be had to other data to ascertain its value;[16] and, even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety. It is usually said that market value is what a willing buyer would pay in cash to a willing seller. Where the property taken, and that in its vicinity, has not

---

[10] *Bauman* v. *Ross,* 167 U. S. 548, 574.

[11] *Boom Co.* v. *Patterson,* 98 U. S. 403, 408; *United States* v. *New River Collieries Co., supra,* 344.

[12] Orgel, "Valuation under Eminent Domain" (p. 56): "The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes." *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 81.

[13] *New York* v. *Sage,* 239 U. S. 57, 61.

[14] *Olson* v. *United States,* 292 U. S. 246, 255.

[15] 2 Lewis, Eminent Domain, 3d Ed., § 705; *Kerr* v. *South Park Commissioners,* 117 U. S. 379, 386; *Shoemaker* v. *United States,* 147 U. S. 282, 304.

[16] See *Monongahela Navigation Co.* v. *United States, supra,* 312, 328–9, 337–8; *Hanson Lumber Co.* v. *United States,* 261 U. S. 581, 589.

in fact been sold within recent times, or in significant amounts, the application of this concept involves, at best, a guess by informed persons.

Again, strict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, must in fairness be eliminated in a condemnation case, as where the formula is attempted to be applied as between an owner who may not want to part with his land because of its special adaptability to his own use, and a taker who needs the land because of its peculiar fitness for the taker's purposes. These elements must be disregarded by the fact finding body in arriving at "fair" market value.

Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker.[17] Thus, although the market value of the property is to be fixed with due consideration of all its available uses,[18] its special value to the condemnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value.[19] The district judge so charged the jury, and no question is made as to the correctness of the instruction.

There is, however, another possible element of market value, which is the bone of contention here. Should the owner have the benefit of any increment of value added to the property taken by the action of the public authority in previously condemning adjacent lands? If so, were the lands in question so situate as to entitle respondents to the benefit of this increment?

Courts have had to adopt working rules in order to do substantial justice in eminent domain proceedings. One

---

[17] *Bauman* v. *Ross*, 167 U. S. 548, 574; *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195; *Olson* v. *United States*, *supra*, 256.

[18] *Boom Co.* v. *Patterson*, 98 U. S. 403, 408; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 81.

[19] *United States* v. *Chandler-Dunbar Co.*, *supra*, p. 76.

of these is that a parcel of land which has been used and treated as an entity shall be so considered in assessing compensation for the taking of part or all of it.

This has begotten subsidiary rules. If only a portion of a single tract is taken, the owner's compensation for that taking includes any element of value arising out of the relation of the part taken to the entire tract.[20] Such damage is often, though somewhat loosely, spoken of as severance damage. On the other hand, if the taking has in fact benefited the remainder, the benefit may be set off against the value of the land taken.[21]

As respects other property of the owner consisting of separate tracts adjoining that affected by the taking, the Constitution has never been construed as requiring payment of consequential damages;[22] and unless the legislature so provides, as it may,[23] benefits are not assessed against such neighboring tracts for increase in their value.

If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the be-

---

[20] Lewis, Eminent Domain, 3d Ed. 686; Nichols, Eminent Domain, 2d Ed. § 236; *Bauman* v. *Ross, supra,* 574; *Sharp* v. *United States,* 191 U. S. 341, 351–2, 354; cf. *United States* v. *Welch,* 217 U. S. 333; *United States* v. *Grizzard,* 219 U. S. 180; *Campbell* v. *United States,* 266 U. S. 368.

[21] *Bauman* v. *Ross, loc. cit.* Congress has provided that in takings such as that here involved, benefits to the remainder of the tract shall be considered by way of reducing the compensation for what is taken. Act July 18, 1918, c. 155, § 6, 40 Stat. 911, 33 U. S. C. § 595.

[22] *Sharp* v. *United States, supra; Campbell* v. *United States, supra,* 371–372.

[23] *Shoemaker* v. *United States, supra,* 302.

ginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.

The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities.

In which category do the lands in question fall? The project, from the date of its final and definite authorization in August 1937, included the relocation of the railroad right-of-way, and one probable route was marked out over the respondents' lands. This being so, it was proper to tell the jury that the respondents were entitled to no increase in value arising after August 1937 because of the likelihood of the taking of their property. If their lands were probably to be taken for public use, in order to complete the project in its entirety, any increase in value due to that fact could only arise from speculation by them, or by possible purchasers from them, as to what the Government would be compelled to pay as compensation.

Shoemaker v. *United States,* 147 U. S. 282, is directly in point and supports this view, notwithstanding respondents' efforts to distinguish the case. There Congress, in

1890, authorized commissioners to establish a park along Rock Creek in the District of Columbia, and, for that purpose, to select not exceeding two thousand acres of land. In 1891 the commissioners prepared a map of the lands to be acquired, which was approved by the President as required by the statute. Proceedings were brought to condemn certain tracts lying within the mapped area. The Supreme Court of the District instructed the appraisers, whom the Act made the triers of fact, that they "shall receive no evidence tending to prove the prices actually paid on sales of property similar to that included in said park, and so situated as to adjoin it or to be within its immediate vicinity, when such sales have taken place since the passage of the act . . . authorizing said park . . ." The instruction was approved by this court.

The majority of the court below thought the case distinguishable in the view that the boundaries of the park were fixed by the Act of Congress authorizing the project and, therefore, it was known what land would lie inside, and what outside, the park from the beginning, and that land taken for the park should not have the benefit of an increase in value which adjoining land might enjoy through its proximity to the improvement. This, of course, would be true if the lines of the park had, in the beginning, been fixed, because property lying outside the boundaries of the park, and not intended to be taken, would be dissimilar from that lying within it, the one gaining value by proximity and the other gaining nothing from the fact that it was to be taken from its owner. Such was the ruling of the court in *Kerr* v. *South Park Commissioners,* 117 U. S. 379, 387. From the citation of that case in the *Shoemaker* opinion, the majority below inferred that the two presented like facts. But, in the *Kerr* case, the lines of the park had been determined, whereas, in the *Shoemaker* case, the Act authorized the appropriation of a fixed acreage within a larger area. Consequently any

land lying within that area was likely to be taken. If a tract happened not to be taken, because not within the limits finally fixed, it might show an increase in readily realizable market value by reason of proximity to the improvement. In the *Shoemaker* case, the court excluded any increment of value arising out of the fact that Congress had authorized the location and condemnation of land for the park, for the very reason that Shoemaker's property lay in the area within which the park was to be laid out. If, in the instant case, the respondents' lands were, at the date of the authorizing Act, clearly within the confines of the project, the respondents were entitled to no enhancement in value due to the fact that their lands would be taken. If they were within the area where they were likely to be taken for the project, but might not be, the owners were not entitled, if they were ultimately taken, to an increment of value calculated on the theory that if they had not been taken they would have been more valuable by reason of their proximity to the land taken. In so charging the jury the trial court was correct.

The respondents assert that a different rule should have been applied in respect of severance damage, even if the court's rulings were correct as to the valuation of land taken. In the light of what has already been said, we find no merit in the contention.

The respondents also say that, whatever the criterion of value adopted by the federal courts, Congress has adopted the local rule followed in the state where the federal court sits; and they claim that the California rule is settled that fair market value at the date of taking is the standard of value, without elimination of any increment attributable to the action of the taker. We need not determine what is the local law, for the federal statutes [24] upon which reliance is placed require only that, in con-

[24] Act of Aug. 1, 1888, c. 728, 25 Stat. 357, §§ 1 and 2, 40 U. S. C. §§ 257, 258; Act of Apr. 24, 1888, c. 194, 25 Stat. 94, 33 U. S. C. § 591.

demnation proceedings, a federal court shall adopt the forms and methods of procedure afforded by the law of the State in which the court sits. They do not, and could not, affect questions of substantive right—such as the measure of compensation—grounded upon the Constitution of the United States.[25]

The respondents urge, further, that the reversal by the Circuit Court of Appeals is justified by the District Court's disregard of the practice of the California courts with respect to the production of opinion evidence as to market value, even though it was right as to the elements which must be excluded. They allege that, in California courts, an opinion witness must state his valuation as at the date of taking and the opposing party is at liberty, upon cross-examination, to elicit the facts on which the witness relied in arriving at that value. Counsel insist that if the Government was entitled to have the witnesses disregard any increment of value due to the Government's intention to construct the project, it could have developed, on cross-examination, how far the inclusion of any such element had affected the value stated. We think that probably under California procedure this would have been the better and more appropriate way to develop the basis of the witnesses' opinions. We do not feel, however, that if there was a disregard of the local practice in this aspect the error is substantial or worked injury to the respondents.

2. We think the court below erred in holding the District Court without power to enter a judgment against three of the respondents to whom payments in excess of the jury's verdicts had been made out of the funds deposited with the Court.

Examination of the Act of February 26, 1931,[26] discloses that the declaration of taking is to be filed in the proceeding for condemnation at its inception or at any later time.

---

[25] *Chappell* v. *United States,* 160 U. S. 499, 512–13; *Brown* v. *United States,* 263 U. S. 78, 86.

[26] *Supra,* Note 5.

When the declaration is filed the amount of estimated compensation is to be deposited with the court, to be paid as the court may order "for or on account" of the just compensation to be awarded the owners. Thus the acquisition by the Government of title and immediate right to possession, and the deposit of the estimated compensation, occur as steps in the main proceeding.

The purpose of the statute is two-fold. First, to give the Government immediate possession of the property and to relieve it of the burden of interest accruing on the sum deposited from the date of taking to the date of judgment in the eminent domain proceeding. Secondly, to give the former owner, if his title is clear, immediate cash compensation to the extent of the Government's estimate of the value of the property. The Act recognizes that there may be an error in the estimate, and appropriately provides that, if the judgment ultimately awarded shall be in excess of the amount deposited, the owner shall recover the excess with interest. But there is no correlative provision for repayment of any excess by the owner to the United States. The necessary result is, so the respondents say, that any sum paid them in excess of the jury's award is their property, which the United States may not recover.

All the provisions of the Act taken together require a contrary conclusion.[27] The payment is of estimated compensation; it is intended as a provisional and not a final settlement with the owner; it is a payment "on account of" compensation and not a final settlement of the amount due. To hold otherwise would defeat the policy of the statute and work injustice; would be to encourage federal officials to underestimate the value of the property with the result that the Government would be saddled with interest on a larger sum from date of taking to final award, and would be to deny the owner the immediate use of cash approximating the value of his land.

[27] See *Garrow* v. *United States*, 131 F. 2d 724.

Respondents assert that whatever the substantive right of the United States to repayment of the surplus, the District Court in rendering judgment against them deprived them of property without due process of law. We think the contention is unsound.

The District Court was dealing with money deposited in its chancery to be disbursed under its direction in connection with an action pending before it. The situation is like that in which litigants deposit money as security or to await the outcome of litigation. Notwithstanding the fact that the court released the fund to the respondents, the parties were still before it and it did not lose control of the fund but retained jurisdiction to deal with its retention or repayment as justice might require.

Denial of notice and hearing is asserted. But, while it is true that the court included the judgment of restitution in its general judgment in the condemnation proceedings without notice to the parties or hearing, the respondents made motions to set aside the judgment against them, and the court heard and acted on the motions. The respondents had full opportunity to urge any meritorious reasons why judgment of restitution should not be entered against them.[28] We think they were entitled to no more.

State courts have proceeded as did the court below, under analogous statutes,[29] and our decisions justify the District Court's action.[30]

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

Reversed.

---

[28] In the judgment originally entered, the court added interest from the date of payment of the moneys to the respondents. After hearing on the motions, the court modified the judgment to impose interest only from the date of the judgment in the eminent domain proceeding.

[29] Lewis, Eminent Domain, 3d Ed., § 843; *Carish* v. *County Highway Committee,* 216 Wis. 375, 257 N. W. 11.

[30] Compare *Baltimore & Ohio R. Co.* v. *United States,* 279 U. S. 781; *Northwestern Fuel Co.* v. *Brock,* 139 U. S. 216.

Statement of the Case.

MARSHALL, DEPUTY COMMISSIONER, U. S. EMPLOYEES' COMPENSATION COMMISSION, ET AL. *v.* PLETZ.

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

No. 93. Argued November 19, 1942.—Decided January 4, 1943.

1. Under the Longshoremen's and Harbor Workers' Compensation Act, an order of a deputy commissioner dismissing a claim as barred under § 13 (a) because not filed within one year after the injury, is not reviewable by the District Court where the question is factual and when the order is supported by findings of fact which, in turn, are supported by substantial evidence. P. 388.
2. A tender of compensation by the insurance carrier to an injured employee, kept good to within less than a year of the filing of the employee's claim, is not the equivalent of a payment within the meaning of the exception in § 13 (a) of the Longshoremen's and Harbor Workers' Compensation Act, which provides "that if payment of compensation has been made without an award on account of such injury . . . a claim may be filed within one year after the date of the last payment." P. 388.
3. The furnishing of medical care to an injured employee up to a time within one year of the presentation of his claim under the Longshoremen's and Harbor Workers' Compensation Act is not "payment of compensation" within the exception in § 13 (a) of the Act. P. 389.
4. The terms "payment" and "compensation" used in § 13 (a) of the Act refer to the periodic money payments to be made by the employer. P. 390.
5. A ground for supporting the judgment below may be considered by this Court though raised here for the first time. P. 390.

127 F. 2d 104, reversed.

CERTIORARI, *post*, p. 607, to review the affirmance of a judgment of the District Court which set aside the order made by a deputy commissioner under the Longshoremen's and Harbor Workers' Compensation Act.

Mr. Robert T. Mautz, with whom *Messrs. Carl C. Donaugh* and *E. K. Oppenheimer* were on the brief, for petitioners.

Mr. William P. Lord, with whom *Mr. Ben Anderson* was on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The importance of questions presented in this case in the administration of the Longshoremen's and Harbor Workers' Compensation Act,[1] as well as a conflict of decisions,[2] impelled us to grant certiorari.

The respondent, a longshoreman and maritime worker employed by the petitioner McCormick Steamship Company in loading a steamship, was injured November 12, 1935. He filed a claim before the petitioner Marshall, a deputy commissioner, April 20, 1937. The petitioner Fireman's Fund Insurance Company, which insured the employer against liability arising under the Act, appeared at the first hearing set by the deputy commissioner and objected that the claim was untimely filed.[3] The respondent asserted that the insurer had, by conduct and negotiations with him, waived the right to object to the claim on the ground stated. After hearing witnesses the deputy commissioner made findings of fact on which he based

[1] March 4, 1927, c. 509, 44 Stat. 1424, 33 U. S. C. c. 18.

[2] *Fulton* v. *Hoage,* 77 F. 2d 110.

[3] Sec. 13 of the Act (33 U. S. C. 913) provides: (a) "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, . . . except that if payment of compensation has been made without an award on account of such injury . . . a claim may be filed within one year after the date of the last payment"; and (b) that the bar shall not be effective unless objection to the failure to file is made "at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard." There are other exceptions in paragraphs (c) and (d) which are here irrelevant.

ultimate findings that the claim was not filed within one year after the injury and that the respondent had not been misled or overreached by the employer or the insurance carrier, and dismissed the claim.

The respondent filed his bill in the District Court, praying that the order be set aside as "not in accordance with law."[4] A motion to dismiss was filed and, after hearing, the court remanded the case to the deputy commissioner with instructions to make findings of fact upon all the issues involved and with leave to consider all the evidence already taken and any other further evidence which might be offered as a basis for such findings. Further evidence was taken, the deputy commissioner made detailed findings of fact, and again concluded that neither the employer nor the insurance carrier had misled the respondent and that neither the carrier nor the employer had waived, or estopped themselves to rely upon, the limitation set by the statute. Thereupon the respondent supplemented his bill and the petitioners moved to dismiss. The court heard the case upon the record certified by the deputy commissioner, but upon that record made its own independent findings of fact. Its conclusions, based on its findings, were that the insurance carrier was estopped to assert that the claim was not timely filed and had waived any defense on that ground. The court set aside the orders of the deputy commissioner and directed him to enter a further order rejecting the objections to the claim and holding it to be in all respects valid, and to proceed to ascertain the amount of compensation due the respondent.

The insurance carrier, the employer, and the deputy commissioner appealed to the Circuit Court of Appeals. That court affirmed the decision of the District Court, one judge dissenting.[5]

---

[4] As permitted by § 21 (b) of the Act, 33 U. S. C. 921 (b).

[5] 127 F. 2d 104.

On the day of his injury respondent was sent to a hospital by the employer. He remained there until about Christmas 1935. A representative of the insurer called on him there, received a statement of his injury, and, within the time required by the statute, tendered him a check for the first installment of compensation due him, calculated according to his weekly earnings as nearly as the same could be ascertained from employment records. Respondent refused the check on the ground that it was not for as much as his earnings justified. It was explained to him that any deficiency could be adjusted as soon as the insurer or he could ascertain the facts more accurately. After leaving the hospital, respondent called on the attorney of the insurer, was again tendered payment of compensation, and again refused it on the ground that it was inadequate. At that time the insurer had some supplementary information and, as a result, advised respondent that it was ready to pay him compensation at a rate slightly in excess of that originally offered.

After refusing compensation, the respondent consulted an attorney who advised him that he had a cause of action against his employer for damages, notwithstanding the provisions of the Compensation Act. He subsequently told the insurer's attorney that he had been so advised.

The respondent's disability necessitated a return to the hospital in February 1936. While there, his present counsel saw him, advised him that he had no valid claims against any third party or his employer, and that he ought to take compensation. On leaving the hospital, respondent continued to receive medical aid which was furnished by the insurer, as was all medical care theretofore.

Respondent repeatedly called upon the insurer's attorney, who consistently advised him that he ought to accept compensation. There is dispute as to who broached the subject of a lump sum settlement in these conversations. Respondent says the attorney did. The

latter insists that the respondent demanded such a settlement; that he explained that no such settlement could be made under the statute until all disability had terminated and the consent of the deputy commissioner had been secured. It seems to be agreed that the respondent repeatedly said he wanted a lump sum settlement with medical care for the indefinite future, and it appears that the attorney insisted that no such settlement could be made.

Sometime in the summer of 1936 the respondent again discussed his case with his present counsel and was again advised that he should accept compensation. There is credible evidence that the respondent called on the deputy commissioner within a year of his injury, was informed that if the amount of compensation tendered him was not the proper amount this could easily be adjusted by reference to the rolls at the employment office, and that he then told the deputy commissioner a lawyer had advised him he could disregard the compensation act and bring an action to recover for his injuries. Respondent insisted, however, that this conversation took place after the year had expired.

The employer, or the insurer, promptly notified the deputy commissioner of the injury, that medical treatment was being furnished and compensation would be paid. Early in December of 1935 the insurer wrote the deputy commissioner that respondent had refused to accept compensation. In answer to an inquiry of the deputy commissioner, the insurer repeated this information in a letter dated January 10, 1936. There was no further correspondence in the matter until November 5, 1936, when the deputy commissioner inquired regarding the status of the case and was advised by the insurer's attorney that the respondent still claimed a disability, the existence of which the attorney doubted, but that respondent was receiving medical care, and seemed more interested in a

lump sum settlement and perpetual medical care than in receiving compensation.

There seems to be no doubt that respondent and insurer's attorney talked repeatedly about the respondent's physical condition and the disposition of his case. There would seem to be little doubt on the evidence that he was repeatedly tendered compensation and refused it.

These are the facts in broad outline. It is unnecessary to recite the evidence in detail. What has been said indicates that issues of fact were presented and that there was substantial evidence to support the findings of the deputy commissioner.

First. The findings of the deputy commissioner supported his order. The District Court could not have set aside the order without retrying the issues of fact and making new and independent findings based upon its own appraisal of the evidence. But, under the overwhelming weight of authority in this and in the lower federal courts, the statute granted no power to the District Court to try these issues *de novo*.[6]

Second. The Circuit Court of Appeals, in affirming the District Court's judgment, did not rely upon that court's resolution of the issues of fact raised before the deputy commissioner. It based its decision on a matter of law. In the light of the uncontradicted fact that the insurance carrier had tendered compensation and had kept its tender good down to within less than a year before the filing of respondent's claim, the majority of the court concluded that a tender of compensation was the equivalent of payment of compensation without an award within the intent and meaning of § 13 (a) of the statute.[7] It found

[6] *Crowell* v. *Benson*, 285 U. S. 22, 46, 66–72; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 257. The cases in the lower courts are collected in 33 U. S. C. A. § 921, Note 3, pp. 216–218.

[7] *Supra*, Note 3.

support for its view in the provisions of § 14 of the Act,[8] which require an employer or insurer who denies liability to file with the deputy commissioner a notice of controversy so as to bring on the question of liability for decision.

We think this construction of the Act inadmissible. Tender is not payment. The insurer at no time denied liability but continuously admitted it and expressed its desire to pay compensation. Laying aside, as the Circuit Court of Appeals properly did, questions of waiver and estoppel, there was nothing to prevent the respondent's filing his claim as the Act contemplates[9] if the insurer neglected to pay compensation. If he refused to accept payment and refrained from filing a claim, whether because he believed he had a cause of action against a third party or against his employer, or for any other reason, he was none the less bound to present his claim within the time fixed by the statute. The fact that the insurer was willing to pay compensation, which he refused, does not bring him within the exception stated in § 13 (a).

Third. At the argument at our bar it was suggested that the judgment below might be sustained on another ground, namely, that the furnishing of medical care to the respondent up to a time well within a year of the presentation of his claim was payment of compensation within the meaning of § 13 (a). On this theory it was urged that the one year period within which a claim must be filed would run from the date of the last rendition of medical care.

At the insistence of respondent's counsel, the deputy commissioner took an opposite view. While he denied compensation in the form of money payments to the respondent, he ordered the continuance of medical care. This was upon the theory that the Act treats the employer's obligations to pay compensation and to render medical aid as independent.

---

[8] 33 U. S. C. § 914.

[9] 33 U. S. C. 914 (h), 919 (a) (c).

Although the point is raised for the first time in this court, if we find it meritorious we may consider it as supporting the judgment below.[10] We hold, however, that the furnishing of medical aid is not the "payment of compensation" mentioned in § 13 (a). Section 2 of the Act[11] is devoted to definitions, one of which is: "(12) 'Compensation' means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein."

Section 6 provides "(a) No compensation shall be allowed for the first seven days of the disability, except the benefits provided for in § 7 of this chapter." The benefits covered in § 7 are the medical services which the employer is bound to furnish, but that section significantly provides that, if the employe refuses to submit to medical treatment, the deputy commissioner may, by order, "suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal." Here compensation is contrasted with medical aid.

Section 8 is entitled "Compensation for disability." The section deals solely with money compensation.

Section 10 states that, "except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation . . ."

Section 14 deals throughout with what it terms "compensation." All of its provisions have to do with the periodic money payments to be made to the injured employe and make no reference to medical care.

---

[10] *Langnes* v. *Green*, 282 U. S. 531, 536, and authorities cited.

[11] The sections referred to in the following discussion are found in 33 U. S. C. under the same section numbers as are used in the original Act, except that each is prefixed with the figure "9"; e. g., section 2 appears in the code as section 902. In the interest of brevity we shall refer to them as they appear in the Act as it is printed at 44 Stat. 1424.

Section 4 of the Act, it is true, refers "to the compensation payable under §§ 7, 8, and 9." It may be argued that as 7 is the section dealing with medical care, Congress meant to include such care within the term "compensation." In the normal case, however, the insurer defrays the expense of medical care but does not pay the injured employe anything on account of such care. Only if the employer and the insurer omit to furnish such care can the employe procure it for himself and then obtain from the deputy commissioner an award to reimburse him for what he has spent.

In the light of all the provisions of the Act, we are persuaded that the terms "payment" and "compensation" used in § 13 (a) refer to the periodic money payments to be made to the employe.

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

Reversed.

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

It has been said that the Act under consideration "should be construed liberally in furtherance of the purpose for which . . . enacted and, if possible, so as to avoid incongruous or harsh results." *Baltimore & Philadelphia Steamboat Co.* v. *Norton,* 284 U. S. 408, 414. The construction given the Act by the court below, which I think was correct, avoids such a result. The result of the construction here is to deprive an injured person of the compensation which the law intended he should have and which the insurance company, defendant, has admitted it owes. The only defense is a one-year statute of limitations, and that defense was not set up under circumstances that square with the Act's purposes. What are those circumstances?

These facts are undisputed: November 12, 1935, Pletz was injured while working for a steamship company which carried liability insurance with the Fireman's Fund Insurance Co., one of the petitioners here. November 26, 1935, the insurance company's attorneys reported to the deputy commissioner administering the Act that payments to Pletz had begun and would continue until notice was given the commissioner. The insurance company did tender a check to Pletz while he was in the hospital which he declined because he thought it insufficient, and on December 4, 1935, the insurance company advised the Commissioner of the refusal. Negotiations between Pletz and the insurance company continued through repeated conversations for a year and five months. The company lawyer testified that "I made the definite offer to him very early in the case that I would pay him his compensation any time he wanted to take it . . . and I told him that I made that offer and that he could take it any time he wanted to. . . ." It is apparent that the controversy throughout was not over the existence of a just claim, but over its size.

November 5, 1936, while negotiations were still in progress, and only seven days before the expiration of the year, the Commissioner wrote the attorney asking about the status of the claim. The attorney responded six days before the statute is said to have operated. He gave no information that Pletz had never accepted compensation, and reported only that he had put Pletz under a doctor's care and that no report had been received from the doctor. If the Commissioner had thought that the claim was controverted, he would have been obligated under § 14 (h) of the Act to hold hearings and take action "upon his own initiative" to protect the rights of the parties. Under that section such a course is required where payment has been stopped or suspended. Instead, the insurance company attorney, according to his own testimony, continued

to negotiate with Pletz until his claim was finally filed on April 19, 1936. The claim itself was filled out in the company lawyer's office without a hint of limitations. Then, for the first time, the company "filed its controversial" with the Commissioner and pleaded in it the statute of limitations.

The Commissioner found in substance that there had been no over-reaching of Pletz by the company and that therefore the company was not estopped from setting up the statute. Accepting his finding of facts, I think that the Commissioner's conclusion was based on an erroneous conclusion of the law concerning estoppel and limitations, and that the continuous process of negotiation and communication between the company, Pletz, and the Commissioner, bar the defense made here.

In *Schroeder* v. *Young*, 161 U. S. 334, 344, this Court said:

"Defendant relies mainly upon the fact that the statutory period of redemption was allowed to expire before this bill was filed, but the court below found in this connection that before the time had expired to redeem the property, the plaintiff was told by the defendant Stephens that he would not be pushed, that the statutory time to redeem would not be insisted upon, and that the plaintiff believed and relied upon such assurance. Under such circumstances the courts have held with great unanimity that the purchaser is estopped to insist upon the statutory period, notwithstanding the assurances were not in writing and were made without consideration, upon the ground that the debtor was lulled into a false security."

Here, the insurance company's representative has sworn, and his evidence is undisputed, that he promised to pay Pletz "his compensation any time he wanted to take it," a statement which was never withdrawn, and which in connection with the continued negotiations for a lump sum settlement, even after the statutory period had ex-

pired, was more than an equivalent of an express promise not to plead the statute of limitations. It is perhaps an understatement to say that the company attorney's conduct was a tacit encouragement to Pletz to act on the assumption that the company would never dispute its constantly admitted liability. *Swain* v. *Seamens,* 9 Wall. 254, 274. The statement of the Supreme Court of Illinois is in harmony with the general rule of law throughout the country: "Where an insurance company leads a party to delay the bringing of suit, or to dismiss a suit already pending, by holding out hopes of adjustment, or by making promises to pay, it is estopped from taking advantage of such delay or dismissal, by pleading the statute of limitations." *Railway Conductors' Benefit Assn.* v. *Loomis,* 142 Ill. 560, 572, 32 N. E. 424, 427; cf. *Ennis* v. *Pullman Palace Car Co.,* 165 Ill. 161, 178, 46 N. E. 439; *O'Hara* v. *Murphy,* 196 Ill. 599, 63 N. E. 1081. See also *Howard* v. *West Jersey & Seashore R. Co.,* 102 N. J. Eq. 517, 522, 147 A. 755; *Baker-Matthews Manufacturing Co.* v. *Grayling Lumber Co.,* 134 Ark. 351, 354, 355, 203 S. W. 1021; *McLearn* v. *Hill,* 276 Mass. 519, 177 N. E. 617. These cases illustrate the principle announced by this Court "that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage." *Insurance Company* v. *Wilkinson,* 13 Wall. 222, 233.

CLYDE-MALLORY LINES *v.* THE EGLANTINE ET AL.

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

No. 265. Argued November 20, 1942.—Decided January 4, 1943.

1. Where a libel *in rem* is brought against a vessel, in private ownership and operation, to recover upon a cause of action arising out of a collision which occurred when the vessel was owned and operated by the Government, and the Government appears in the suit and assumes liability under § 4 of the Suits in Admiralty Act, the two-year limitation period of § 5 of that Act is applicable. P. 397.
2. Section 18 of the Merchant Marine Act of 1920, which incorporates § 9 of the Shipping Act of 1916, provides that government merchant vessels should be "subject to all laws, regulations and liabilities governing merchant vessels," leaving the time within which to bring suits for the enforcement of liens to be decided in accordance with the general rules of laches under admiralty practice. In a case such as the one here presented, the two-year bar of § 5 of the Suits in Admiralty Act is not affected by § 9 of the Shipping Act of 1916 as reënacted, even though the reënactment was subsequent to the Suits in Admiralty Act. P. 398.

127 F. 2d 569, affirmed.

CERTIORARI, *post*, p. 609, to review the reversal of a decree in favor of the petitioner, 38 F. Supp. 658, in a suit begun by a libel *in rem* against a vessel and in which the United States intervened.

Mr. Chauncey I. Clark, with whom *Mr. Eugene Underwood* was on the brief, for petitioner.

Mr. Sidney J. Kaplan, with whom *Solicitor General Fahy, Assistant Attorney General Shea*, and *Mr. J. Frank Staley* were on the brief, for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

The question in this case is whether the libel in rem brought by the petitioner against the Steamship Eglantine

is barred by § 5 of the Suits in Admiralty Act, 41 Stat. 525, which provides that "suits hereunder shall be brought within two years after the cause of action arises."

On December 21, 1932, while the Eglantine was being operated by the United States as a merchant vessel, it collided with the Steamship Brazos, owned by the petitioner. Four and one-half years later, after the government had sold the Eglantine to a private operator, the petitioner filed this libel in rem against the vessel and the marshal took it from the private owner under an admiralty warrant of attachment. Admiralty imposes a lien upon privately owned vessels for damages inflicted by negligent operation and provides for enforcement by proceedings against the vessels themselves.[1] In § 9 of the Shipping Act of 1916, 39 Stat. 728, Congress permitted enforcement of such liens against government merchant vessels by providing that they should be "subject to all laws, regulations and liabilities governing merchant vessels" generally. The Shipping Act contained no limitation of time within which such actions must be commenced, but left that question to be decided in accordance with the general rules of laches under admiralty practice.[2] This clause was carried forward and became a part of § 18 of the Merchant Marine Act of 1920. 46 U. S. C. § 808.

It is the petitioner's contention that this action in rem was authorized and controlled by § 9 as amended. The government contends that the Suits in Admiralty Act withdrew the previous 1916 congressional consent to impose and enforce liens against vessels for injuries inflicted by government operation whether the vessels are in its possession or that of its purchasers. In addition, the government asserts that this proceeding is one under and controlled by § 5 of the Suits in Admiralty Act and therefore barred because brought more than two years after the col-

[1] *The John G. Stevens*, 170 U. S. 113, 120.

[2] *The Key City*, 14 Wall. 653.

lision. The District Court ruled against the government on both these defenses, under authority of *The Bascobal,* 295 F. 299. But the Circuit Court of Appeals declined to follow its former ruling in *The Bascobal,* held § 5 applicable, and accordingly reversed, 127 F. 2d 569. We granted certiorari because the questions raised are important in the construction of the Suits in Admiralty Act, and are in some doubt. Cf. *The Caddo,* 285 F. 643. We think the limitations of § 5 of the Suits in Admiralty Act are controlling, and for that reason we find it unnecessary to consider the other defense set up by the government.

In *The Lake Monroe,* 250 U. S. 246, this Court decided that § 9 of the Shipping Act of 1916 did make government merchant vessels subject to seizure under in rem proceedings. This decision however prompted Congress shortly thereafter to review and reconsider the effect of the broad powers § 9 had granted.[3] The result of this review was passage of the Suits in Admiralty Act in which Congress expressly withdrew its previous consent to have government vessels subject to the laws applicable to merchant ships generally. Section 1 provided for their immunity from arrest or seizure by judicial process in the United States or its possessions; § 2 authorized libels in personam directly against the United States for injuries inflicted by its governmental ship operations. But Congress went beyond the cases of liability for ships in the possession of the United States and made careful provision in § 4 for a manner of determining governmental liability for maritime torts occurring during the period of government ownership should government vessels be transferred to private owners before suit was brought. That Section gave the government the privilege, of which it availed itself in this case, to appear as a party defendant and assume liability, and expressly prescribed that "thereafter such cause shall proceed against the United States in

[3] *Blamberg Bros.* v. *United States,* 260 U. S. 452, 458.

accordance with the provisions of this Act." Immediately subsequent is the "provision of this Act" here in question: "Suits hereunder shall be brought within two years." This is as surely a provision of the Act in accordance with which the cases must be governed as is any other clause. The Suits in Admiralty Act thus prescribes a comprehensive procedural pattern designed fully to control the method by and the time within which obligations for damages inflicted by government operation of ships must be instituted and determined.

There is no question that under the Suits in Admiralty Act suits against the government for maritime torts committed by its vessels, when brought while the vessels are still in the possession of the government, are subject to the two-year limitation provision. Section 4 provides so closely related a method of permitting the government to meet its obligations on a maritime tort with economy and dispatch that we should be slow to construe any ambiguity in the statute to establish a separate and distinct period of limitation for it. The conclusion is inescapable that there is no practical difference between suits against the government as owner of the vessel and against the government as the party in interest when it voluntarily appears to defend its lately sold property against tort liability.

As has been noted, § 9 of the 1916 Act was incorporated in the 1920 Merchant Marine Act, passed three months after the Suits in Admiralty Act. It has been suggested, although not vigorously pressed, that even if the Suits in Admiralty Act was intended to bar actions such as this, it was modified by re-enactment of § 9. Congress did not, however, in passing the Merchant Marine Act, as it did in passage of the Suits in Admiralty Act, have its attention focused on this particular problem. Running through the Merchant Marine Act there appears repeated manifestation of a Congressional purpose to expedite transfer

of government vessels into private hands,[4] a purpose clearly compatible with the Suits in Admiralty Act which through its limitation provisions cut off lingering liens. There is nothing whatever in the 1920 Merchant Marine Act, nor, so far as has been pointed out to us, anything in its legislative history, indicating that Congress intended to repeal, alter, or amend the Suits in Admiralty Act in whole or in part. The 1920 re-enactment is not meaningless; it retains in the law that portion of the 1916 statute unaffected by the Suits in Admiralty Act. It remains an expression of the basic policy of waiver of immunity by the government for maritime torts of the sort within its scope.

We hold that when the government voluntarily appears in an action authorized by § 4 of the Suits in Admiralty Act, the proceedings are governed by § 5 with its limitation provisions.

Affirmed.

KIESELBACH ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 184. Argued December 11, 1942.—Decided January 4, 1943.

Title to real property in the City of New York was taken by the City, together with the possession and the right to all after-accruing rents, by a proceeding in condemnation under § 976 of the Greater New York Charter. Several months later, the final decree awarded the former owners, as just compensation, the value of the property on the day of taking, with interest thereon from that date till the date of payment. *Held* that the part of the award designated as "interest," although it was part of the "just compensation" that must be paid the owner to justify the taking, was not a part of the sale price of a capital asset under § 117 (a) of the Revenue Act of 1936 and was taxable as income under § 22 of that Act. P. 403.

127 F. 2d 359, affirmed.

---

[4] 41 Stat. 988, §§ 1, 5, 6, 7, 12, 19

CERTIORARI, *post*, p. 612, to review a judgment which reversed a decision of the Board of Tax Appeals, 44 B. T. A. 279, overruling a deficiency income tax assessment.

Mr. Harry Friedman for petitioners.

Mr. Arnold Raum, with whom *Solicitor General Fahy*, *Assistant Attorney General Clark*, and *Messrs. Sewall Key*, *J. Louis Monarch*, and *Arthur A. Armstrong* were on the brief, for respondent.

Mr. John Jay McKelvey filed a brief on behalf of Isaac G. Johnson & Co., as *amicus curiae*, in support of petitioners.

MR. JUSTICE REED delivered the opinion of the Court.

This writ of certiorari was granted limited to a single narrow point in the law of income taxes. The sum in question was received as part of the compensation in a condemnation proceeding instituted by the City of New York. Payment was made several years after the actual taking. The issue concerns the nature of that portion of the payment which is called "interest" by the Greater New York Charter and which the owner must receive, in addition to the value of the property fixed as of the time of the taking, to produce, when actually paid, the full equivalent of that value. Was this portion a capital gain or ordinary income?

The writ was granted because of conflict upon the point between this case below, *Commissioner* v. *Kieselbach*, 127 F. 2d 359 (C. C. A. 3), and *Seaside Improvement Co.* v. *Commissioner*, 105 F. 2d 990 (C. C. A. 2).

The taxpayers owned a piece of realty in the City of New York. In December, 1932, that city's Board of Estimate passed a resolution which directed that upon January 3, 1933, the title in fee to a large part of the parcel would vest in the city. The condemnation proceeding, of which the resolution was a part, was pursuant to § 976

of the Greater New York Charter, which provides in part as follows:

"Upon the date of the entry of the order granting the application to condemn, or of the filing of the damage map in the proceeding, as the case may be, or upon such subsequent date as may be specified by resolution of said board, the city of New York shall become and be seized in fee of or of the easement, in, over, upon or under, the said real property described in the said order or damage map, as the board of estimate and apportionment may determine, the same to be held, appropriated, converted and used to and for such purpose accordingly. Interest at the legal rate upon the sum or sums to which the owners are justly entitled upon the date of the vesting of title in the city of New York, as aforesaid, from said date to the date of the final decree shall be awarded by the court as part of the compensation to which such owners are entitled."

The city took possession on the date named in the resolution and received all rents thereafter accruing. The Supreme Court of New York entered its final decree in the proceedings on March 31, 1937. It was for $73,246.57 and was stated to be the just compensation which the owners were entitled to receive. Payment was made on May 12, 1937. It has been stipulated that:

"The amount of said payment was computed by adding to the principal amount of $58,000.00, interest thereon as provided by Section 976 of the Greater New York Charter, in the sum of $15,246.57, computed at the rate of 6% per annum from January 3, 1933 to May 12, 1937, or a total of $73,246.57." [1]

[1] No question is raised involving the accuracy of this computation. While § 976 requires interest only to the date of the decree, § 981, Greater New York Charter, as amended by Laws of 1932, c. 391, requires interest on the decree. *Matter of City of New York* (*Chrystie St.*). 264 N. Y. 319, 190 N. E. 654.

We accept as a fact that the $58,000, principal amount just referred to, was, as petitioners allege, an award to them. We assume it was the value on January 3, 1933, of this property then taken by the city.

Section 22 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, 1657, contains the general definition of gross income. It reads as follows:

"(a) *General Definition.*—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . ."

The taxpayers' basis on the condemned property was around $42,000. In their original return the difference between the basis and the total sum received was treated as capital gain and only a percentage was returned as income pursuant to § 117.[2] The Commissioner assessed a deficiency on the portion of the award computed as interest, on the ground that such portion was ordinary income.

---

[2] Section 117 reads as follows:

"(a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

. . . . . .

"40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

"30 per centum if the capital asset has been held for more than 10 years.

"(b) *Definition of Capital Assets.*—For the purposes of this title, 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), . . ." 49 Stat. 1691.

The Board of Tax Appeals reversed the Commissioner and the Circuit Court of Appeals, in turn, held with the Commissioner. 127 F. 2d 359.

We agree with the Court of Appeals. The sum paid these taxpayers above the award of $58,000 was paid because of the failure to put the award in the taxpayers' hands on the day, January 3, 1933, when the property was taken. This additional payment was necessary to give the owner the full equivalent of the value of the property at the time it was taken. Whether one calls it interest on the value or payments to meet the constitutional requirement of just compensation is immaterial. It is income under § 22, paid to the taxpayers in lieu of what they might have earned on the sum found to be the value of the property on the day the property was taken. It is not a capital gain upon an asset sold under § 117. The sale price was the $58,000.[3]

The property was turned over in January, 1933, by the resolution. This was the sale. Title then passed. The subsequent earnings of the property went to the city. The transaction was as though a purchase money lien at legal interest was retained upon the property. Such interest when paid would, of course, be ordinary income.

From the premises that the value at time of the taking plus compensation for delay in payment equals just compensation, *United States* v. *Klamath Indians,* 304 U. S. 119, 123,[4] and that a good measure of the necessary additional amount is interest "at a proper rate," *Seaboard Air*

[3] The involuntary character of the transaction is not significant. *Helvering* v. *Hammel,* 311 U. S. 504, 510.

No review is sought of the holding that transfer of property through condemnation proceedings is a sale within the meaning of § 117 of the Revenue Act of 1936. *Commissioner* v. *Kieselbach,* 127 F. 2d 359, 360.

[4] See also *Shoshone Tribe* v. *United States,* 299 U. S. 476, 496; *Phelps* v. *United States,* 274 U. S. 341; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106; *Liggett & Myers Co.* v. *United States,* 274 U. S. 215.

Line Ry. Co. v. *United States,* 261 U. S. 299, 306, petitioner contends that as just compensation requires the payment of these sums for delay in settlement, they are a part of the damages awarded for the property. But these payments are indemnification for delay, not a part of the sale price. While without their payment just compensation would not be received by the vendor, it does not follow that the additional payments are a part of the sale price under § 117 (a). The just compensation constitutionally required is not the same thing as the sale price of a capital asset.[5]

In *Seaside Improvement Co.* v. *Commissioner,* 105 F. 2d 990, 994, an opposite conclusion apparently was reached by treating the additional payments as part of the purchase price as well as part of "just compensation." [6]

Petitioners urge that the additional sum paid should be construed as a part of the sale price, in analogy to decisions that such sums, when paid in condemnation proceedings by a state, are not interest entitled to exemption under § 22 (b) (4), Internal Revenue Code, as "interest upon the obligations of a state." [7] The cases cited construe the quoted phrase as designed to protect

[5] The same principle is applicable to the New York decisions, holding that interest is a part of the condemnation award. Just compensation requires satisfaction for the delay by payment of the additional sums. *Matter of City of New York (West 151st St.),* 222 N. Y. 370, 372, 118 N. E. 807; *Matter of Minzesheimer,* 144 App. Div. 576, 579, 129 N. Y. S. 779, affirmed 204 N. Y. 272, 97 N. E. 717; *Matter of City of N. Y. (Bronx River Parkway),* 284 N. Y. 48, 54, 29 N. E. 2d 465. The obligation to pay its value arises when the property is taken. Title then passes. *Kahlen* v. *State of New York,* 223 N. Y. 383, 389, 119 N. E. 883. *Woodward-Brown Realty Co.* v. *City of New York,* 235 N. Y. 278, 139 N. E. 267, is not to the contrary. It deals with the unity of a right of action on an award with interest, holding only one proceeding is authorized against the condemnor.

[6] "Such additional sums are not considered normal interest but part of the compensation awarded for the property taken." 105 F. 2d at 994.

[7] *Holley* v. *United States,* 124 F. 2d 909 (C. C. A. 6, 1942); *Posselius* v. *United States,* 90 Ct. Cls. 519, 31 F. Supp. 161 (1940); *Williams*

the states' borrowing power. In any event, the question here is not whether these sums are interest. They may not be interest and yet be other than part of the sale price.[8] If not interest, they may be compensation for the delay in payment.

Other contentions are made by the petitioners. It is said that in other situations interest on delayed payments has been treated as part of the principal received and not as normal income.[9] By analogy it is urged that the same principle be applied here. The first three cases in the preceding note involved payments of awards in liquidation of claims against Germany allowed by the Mixed Claims Commission. See Settlement of War Claims Act of 1928, 45 Stat. 254. As the aggregate payments did not equal the taxpayers' basis, the decisions refused to consider as income the portions designated as interest on the ground that in liquidation the investment first must be restored before income is realized. *Koninklijke Hollandische Lloyd* v. *Commissioner* and *Consorzio Veneziano etc.* v. *Commissioner* applied the rule that payment for deferred compensation was not interest under § 119 (a)[10]

Land Co. v. *United States,* 90 Ct. Cls. 499, 31 F. Supp. 154 (1940); *Baltimore & Ohio R. Co.* v. *Commissioner,* 78 F. 2d 460 (C. C. A. 4, 1935); *U. S. Trust Co. of New York* v. *Anderson,* 65 F. 2d 575 (C. C. A. 2, 1933).

[8] "Nor is it quite accurate to say that interest as such is added to value at the time of the taking in order to arrive at just compensation subsequently ascertained and paid." *United States* v. *Klamath Indians,* 304 U. S. 119, 123.

[9] *Helvering* v. *Drier,* 79 F. 2d 501 (C. C. A. 4, 1935); *Commissioner* v. *Speyer,* 77 F. 2d 824 (C. C. A. 2, 1935); *Drier* v. *Helvering,* 63 App. D. C. 283, 72 F. 2d 76 (1934); Consorzio Veneziano di Armamento e Navigazione *v.* Commissioner, 21 B. T. A. 984 (1930); N. V. Koninklijke Hollandische Lloyd (Royal Holland Lloyd) *v.* Commissioner, 34 B. T. A. 830 (1936).

[10] This section specifies interest on interest bearing obligations of residents as one of the items of income from sources within the United States.

of the Revenue Act of 1932 or 1928. These decisions obviously are not in point on the question whether the additional payments in the present case are part of the sale price or other income under § 22. Nor do we find persuasive the cases refusing to allow an installment purchaser an interest deduction because of his deferred payments where the purpose was an arrangement for the payment of the purchase price.[11] In the present case, the purchase price was settled as of January 3, 1933, when the property was taken over.

Affirmed.

CORYELL ET AL. *v.* PHIPPS ET AL.

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

No. 246. Argued December 15, 1942.—Decided January 4, 1943.

1. Revised Statutes § 4283—the limitation of liability provision—should be administered liberally. P. 411.
2. An individual owner of a vessel who selects competent men to store and inspect it, and who is not on notice as to the existence of any defect in it, can not, upon the theory that the "privity" and "knowledge" of his negligent agents are imputable to him, be denied the benefit of the limitation of liability under R. S. § 4283, as respects damage resulting from fire caused by an explosion on board during the period of storage. P. 412.

128 F. 2d 702, affirmed.

CERTIORARI, *post*, p. 609, to review the affirmance of a decree of the District Court in admiralty, 39 F. Supp. 142, permitting limitation of liability in a suit to recover damages for the destruction of petitioners' vessels

[11] *Hundahl* v. *Commissioner*, 118 F. 2d 349 (C. C. A. 5th, 1941); *Henrietta Mills* v. *Commissioner*, 52 F. 2d 931 (C. C. A. 4th, 1931); *Pratt-Mallory Co.* v. *United States*, 82 Ct. Cls. 292, 12 F. Supp. 1020 (1936); *Daniel Brothers Co.* v. *Commissioner*, 28 F. 2d 761 (C. C. A. 5th, 1928).

resulting from fire aboard a vessel owned by one of the respondents.

Mr. T. Catesby Jones, with whom *Mr. Leonard J. Matteson* was on the brief, for petitioners.

Mr. Chauncey I. Clark, with whom *Mr. Eugene Underwood* was on the brief, for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioners instituted a suit in Admiralty in the federal District Court to recover damages for the destruction of vessels owned by them as a result of a fire which occurred in June, 1935, while the vessels were afloat at Pilkington's storage basin at Fort Lauderdale, Florida. The fire was caused by an explosion of gasoline fumes in the engine room of the yacht Seminole, registered in the name of Seminole Boat Co. and owned by it. Prior to 1929 the Seminole was owned by respondent Phipps and his brother. At that time they transferred the yacht to the Seminole Boat Co., a Delaware corporation, all of the stock of which was issued to the two brothers. At the time of the fire, respondent Phipps still owned half of the shares of stock, the other half having been acquired by his sister. Neither she nor Phipps was an officer or director of the company.

Respondent Phipps was sued on the theory that he was the owner of the yacht and operated and controlled her and that the Seminole Boat Co. was a dummy corporation. In his answer, Phipps set up, *inter alia,* the defense of limitation of liability contained in R. S. § 4283, 46 U. S. C. § 183.[1] The District Court found negligence on the part

[1] That section, as it read at the time of the fire, provided: "The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise,

of the Seminole Boat Co. It held that the corporation was not a sham or a fraud but adequate to insulate Phipps as a stockholder from liability for this tort. It went on to hold that, even if the corporation be disregarded, Phipps was without "privity or knowledge" of the events which caused the fire and hence could limit his liability to the value of his interest in the yacht. 39 F. Supp. 142. The Circuit Court of Appeals affirmed. 128 F. 2d 702. The case is here on a petition for a writ of certiorari which we granted because of an asserted conflict, on the point of limitation of liability under § 4283, between the decision below and *In re New York Dock Co.*, 61 F. 2d 777, and *In re Great Lakes Transit Corp.*, 81 F. 2d 441.

The sole questions raised by the petition relate to the liability of Phipps. Petitioners renew here their contention that the corporate existence of the Seminole Boat Co. should be disregarded and that it should be treated as a mere dummy or sham. We need not recite the facts on which that argument rests nor express an opinion on it. For even if we assume, without deciding, that the contention is a valid one and that Phipps should be treated as owner of the yacht for the purposes of this litigation, we nevertheless conclude that the courts below were correct in allowing the limitation of liability under § 4283.

That section, as it read at the time of the fire,[2] provided as we have stated that the "liability of the owner" might be limited to the "amount or value of the interest of such

shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

[2] No question has been raised here as respects the amendments to the section made by the Act of August 29, 1935, 49 Stat. 960, or by the Act of June 5, 1936, 49 Stat. 1479.

owner" in the vessel, where the loss was occasioned or incurred without his "privity or knowledge." The District Court found that the proximate cause of the fire was the presence of gasoline fumes in the engine room, caused by a leak in some part of the machinery or equipment. That leak, it concluded, occurred not from faulty original installation of the gasoline tanks but with the passage of time. The Circuit Court of Appeals sustained those findings. It was not found by either of the courts below, nor is it claimed, that Phipps had knowledge of that condition. It is urged, however, that the agents of Phipps and the Seminole Boat Co. selected to manage and inspect the yacht were incompetent and negligent, that their negligence is attributable to Phipps, and that, in any event, he could not establish his claim for limitation of liability without showing that he had appointed competent persons to make the inspection. See *M'Gill* v. *Michigan S. S. Co.*, 144 F. 788; *In re Reichert Towing Line*, 251 F. 214; *The Silver Palm*, 94 F. 2d 776. The Circuit Court of Appeals found that the vessel had been examined and pronounced fit by an experienced ship surveyor in February, 1935, that she developed no faults in a cruise between February and April of that year when she was turned over to Pilkington for storage, that "the crew left her gasoline valves closed, her electric switches open, her gas tanks registering empty, and her bilges clean and free of gasoline or gasoline vapor," and that "she was repeatedly examined by competent men between April 15 and June 24, 1935, who discovered nothing wrong with her." There is evidence to support those findings and we will not disturb them. Thus respondent has satisfied the burden of proof, which is on those who seek the benefit of § 4283, of establishing the lack of privity or knowledge (*M'Gill* v. *Michigan S. S. Co., supra; In re Reichert Towing Line, supra; The Silver Palm, supra*) and is entitled to limit his liability, unless any neglect of those to whom duties

were delegated may be attributed to him for purposes of § 4283.

Petitioners press several lines of cases on us. We are not concerned here, however, with the question of limitation of liability where the loss was occasioned by the unseaworthiness of the vessel. The limitations acts have long been held not to apply where the liability of the owner rests on his personal contract. *Pendleton* v. *Benner Line,* 246 U. S. 353; *Luckenbach* v. *McCahan Sugar Co.,* 248 U. S. 139; *Capitol Transportation Co.* v. *Cambria Steel Co.,* 249 U. S. 334. As stated by Chief Justice Hughes in *American Car & Foundry Co.* v. *Brassert,* 289 U. S. 261, 264, "For his own fault, neglect and contracts the owner remains liable." And that exception extends to an implied as well as to an express warranty of seaworthiness. *Cullen Fuel Co.* v. *Hedger Co.,* 290 U. S. 82. But whatever limit there may be to that exception (*id.,* p. 89; cf. *Earle & Stoddart* v. *Ellerman's Wilson Line,* 287 U. S. 420, arising under the fire statute) those cases are no authority for imputing to the individual owner the neglect of another so as to establish on his part privity within the meaning of the statute.

Petitioners also rely on cases involving corporate shipowners. In those cases it is held that liability may not be limited under the statute where the negligence is that of an executive officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred. *Spencer Kellogg & Sons* v. *Hicks,* 285 U. S. 502, and cases cited; 3 Benedict, Admiralty (6th ed.) § 490. But those cases are no authority for holding that the negligence of a subordinate may be imputed to an individual owner so as to place him in privity within the meaning of the statute. A corporation necessarily acts through human beings. The privity of some of those persons must be the privity of the corporation else it could always limit its

liability. Hence the search in those cases to see where in the managerial hierarchy the fault lay.

In the case of individual owners, it has been commonly held or declared that privity as used in the statute means some personal participation of the owner in the fault or negligence which caused or contributed to the loss or injury. *The 84–H,* 296 F. 427; *Warnken* v. *Moody,* 22 F. 2d 960; *Flat-Top Fuel Co.* v. *Martin,* 85 F. 2d 39; and see *La Bourgogne,* 210 U. S. 95, 122; *Richardson* v. *Harmon,* 222 U. S. 96, 103; 3 Benedict, Admiralty (6th ed.) § 489. That construction stems from the well settled policy to administer the statute not "with a tight and grudging hand" (Mr. Justice Bradley in *Providence & New York S. S. Co.* v. *Hill Mfg. Co.,* 109 U. S. 578, 589) but "broadly and liberally" so as "to achieve its purpose to encourage investments in shipbuilding and to afford an opportunity for the determination of claims against the vessel and its owner." *Just* v. *Chambers,* 312 U. S. 383, 385. And see *Larsen* v. *Northland Transportation Co.,* 292 U. S. 20, 24; *Flink* v. *Paladini,* 279 U. S. 59, 62; *Richardson* v. *Harmon, supra,* p. 103. Some cases, however, have barred the individual owner from the benefits of the statute even though the element of personal participation in the fault or negligence was not present. Thus it has been thought that the scope of authority delegated by an individual owner to a subordinate may be so broad as to justify imputing privity (*In re New York Dock Co., supra,* p. 779) as well as knowledge. *In re Great Lakes Transit Corp., supra,* p. 444. We need not reach those questions in this case. Privity, like knowledge, turns on the facts of particular cases. Here two courts have found the absence of both. We accept concurrent findings upon such matters. *Just* v. *Chambers, supra,* p. 385. And even were we to assume without deciding that for the purposes of § 4283 privity as well as knowledge of an individual owner may be constructive rather than actual, it does not follow

that Phipps should be barred from limiting his liability. One who selects competent men to store and inspect a vessel and who is not on notice as to the existence of any defect in it cannot be denied the benefit of the limitation as respects a loss incurred by an explosion during the period of storage, unless "privity" or "knowledge" are to become empty words. If § 4283 does not give protection to the individual owner in these circumstances, it is difficult to imagine when it would.

Affirmed.

PENDERGAST *v.* UNITED STATES.*

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

No. 183. Argued December 14, 15, 1942.—Decided January 4, 1943.

1. Revised Statutes § 1044, providing that "No person shall be prosecuted, tried, or punished for any offense, not capital, . . . unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed," applies to a prosecution for criminal contempt. P. 416.
2. The act of inducing a federal court through misrepresentations by attorneys to issue decrees effectuating a corrupt settlement of litigation, including a distribution of impounded funds, if assumed to be "misbehavior" in the "presence" of the court within the meaning of Jud. Code § 268, is a criminal contempt and an "offense" against the United States within the meaning of R. S. § 1044. P. 416.
3. The time when the three-year limitation of R. S. § 1044 begins to run against a prosecution for a criminal contempt under Jud. Code § 268 is the time when the act of misbehavior in the presence of the court was committed; and, in a case of alleged contempt committed by inducing the court by false representations to order a distribution of impounded funds, effectuating a fraudulent scheme, the offense was complete when the misrepresentations were made,

---

*Together with No. 186, *O'Malley* v. *United States,* and No. 187, *McCormack* v. *United States,* also on writs of certiorari, *post,* p. 608, to the Circuit Court of Appeals for the Eighth Circuit.

and the three years are counted from that time. The bar of the statute can not be deferred upon the ground that the offense was a continuing one and was not complete until the litigation ended, or until further acts *dehors* were committed in the execution of the scheme. P. 419.

128 F. 2d 676, reversed.

CERTIORARI, *post*, p. 608, to review judgments affirming sentences for contempt. For opinions of the trial court, see 35 F. Supp. 593, 39 F. Supp. 189.

Mr. Ralph M. Russell argued the cause for petitioner in No. 186; *Mr. John G. Madden* argued the cause for petitioner in No. 183; and *Messrs. James E. Burke* and *James P. Aylward* were with them on the brief for petitioners in Nos. 183 and 186. *Mr. James E. Carroll* submitted for petitioner in No. 187.

Messrs. William S. Hogsett and *Herbert W. Wechsler* argued the cause, and *Solicitor General Fahy* and *Mr. Richard K. Phelps* were with *Mr. Hogsett* on the brief, for the United States.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioners, together with one Street, now deceased, conceived and executed a nefarious scheme in fraud of the federal District Court and in corruption of the administration of justice. The short of it was that petitioners by fraud and deceit and through misrepresentations by attorneys induced the court to issue decrees effectuating a corrupt settlement of litigation. It happened this way:

Several insurance companies doing business in Missouri filed with the Superintendent of Insurance an increase in insurance rates which the Superintendent denied. The insurance companies filed over 130 separate injunction suits against the Superintendent and the Attorney Gen-

eral in the federal court to restrain the enforcement of certain statutes of Missouri on the ground of unconstitutionality. A three-judge court was convened which granted motions for interlocutory injunctions on July 2, 1930, whereby the Superintendent and the Attorney General were enjoined, pending final decision, from enforcing the Missouri statutes—on condition, however, that the insurance companies deposit the amount of increase in rates which was collected with a custodian of the court to await the final outcome of the litigation. In September 1930 a special master was appointed, who held hearings. During this time the premiums impounded by the court accumulated, until by 1936 they amounted to almost $10,000,000.

The lure of this sizeable amount of other people's money played an important part in the scheme which was hatched.

Street was in charge of the rate litigation for the insurance companies. Pendergast was a "political boss." O'Malley was the then Superintendent of Insurance. McCormack was an insurance agent. Of these, only O'Malley was a party to the litigation. Street agreed to pay Pendergast a "fee" of $750,000 to use his influence over O'Malley and obtain a settlement of the litigation which would be satisfactory to the insurance companies. O'Malley was agreeable. McCormack was the go-between. Street made an initial payment of $100,000 in currency, which was divided $55,000 to Pendergast, $22,500 to O'Malley, and $22,500 to McCormack. Thereafter an agreement was reached and reduced to writing in form of a memorandum. O'Malley would approve as of June 1, 1930, 80% of the increase in rates which the companies had sought; the parties would appear by their attorneys and join in seeking appropriate orders for distribution of the impounded money; 20% was to go to the policyholders, 50% directly to the insurance

companies, and 30% to Street and another as trustees for the insurance companies. The latter were to account to the companies but not to the court or the superintendent. The memorandum agreement was not disclosed to the court. But on June 18, 1935, the insurance companies filed in each case a motion reciting terms of settlement and praying for an order of distribution. On the next day the insurance companies and O'Malley filed stipulations agreeing that the court should make the order of distribution. Thereafter on June 22, 1935, October 26, 1935 and January 24, 1936, hearings were held in open court on the motions, and briefs were filed. Counsel, who were wholly innocent and acting in good faith, assured the court of the honesty, fairness, and desirability of the settlement. On February 1, 1936, the court, acting in reliance on the representations and without a hearing on the merits, entered a decree ordering distribution of the impounded funds as prayed in the motions. It also dismissed the bills, reserving jurisdiction, however, for certain purposes.

Petitioners then proceeded further with their corrupt plan. About April, 1936, Street paid $330,000 in currency, of which Pendergast received $250,000, O'Malley $40,000 and McCormack $40,000. In the fall of 1936, Pendergast received another $10,000 in cash from Street. That left $310,000 of the $750,000 "fee" unpaid. And, so far as appears, it was never paid, due to the unraveling of facts which led to an exposure of the entire corrupt scheme. For about that time an internal revenue investigation of Street's income tax return disclosed that over $400,000 of the funds for which Street was to account as trustee had been paid to unknown persons. This was reported to the Court in February 1939. A grand jury investigation followed, in which the rest of the sordid story was unfolded. See *United States* v. *Pendergast,* 28 F. Supp. 601. The Department of Justice caused Pender-

gast and O'Malley to be indicted for evasion of income taxes on the amounts of money so received. They pleaded guilty and were fined and imprisoned late in May, 1939. *Id.* On May 29, 1939, O'Malley's successor filed a motion praying that the decrees of February 1, 1936, be set aside on the basis of those disclosures and that the insurance companies be ordered to restore the funds distributed to them. The court ordered the insurance companies to make restitution; and they did. At the same time, the court asked the district attorney whether contempt proceedings should be filed. About a year passed, when the court on May 20, 1940, requested the district attorney to institute contempt proceedings against petitioners. An information was filed July 13, 1940. Motions to abate and quash were overruled. 35 F. Supp. 593. Thereafter answers were filed and a hearing had. Petitioners were adjudged guilty of contempt—Pendergast and O'Malley being sentenced to two years' imprisonment and McCormack being sentenced to probation for two years. 39 F. Supp. 189. The Circuit Court of Appeals affirmed. 128 F. 2d 676. We granted the petition for certiorari because of the importance in the administration of justice of the problems raised.

Petitioners press several objections to the judgment below. The chief of these are that the offense was not a contempt under § 268 of the Judicial Code (28 U. S. C. 385) as construed by *Nye* v. *United States,* 313 U. S. 33, and that even though it was, the prosecution of it was barred by the three year statute of limitations contained in § 1044 of the Revised Statutes, 18 U. S. C. § 582. We do not reach the first of these questions and need not express an opinion on it. For although we assume *arguendo* that the Circuit Court of Appeals was correct in holding (128 F. 2d p. 683) that the conduct of petitioners was "misbehavior" in the "presence" of the court, within the meaning of § 268 of the Judicial Code, and

therefore punishable as a contempt, we are of the opinion that this prosecution was barred by § 1044 of the Revised Statutes.

That section provides: "No person shall be prosecuted, tried, or punished for any offense, not capital, . . . unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed . . ." It would seem that the statute fits this case like a glove. If the conduct in question was a contempt, there can be no doubt that it was a criminal contempt as defined by our decisions. See *Nye* v. *United States, supra,* pp. 41–43 and cases cited. As such, it was an "offense" against the United States, within the meaning of § 1044. It was held in *Gompers* v. *United States,* 233 U. S. 604, that a wilful violation of an injunction, likewise punishable as a contempt under § 268 of the Judicial Code, was such an "offense." And see *United States* v. *Goldman,* 277 U. S. 229. Cf. *Ex parte Grossman,* 267 U. S. 87. It was said in the *Gompers* case that those contempts were "infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech." 233 U. S. p. 610. That observation is equally pertinent here. Moreover, we can see no reason for treating one type of contempt under § 268 of the Judicial Code differently in this respect from others under the same section. No such difference is discernible from the language of § 1044. Because of that and because of the further circumstance that Congress classified them together in defining the offense in § 268, we can hardly conclude that a distinction between them for purposes of § 1044 should be implied. Furthermore, the fact that this prosecution was by information, the absence of which has been held not fatal under § 1044 (*Gompers* v. *United States,*

supra, pp. 611–612), brings the case squarely within the language of the section.

Certainly the power to punish contempts in the "presence" of the court, like the power to punish contempts for wilful violations of the court's decrees, "must have some limit in time." *Gompers* v. *United States, supra,* p. 612. It is urged, however, that there is no limitation on prosecutions for contempts in the "presence" of the court except as one may be implied from the conclusion of the proceeding in which the contempt arises. But if we are free to consider the matter as open, no reason for that different treatment of contempts in the "presence" of the court is apparent. *Adams* v. *Woods,* 2 Cranch 336, held that this statute of limitations was applicable to an action of debt for a penalty. Chief Justice Marshall stated that it would be "utterly repugnant to the genius of our laws" to allow such an action to lie "at any distance of time." *Id.,* p. 342. That observation is equally apt here. Proceedings like the rate litigation out of which this prosecution arose might well continue for years on end awaiting final disposition of all the funds. If there is a contempt, it takes place when the "misbehavior" occurs in the "presence" of the court. Statutes of limitations normally begin to run when the crime is complete. See *United States* v. *Irvine,* 98 U. S. 450. Every statute of limitations, of course, may permit a rogue to escape. Yet, as Chief Justice Marshall observed in *Adams* v. *Woods, supra,* p. 342, "not even treason can be prosecuted after a lapse of three years." That was still true at the time of this offense. See R. S. § 1043, 18 U. S. C. § 581. There is no reason why this lesser crime, punishable without some of the protective features of criminal trials, should receive favored treatment.

But it is said that the contrary conclusion is to be inferred from *Gompers* v. *United States, supra,* because this Court took pains to point out that its ruling was applicable

only to proceedings for contempt "not committed in the presence of the court." 233 U. S. p. 606. But that reservation, made out of an abundance of caution, also extended to "proceedings of this sort only" (*id.*, p. 606), *viz.* proceedings where no information was filed. *Ex parte Terry*, 128 U. S. 289, 314, sanctioned summary punishment for "direct contempts" committed in the "presence" of the court. The question whether that procedure could be followed "at a subsequent term, or at a subsequent day of the same term," was specifically reserved. *Id.*, p. 314. That is a procedural problem peculiar to direct contempts in the face of the court (see *Cooke* v. *United States*, 267 U. S. 517), and obviously has no relevancy to the problem of the statute of limitations.

The prosecution contends, however, that the offense consisted in the imposition of a fraudulent scheme upon the court, that successful execution of the scheme required not only misrepresentations to the court but continuous coöperation in concealing the scheme until its completion, that the fraud on the court would not be fully effected until 80% of the impounded funds was distributed to the insurance companies and $750,000 paid by Street and divided among petitioners. On that theory the fraudulent scheme, though commenced before the three year period, continued thereafter. Accordingly, it is argued, by analogy to such cases as *United States* v. *Kissel*, 218 U. S. 601, 607–608; *Hyde* v. *United States*, 225 U. S. 347, 367–370; *Brown* v. *Elliott*, 225 U. S. 392, 400–401, that the statute of limitations began to run only after the latest act in the execution of the scheme. It is true that the information was drawn on the theory of such a continuing offense. But the difficulty with that theory lies in the nature of the offense described by § 268 of the Judicial Code.

That section, so far as material here, limits the power "to punish contempts" to cases of "misbehavior" in the

"presence" of the court. If this was an ordinary criminal prosecution brought under § 135 of the Criminal Code (18 U. S. C. § 241) for "corruptly" obstructing "the due administration of justice," quite different considerations would govern. The fact that the acts were not in the "presence" of the court would be immaterial. And we may assume that a fraudulent scheme of the character of the present one would constitute a continuous offense under that section. We may also assume that certain "misbehavior" in the "presence" of the court might constitute an offense under § 135 of the Criminal Code as well as a contempt under § 268 of the Judicial Code, so as to give a choice between prosecution before a jury and prosecution before a judge. But the offense of "misbehavior" in the "presence" of the court does not have the sweep of "corruptly" obstructing or conspiring to obstruct "the due administration of justice." Congress restricted the class of offenses for which one may be tried without a jury. In the present case, as in prosecutions for contempt for wilful violations of injunctions (*Gompers* v. *United States, supra,* p. 610), each act "so far as it was a contempt, was punishable as such" and therefore "must be judged by itself." As we have said, once the "misbehavior" occurs in the "presence" of the court, the crime is complete. It is conceded that but for the misrepresentations made to the court there would have been no "misbehavior" in its "presence" within the meaning of § 268 of the Judicial Code. And it is not claimed that there were any misrepresentations made to the court within three years of the filing of the information; or if May 29, 1939, the date when the court directed the inquiry, be deemed the important one (*Gompers* v. *United States, supra,* p. 608), there is no contention that any such misrepresentations were made within three years of that time. It is not fraud on the court which § 268 makes punishable as a contempt, unless that fraud is "misbehavior" in the "presence" of the court

or "so near thereto as to obstruct the administration of justice." And, if the latter requirements are not met, the fact that the fraud may be "misbehavior" is not sufficient. The mere continuance of a fraudulent intent after an act of "misbehavior" in the "presence" of the court does not make that "misbehavior" a continuing offense under § 268. The misrepresentations to the court made possible, of course, the consummation of this nefarious scheme. But each subsequent step in that scheme did not constitute a contempt unless, like the misrepresentation itself, it was "misbehavior" in the "presence" of the court or "so near thereto as to obstruct the administration of justice." No such showing has been made here and none has been attempted. The fact that the scheme was fraudulent and corruptly obstructed the administration of justice does not enlarge the limited power to punish for contempt. It merely means that if petitioners can be punished, it must be through the ordinary channels of criminal prosecutions under the Criminal Code. We are forced to conclude that any contempt committed occurred not later than February 1, 1936, when the court ordered the distribution of the impounded funds. It was therefore barred by the statute of limitations.

Reversed.

MR. JUSTICE MURPHY took no part in the consideration or disposition of this case.

MR. JUSTICE JACKSON, dissenting:

I do not agree that we should leave undecided the question whether conduct of this sort constitutes punishable contempt. To use bribery and fraud on the Court to obtain its order for disbursement of nearly $10,000,000 in trust in its custody is not only contempt but contempt of a kind far more damaging to the Court's good name and more subtly obstructive of justice than throwing an ink-

well at a Judge or disturbing the peace of a courtroom. I would hold the conduct of these petitioners to be "misbehavior" and within the "presence" of the Court and hence a contempt within the meaning of the statute. I should not deflect what seems to be the course of practical and obvious justice in this case by resort to metaphysical speculations as to the effect of absence of the schemers from the courtroom when attorneys whom also they had deceived obtained the order from the Court.

Neither can I agree with the Court's conclusion that this contempt expired with the setting sun and the statute of limitation then began its work of immunizing these defendants. The fraud had as its object not merely to get the Court order, but to get the money from the Court's custody. The contempt and the fraud did not cease to operate so long as the money was being disbursed in reliance upon it, and by virtue of its concealment.

Hence, I find no good reason for interfering with the effort of the lower court to bring these men to account for their fraud on it.

MR. JUSTICE FRANKFURTER:

I wholly agree with the conclusion of MR. JUSTICE JACKSON that the petitioners' conduct constituted a contempt within the meaning of § 268 of the Judicial Code, 28 U. S. C. § 385. But I am also compelled to conclude, for the reasons stated in the opinion of the Court, that prosecution for such offense is barred by the applicable statute of limitations, R. S. § 1044, 18 U. S. C. § 582.

NATURAL MILK PRODUCERS ASSOCIATION ET AL. *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 385. Argued December 16, 17, 1942.—Decided January 11, 1943.

Where a federal question sought to be reviewed on certiorari becomes moot by reason of a change in the factual situation, which occurred after the trial and which was not noticed by the court below, the proper practice is to vacate the judgment, without costs to either party in this Court, and remand the cause to the court below for such further proceedings as it may deem proper. P. 424.

20 Cal. 2d 101, 124 P. 2d 25, vacated and remanded.

Mr. Philip S. Ehrlich for appellants.

Messrs. Henry Heidelberg and *Herbert Levy,* with whom *Mr. John J. O'Toole* was on the brief, for appellees.

PER CURIAM.

In this case appellants contend that the San Francisco Milk Ordinance violates the Fourteenth Amendment because it requires non-pasteurized raw milk sold in San Francisco to be certified by, and to conform to standards prescribed by, the Milk Commission of the San Francisco Medical Society, instead of by a public board or officer, while at the same time prohibiting the sale of all other non-pasteurized milk, including "guaranteed raw milk" which appellants allege is the same as certified raw milk. Subsequent to the trial of the case, the Milk Commission of the San Francisco Medical Society determined that non-pasteurized milk could not be certified by it as free from harmful bacteria, and promulgated an order accordingly, effective January 15, 1939. This fact, which apparently was not called to the attention of the Supreme Court of California, renders moot the federal questions

raised by appellants, since all milk sold in San Francisco, not certified by the Milk Commission of the Medical Society, is required by the ordinance to be pasteurized, and since appellants do not by this suit challenge the validity under the Fourteenth Amendment of the pasteurization requirement. In order that the state court may make proper disposition of the case in the light of the fact that the federal questions cannot be decided here, we vacate the judgment, without costs to either party in this Court, and remand the cause to the Supreme Court of California for such further proceedings as it may deem appropriate. *Florida* v. *Knott,* 308 U. S. 507; *Washington ex rel. Columbia Broadcasting Co.* v. *Superior Court,* 310 U. S. 613; *Missouri ex rel. Wabash Ry. Co.* v. *Public Service Comm'n,* 273 U. S. 126.

So ordered.

UNITED STATES *v.* MONIA ET AL.

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

No. 248. Argued December 16, 1942.—Decided January 11, 1943.

One who, in obedience to a subpoena, appears before a grand jury inquiring into an alleged violation of the Sherman Act, and gives testimony under oath substantially touching the alleged offense, obtains immunity from prosecution for that offense, pursuant to the terms of the Sherman Act, as amended, although he does not claim his privilege against self-incrimination. P. 430.

Affirmed.

APPEAL under the Criminal Appeals Act from a judgment overruling demurrers to special pleas in bar filed by the appellees to an indictment for violation of the Sherman Act.

Mr. Edward H. Miller, with whom *Solicitor General Fahy, Assistant Attorney General Arnold,* and *Mr. Robert L. Stern* were on the brief, for the United States.

Mr. A. L. Hodson, with whom *Messrs. Charles J. Faulkner, Jr., Weymouth Kirkland, John P. Barnes, R. F. Feagans, Walter H. Jacobs,* and *Thomas A. Reynolds* were on the brief, for appellees.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This is a direct appeal from the District Court for Northern Illinois prosecuted pursuant to the Criminal Appeals Act.[1] It presents a question upon which the lower federal courts have sharply divided.[2] The question is whether one who, in obedience to a subpoena, appears before a grand jury inquiring into an alleged violation of the Sherman Act, and gives testimony under oath substantially touching the alleged offense, obtains immunity from prosecution for that offense, pursuant to the terms of the Sherman Act, although he does not claim his privilege against self-incrimination.

The Sherman Act[3] provides in part:

". . . no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts [the Interstate Commerce Act, the Sherman Antitrust Act, and other acts]; *Provided further,* that no person so testifying

[1] Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U. S. C. 682.

[2] Compare *United States* v. *Armour & Co.,* 142 F. 808; *United States* v. *Skinner,* 218 F. 870; *United States* v. *Elton,* 222 F. 428; *United States* v. *Lee,* 290 F. 517; *Johnson* v. *United States,* 5 F. 2d 471; *United States* v. *Lay Fish Co.,* 13 F. 2d 136; *United States* v. *Greater New York Live Poultry C. of C.,* 33 F. 2d 1005, with *United States* v. *Pardue,* 294 F. 543; *United States* v. *Ward,* 295 F. 576; *United States* v. *Moore,* 15 F. 2d 593; *United States* v. *Goldman,* 28 F. 2d 424.

[3] Act of February 25, 1903, c. 755, 32 Stat. 854, 904, 15 U. S. C. 32.

shall be exempt from prosecution or punishment for perjury committed in so testifying."

That statute was supplemented by the Act of June 30, 1906,[4] which, so far as material, is

". . . under the immunity provisions [of the above Act and others] immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath."

An indictment was returned charging corporations and individuals, including the two appellees, with conspiracy to fix prices in violation of the Sherman Act. The appellees filed special pleas in bar, each alleging that, in obedience to a subpoena duly served, he appeared as a witness for the United States before the grand jury inquiring respecting the matters charged in the indictment, and gave testimony substantially connected with the transactions covered by the indictment. No question is made but that the testimony so given did substantially relate to the transactions which were the subject of the indictment.

The United States demurred to the pleas as insufficient, since neither alleged that the witness asserted any claim of privilege against self-incrimination and therefore neither the Fifth Amendment of the Constitution nor the immunity statute could avail him.

The District Court overruled the demurrers on the ground that the plain mandate of the statute precluded prosecution of the appellees whether they had claimed the privilege or not. We hold that the decision was right.

Beyond dispute the appellees were entitled to immunity from prosecution if the statute is to be given effect as it is written. We are asked, however, to read into it a qualification to the effect that immunity is not obtained unless the privilege against self-incrimination is claimed. Inas-

[4] 34 Stat. 798, 15 U. S. C. 33.

much as the statute is addressed to this privilege, and the privilege is accorded by the Fifth Amendment, it is said that if immunity is offered as a substitute for the privilege, the immunity, like the privilege, ought to be claimed; that thus the statute and the Fifth Amendment, which are *pari materia,* will be given a consistent construction.

In the second place, it is urged that qualification of the forthright terms of the statute is necessary in order to avoid an unreasonable, unfair, and unintended result. The argument runs that if the statute is construed automatically to grant immunity without a claim of privilege, the prosecutor is at a disadvantage, since he does not know whether, or to what extent, a witness may have participated in a crime; and so runs the risk of unintentionally affording immunity. On the other hand, so it is said, the witness has full knowledge as to the nature of his own conduct, and as to his possible incrimination by testimony, and it is not unfair to require him to claim his privilege and so put the prosecutor on notice that, if he insists upon the testimony, the witness will obtain immunity.

The well-understood course of legislation before and after the adoption of the statute involved, and the legislative history, compel rejection of the contentions.

The Fifth Amendment declares that "No person . . . shall be compelled in any criminal case to be a witness against himself." An investigation by a grand jury is a criminal case.[5] The Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been "compelled" within the meaning of the Amendment.[6]

More than seventy years ago Congress was advised that, in suits prosecuted by the United States, where

[5] *Counselman* v. *Hitchcock,* 142 U. S. 547, 562.

[6] *United States ex rel. Vajtauer* v. *Commissioner,* 273 U. S. 103, 113.

evidence had been sought from certain persons, to be used by the Government, they had interposed a claim of privilege which had been sustained by the courts.[7] In order to forestall the obstruction and delay incident to judicial determination of the validity of the witness' claim, and in order to obtain necessary evidence, even though the claim were well founded, Congress adopted the Act of February 25, 1868,[8] which became R. S. 860. This Act applied to all judicial proceedings and provided, in effect, that no evidence obtained from a witness could be used against him in a criminal proceeding.

This court, in *Counselman* v. *Hitchcock,* 142 U. S. 547, held the Act unconstitutional because, while it prevented the use of the evidence against the witness, it did not preclude his prosecution as a result of information gained from his testimony. The court indicated clearly that nothing short of absolute immunity would justify compelling the witness to testify if he claimed his privilege.

The original Interstate Commerce Act[9] contained an immunity provision in the form held invalid in the *Counselman* case. To meet the decision in that case, Congress passed the Act of February 11, 1893,[10] which applied only to proceedings under the Interstate Commerce Act. This statute, however, became the model for immunity provisions which were enacted at various times up to 1933, including the Act of February 25, 1903, *supra,* with which we are here concerned. This court sustained the constitutionality of these Acts.[11]

In 1906 the District Court for the Northern District of Illinois held, in *United States* v. *Armour & Co.,* 142 F. 808, that a voluntary appearance, and the furnishing of

[7] Cong. Globe, 40th Cong., 2d Sess., pp. 950–51, 1334.

[8] 15 Stat. 37.

[9] 24 Stat. 383.

[10] 27 Stat. 443, 49 U. S. C. 46.

[11] *Brown* v. *Walker,* 161 U. S. 591.

testimony and information without subpoena, operated to confer immunity from prosecution under the Sherman Act. The court held that the immunity conferred was broader than the privilege given by the Fifth Amendment. The decision attracted public interest since, if it stood, one could immunize himself from prosecution by volunteering information to investigatory bodies. Congress promptly adopted the Act of June 30, 1906, *supra*, providing that the immunity should only extend to a natural person who, in obedience to a subpoena, testified or produced evidence under oath. The Congressional Record shows that the sole purpose of the bill was exactly what its language states.[12] Senator Knox, who sponsored the bill, stated: "Mr. President, the purpose of this bill is clear, and its range is not very broad. It is not intended to cover all disputed provisions as to the rights of witnesses under any circumstances, except those enumerated in the bill itself."

It is evident that Congress, by the earlier legislation, had opened the door to a practice whereby the Government might be trapped into conferring unintended immunity by witnesses volunteering to testify. The amendment was thought, as the Congressional Record demonstrates, to be sufficient to protect the Government's interests by preventing immunity unless the prosecuting officer, or other Government official concerned, should compel the witness' attendance by subpoena and have him sworn.

Not until 1933 did Congress evidence an intent that if the witness desired immunity he must, in addition, assert his constitutional privilege. In a series of acts adopted between 1934 and 1940 an additional provision was inserted adding this requirement.[13] These acts indicate

[12] 40 Cong. Rec. 5500, 7657–58, 8734–39–40.

[13] See e. g. Securities Exchange Act, 48 Stat. 900, 15 U. S. C. 78u (d); Investment Advisers Act, 54 Stat. 853, 15 U. S. C. 80b–9 (d).

how simple it would have been to add a similar provision applicable to the Interstate Commerce Act, the Sherman Act, and others which have been allowed to stand as originally enacted save for the amending Act of 1906.[14]

The legislation involved in the instant case is plain in its terms and, on its face, means to the layman that if he is subpoenaed, and sworn, and testifies, he is to have immunity. Instead of being a trap for the Government, as was the original Act, the statutes in question, if interpreted as the Government now desires, may well be a trap for the witness. Congress evidently intended to afford Government officials the choice of subpoenaing a witness and putting him under oath, with the knowledge that he would have complete immunity from prosecution respecting any matter substantially connected with the transactions in respect of which he testified, or retaining the right to prosecute by foregoing the opportunity to examine him. That Congress did not intend, or by the statutes in issue provide, that, in addition, the witness must claim his privilege, seems clear. It is not for us to add to the legislation what Congress pretermitted.

We have referred to the diversity of views amongst the lower courts. The Government insists that this court has settled the question in favor of its view. Its reliance is upon *Heike* v. *United States*, 227 U. S. 131. That case, however, decided only that the immunity conferred by the legislation in question was intended to protect the witness to the same extent that the Fifth Amendment protects him. The question was whether the immunity extended to prosecution for crimes with which the matters testified to were but remotely connected. This court held that, as the Amendment did not justify a claim of

[14] It may be, that, due to the thoroughness of preliminary investigation in the classes of cases in question, Congress has believed that the Government's representatives needed no further warning of the result of subpoenaing a witness and examining him under oath.

privilege against such remote contingencies, the immunity should be likewise construed not to reach them. The question of the necessity of a witness before an investigatory body claiming his privilege in order to earn his immunity was not decided.

The judgment is

Affirmed.

MR. JUSTICE FRANKFURTER, dissenting:

It is beyond dispute that the Constitution does not compel Congress to afford immunity from prosecution to those who testify without invoking the constitutional privilege against self-incrimination. The question for decision here is whether, by the Act of June 30, 1906, 34 Stat. 798, amending the immunity provision of the Act of February 25, 1903, 32 Stat. 904, Congress granted more than the Constitution requires and offered a "gratuity to crime," *Heike* v. *United States,* 227 U. S. 131, 142, by conferring immunity to persons who testify without claiming the protection of the privilege against self-incrimination and who in no way indicate that their testimony is being given in return for the statutory immunity. In other words, did Congress, by that amendment, seek to facilitate the enforcement of law by making "evidence available and compulsory that otherwise could not be got," *ibid.,* or was it passing an act of amnesty?

This question cannot be answered by closing our eyes to everything except the naked words of the Act of June 30, 1906. The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. It is a wooden English doctrine of rather recent vintage (see Plucknett, A Concise History of the Common Law, 2d ed., 294–300; Amos, The Interpretation of Statutes, 5 Camb. L. J. 163; Davies, The Interpretation of Statutes, 35 Col. L. Rev. 519), to which lip service has on occasion been given here, but which since

the days of Marshall this Court has rejected, especially in practice. *E. g., United States* v. *Fisher,* 2 Cranch 358, 385–86; *Boston Sand Co.* v. *United States,* 278 U. S. 41, 48; *United States* v. *American Trucking Assns.,* 310 U. S. 534, 542–44. A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning. And so we must turn to the history of federal immunity provisions.

The earliest federal statute dealing with immunity is the Act of January 24, 1857, 11 Stat. 155, as amended by the Act of January 24, 1862, 12 Stat. 333. This legislation, relating to testimony before either House of Congress, furnished a model for later immunity provisions. Congress was careful to state precisely what it was for which immunity was given: "No witness shall hereafter be allowed *to refuse to testify* to any fact or to produce any paper. . . ." 11 Stat. 156 (italics added). It was the refusal to testify, not the refusal to appear as a witness, which Congress took away and for which it gave immunity.

Duty, not privilege, lies at the core of this problem—the duty to testify, and not the privilege that relieves of such duty. In the classic phrase of Lord Chancellor Hardwicke, "the public has a right to every man's evidence."[1] The duty to give testimony was qualified at

[1] Debate in the House of Lords on the Bill to indemnify Evidence, 12 Hansard's Parliamentary History of England, 675, 693, May 25, 1742, quoted in 8 Wigmore on Evidence (3d ed.) p. 64, § 2192.

common law by the privilege against self-incrimination. And the Fifth Amendment has embodied this privilege in our fundamental law. But the privilege is a privilege to withhold answers and not a privilege to limit the range of public inquiry. The Constitution does not forbid the asking of criminative questions. It provides only that a witness cannot be compelled to answer such questions unless "a full substitute" for the constitutional privilege is given. *Counselman* v. *Hitchcock,* 142 U. S. 547, 586. The compulsion which the privilege entitles a witness to resist is the compulsion to answer questions which he justifiably claims would tend to incriminate him. But the Constitution does not protect a refusal to obey a process. A subpoena is, of course, such a process, merely a summons to appear. 8 Wigmore on Evidence (3d ed.) p. 106, § 2199. There never has been a privilege to disregard the duty to which a subpoena calls. And when Congress turned to the device of immunity legislation, therefore, it did not provide a "substitute" for the performance of the universal duty to appear as a witness—it did not undertake to give something for nothing. It was the refusal to give incriminating testimony for which Congress bargained, and not the refusal to give any testimony. And it was only in exchange for self-incriminating testimony which "otherwise could not be got" (*Heike* v. *United States,* 227 U. S. 131, 142) because of the witness's invocation of his constitutional rights that Congress conferred immunity against the use of such testimony.

Instead of giving more than the constitutional equivalent for the privilege against self-incrimination, Congress for a long time did not give enough. See *Counselman* v. *Hitchcock,* 142 U. S. 547, invalidating the Act of February 25, 1868, 15 Stat. 37, R. S. § 860, the first immunity statute relating to judicial proceedings. In order to remove the gap between what this Act gave and what the Constitution was construed to require, Congress promptly

passed the Act of February 11, 1893, 27 Stat. 443, in order not to interrupt the effective enforcement of the Interstate Commerce Act. As the debates reveal, Congress acted on its understanding of what this Court in the *Counselman* decision indicated was an adequate legislative alternative. See remarks of Senator Cullom, July 18, 1892, 23 Cong. Rec. 6333. The 1893 Act followed the language of the Act of January 24, 1857, by providing that "no person shall be *excused from attending and testifying* or from producing books . . ." 27 Stat. 443 (italics added). And in 1896 this Court, in *Brown* v. *Walker*, 161 U. S. 591, 595, found that the 1893 Act "sufficiently satisfies the constitutional guarantee of protection." There was no indication of any belief that Congress had given anything more than it had to give—and, indeed, only a bare majority of the Court thought that the statute had given as much as the Constitution required.

Certainly until the beginning of this century, therefore, Congress displayed no magnanimity to criminals by affording amnesty for their crimes. Indeed, so sensitive has Congress been against immunizing crime that it has not entrusted prosecutors generally with the power to relieve witnesses from prosecution in exchange for incriminating evidence against others. But as part of the legislative program for the correction of corporate abuses, Congress in February 1903 included provisions for immunity in three additional measures, the Act of February 14, 1903, 32 Stat. 828, establishing the Department of Commerce and Labor and conferring upon the Commissioner of Corporations the investigatory powers possessed by the Interstate Commerce Commission, the Elkins Amendment of February 19, 1903, 32 Stat. 848, to the Interstate Commerce Act, and the Act of February 25, 1903, 32 Stat. 903–04, making large appropriations for the enforcement of the Interstate Commerce Act, the Sherman Law, and other enactments. It is this latter

provision, as amended by the Act of 1906, which is immediately before us.

It was not until the startling decision of District Judge Humphrey in *United States* v. *Armour & Co.*, 142 F. 808, that the suggestion was seriously made that Congress, in studiously fashioning a constitutional equivalent for the privilege against self-incrimination, was playing Lady Bountiful to criminals. The particular concerns which the *Armour* opinion stirred must be heeded because they provoked the Act of 1906. The meaning of that legislation is lost unless derived from the circumstances which gave rise to it. The case arose out of a proceeding begun under the Act of February 14, 1903, 32 Stat. 825, creating the Department of Commerce and Labor. Section 8 of that Act provided that the Secretary of Commerce and Labor shall "from time to time make such special investigations and reports as he may be required to do by . . . either House of Congress." In obedience to a resolution of the House of Representatives, the Secretary directed the Commissioner of Corporations to investigate the causes of the low prices of beef cattle. Accordingly, the Commissioner instituted such an inquiry. At a conference with officers of the packing corporations and their counsel, the Commissioner explained the purposes and scope of his investigation. He informed them that he was acting independently and not in coöperation with the Department of Justice in its contemporaneous proceeding against the "Beef Trust" for alleged violations of the Sherman Law, and that any evidence obtained from the packers would not be given to the Department but would be reported only to the President for his appropriate use. (H. Doc. No. 706, 59th Cong., 1st Sess., p. 6.) Thereupon the Commissioner's agents were afforded an opportunity to examine the packers' books and papers.

Subsequently, an indictment under the Sherman Law was found against the packing corporations and their

officers. Pleas in bar were filed, alleging in substance that, as a result of the investigation made by the Commissioner of Corporations, the defendants had obtained immunity from prosecution for the offenses charged in the indictment. Judge Humphrey sustained these pleas as to the individual defendants on the ground that the information furnished by the defendants brought into operation the immunity provision of the Act of February 14, 1903, which incorporated by reference the Act of February 11, 1893, 27 Stat. 443, relating to testimony before the Interstate Commerce Commission. Judge Humphrey reached his conclusion by attributing to Congress in passing the Act of February 11, 1893, a purpose which this Court later unanimously rejected in *Heike* v. *United States,* 227 U. S. 131. For while Judge Humphrey correctly held that "the privilege of the amendment permits a refusal to answer," he also stated, quite incorrectly and without any warrant in the language, legislative history or policy of the Act, that the statute "wipes out the offense about which the witness might have refused to answer." 142 F. at 822. In other words, the district judge treated the immunity act as though it were an act of amnesty, and that is precisely what this Court in the *Heike* case said it was not: "Of course there is a clear distinction between an amnesty and the constitutional protection of a party from being compelled in a criminal case to be a witness against himself. Amendment V. But the obvious purpose of the statute [the Act of February 25, 1903] is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned. We believe its policy to be the same as that of the earlier act of February 11, 1893, c. 83, 27 Stat. 443,

which read 'No person shall be excused from attending and testifying,' &c. 'But no person shall be prosecuted,' &c., as now, thus showing the correlation between constitutional right and immunity by the form." 227 U. S. at 142.

Judge Humphrey doubtless fell into error because he treated the immunity provision as subsidiary to the main purpose, as he conceived it, of the Act establishing the Department of Commerce and Labor. He believed "the primary purpose" of that Act was to "secure information for the use of the legislative body." 142 F. at 826. It is plain that he did not view the immunity provisions in their true light, that is, as means to facilitate the administration of the criminal law. Whatever justification Judge Humphrey may have had for entertaining such a notion with regard to the Act creating the Department of Commerce and Labor, it certainly has no application to the immunity provisions touching the Interstate Commerce Act and the Sherman Law. Those provisions were enacted as aids in the enforcement of criminal justice; they were not acts of amnesty designed to wipe out criminal offenses.

Acting swiftly to correct the error of the *Armour* decision, the President recommended that "the Congress pass a declaratory act" to set aside Judge Humphrey's misconception of congressional purpose. Message from the President of the United States, April 18, 1906, H. Doc. No. 706, 59th Cong., 1st Sess., p. 3. In so doing, President Theodore Roosevelt was acting upon the advice of Attorney General (soon to become Mr. Justice) Moody. Naturally enough, the declaratory legislation directed itself to the correction of the two evils that Judge Humphrey's opinion projected, namely, to make it clear that immunity should not be afforded for producing corporate documents which could in any event be had because the privilege against self-crimination is not available to cor-

porations, *Wilson* v. *United States,* 221 U. S. 361, 372–74, and that a person who does not give evidence under the ordinary formalities incident to being a witness was not entitled to immunity. The legislation was responsive to the Government's position, as stated by Attorney General Moody: "Upon these facts [in the *Armour* case] the Government contended that the statutory immunity could be conferred only upon persons subpoenaed by the Commissioner of Corporations who might subsequently give testimony or evidence (in the legal sense of those terms) relating to the subject-matter of the indictment." H. Doc. No. 706, 59th Cong., 1st Sess., p. 7.

Such was the limited purpose of the 1906 amendment. Could it be that the President having proposed, and the Congress having enacted, a restrictive declaration regarding the scope of the immunity provision in order to prevent other courts from following the latitudinarian misconception of Judge Humphrey, the President and the Congress, both acting upon the advice of one of the ablest of Attorneys General, were unwittingly betrayed into introducing a new gratuity for witnesses under duty to respond to a subpoena, by giving an amnesty in exchange for the mere response?

For more than seventeen years thereafter it was unquestioned that Congress had given no more than the Constitution required—freedom from prosecution for evidence that could not otherwise be obtained, evidence that was withheld upon claim of constitutional privilege, evidence that was given only because Congress had provided immunity. This was the ruling of all the federal courts which considered the question, courts on which sat some of the ablest judges of their day—Judge Martin in *United States* v. *Heike,* 175 F. 852; Judge Grubb in *United States* v. *Skinner,* 218 F. 870; Judge Hunt in *United States* v. *Elton,* 222 F. 428; and Judge Rose in *Johnson* v. *United States,* 5 F. 2d 471. The narrow purpose of the 1906

amendment, in the light of the events which gave rise to it, was succinctly set forth by Judge Rose: "Quite clearly this act did only two things and it was intended to do no more. It made it clear that the immunity granted did not inure to the benefit of corporations and that a natural person could not claim it unless he had testified in obedience to a subpoena. It was passed to meet the serious situation which the President and Congress thought had been created by the rulings of Judge Humphrey. . . . It was clearly not intended to change the previously existing law in any other respect. . . . A construction should not be given to it which would result in a grand jury or prosecuting officer unwittingly conferring immunity upon a serious offender because in the best of good faith, and with no reason to suppose that he was criminally involved in the transaction, he was subpoenaed to produce some documents or to give some testimony which perhaps could just as well have been obtained from other sources. Unquestionably the witness has the constitutional right to object to testifying. Then it is open to the government to elect whether it will or will not proceed with his examination under the statute, but if it does not, his rights remain as they were before he was called to the stand." *Johnson* v. *United States*, 5 F. 2d 471, 477.

The observations of Judge Grubb in *United States* v. *Skinner*, 218 F. 870, 879, are equally pertinent here: "The witness, in many cases, is alone informed as to whether his evidence will tend to incriminate him. The supposed incrimination may relate to offenses not under investigation by the examining tribunal, and of the existence of which or of the relation of the desired evidence to which the examining tribunal or the government law officer may have no knowledge. The Heike Case is an apt illustration of this possibility. The witness is likely to have exclusive knowledge as to what facts and what answers may tend to his incrimination, and with reference to what

offenses. Again, the witness alone knows whether he willingly gives his evidence for the purpose of exonerating himself, or only with the expectation of receiving immunity therefor. He is therefore in a better position to be called upon to assert his constitutional privilege than is the examining tribunal or the law officer of the government to call upon him to elect to do so. If any hardship attends the imposition of this burden on the witness, it has never been considered weighty enough to relieve him therefrom in exercising his constitutional privilege, prior to the immunity statutes. The immunity granted by the statute is a mere substitute for the constitutional safeguard, and has been held by the Supreme Court to be coterminous with it. There would seem, therefore, to be no reason for a different practice as to the assertion of the privilege where immunity is desired and where the constitutional privilege is insisted upon."

These decisions thus reflected weighty considerations of policy in finding that Congress afforded immunity from prosecution only to the extent that the Constitution required in exchange for a privilege and that Congress was not giving away indulgences.

These considerations of policy were certainly not answered in the opinion of the Texas district court which, in 1923, made the first departure from this uniform construction of the statute. The court held that immunity came merely because one testified in obedience to a subpoena, without any claim, either explicit or implied by the circumstances, that he had a constitutional right to refuse to answer on the ground that he might thereby be incriminated and that the testimony was being given only under compulsion of the immunity statute. *United States* v. *Pardue,* 294 F. 543. The court stated that its position was supported by the weight of authority, citing (1) the decision of Judge Humphrey in the *Armour* case; (2) *United States* v. *Swift,* 186 F. 1002, the opinion in

which, so far as it is relevant to the question here, seems to point clearly the other way (see, especially, 186 F. at 1016–18); (3) *State* v. *Murphy,* 128 Wis. 201, 107 N. W. 470, which, much questioned originally, has been repudiated by the court which rendered it, *Carchidi* v. *State,* 187 Wis. 438, 204 N. W. 473, and *State* v. *Grosnickle,* 189 Wis. 17, 206 N. W. 895; and (4) a decision of the New York Court of Appeals, *People* v. *Sharp,* 107 N. Y. 427, 14 N. E. 319. In considering "the reasons which should control," the district court was "shocked by the unconscionableness of the claim . . . that the government can under a statute which . . . grants general amnesty to persons who appear and testify in obedience to a subpoena, compel them to testify, and thereafter break faith with them by denying the protection of the statute to those who testify in exact accordance with its terms." 294 F. at 547. Starting with the misconception that the immunity provision was an act of amnesty and not a *quid pro quo* for the constitutional privilege, the district court readily glided into question-begging by finding that there was a breach of faith in contesting the claim of amnesty.[2]

Once the confusion is avoided between an act of amnesty and an act which gives immunity in order "to make evidence available and compulsory that otherwise could not be got" because it could be withheld upon a claim of constitutional privilege, it becomes clear that a witness is not "entrapped" by requiring him to claim his constitutional privilege before affording him a substitute. A witness is no more entrapped by the requirement that he must stand

---

[2] It is significant that the *Heike* case, in which this Court held there was "no reason for supposing that the [immunity] act offered a gratuity to crime," 227 U. S. at 142, was cited neither by the court below in this case, nor by Judge Hutcheson in the *Pardue* case, 294 F. 543, nor in any of the cases following the *Pardue* ruling, *United States* v. *Ward,* 295 F. 576, *United States* v. *Moore,* 15 F. 2d 593, and *United States* v. *Goldman,* 28 F. 2d 424.

upon his constitutional rights, if he desires their protection, when there is an immunity statute than he is where there is none at all. It is one thing to find that incriminating answers given by a witness were given because in the setting of the particular circumstances he would not have been allowed to withhold them. It is quite another to suggest that one who appears as a witness should, merely because his appearance is in obedience to a subpoena, thereby obtain immunity "on account of any transaction, matter or thing concerning which he may testify," even though the incrimination may relate to a transaction wholly foreign to the inquiry in which the testimony is given and even though the most alert and conscientious prosecutor would not have the slightest inkling that the testimony led to a trail of self-crimination. Such a construction makes of the immunity statute not what its history clearly reveals it to be, namely, a carefully devised instrument for the achievement of criminal justice, but a measure for the gratuitous relief of criminals. The statute reflects the judgment of Congress that "the public has a right to every man's evidence." It is not for us to relax the demands of society upon its citizens to appear in proceedings to enforce laws enacted for the public good.

Beginning with the Securities Act of 1933, 48 Stat. 87, Congress has enacted no less than seventeen regulatory measures which contain provisions for immunity from prosecution in exchange for self-incriminating testimony. Of these, fourteen, including *inter alia* the Securities Exchange Act of 1934, 48 Stat. 900, the National Labor Relations Act, 49 Stat. 456, the Communications Act of 1934, 48 Stat. 1097, the Public Utility Holding Company Act of 1935, 49 Stat. 832, the Federal Power Act, 49 Stat. 858, and the Civil Aeronautics Act of 1938, 52 Stat. 1022, confer immunity when a person testifies under compulsion "after having claimed his privilege against self-incrimi-

nation." Three of these statutes, however, the Motor Carrier Act of 1935, 49 Stat. 550, the Industrial Alcohol Act, 49 Stat. 875, and the Fair Labor Standards Act of 1938, 52 Stat. 1065, do not contain this additional clause—they merely follow the old form customarily used by Congress prior to the Securities Act of 1933. Of course, there is a difference in the language of these statutory provisions. But the process of construing a statute cannot end with noting literary differences. The task is one of finding meaning; and a difference in words is not necessarily a difference in the meaning they carry. The question is not whether these provisions are different, but whether there is significance in the difference. If the difference in language reflected a difference in the scope of the immunity given, or in the nature of the considerations that moved Congress to make a differentiation, there would surely be some indication, however faint, somewhere in the legislative history of these enactments that some legislator was aware that the difference in language had significance. But there is none.

If Congress saw fit gratuitously to confer immunity to citizens who appear as witnesses in proceedings to enforce the Motor Carrier Act of August 9, 1935, it is hard to understand why it should give such immunity only to those who, after asserting their privilege, were pressed to give evidence in proceedings to enforce the Federal Power Act of August 26, 1935, and in proceedings to enforce the Public Utility Holding Company Act which became law the same day, and again should have given the privilege gratuitously in the Industrial Alcohol Act, which became law the following day. The Railroad Unemployment Insurance Act, 52 Stat. 1107, and the Fair Labor Standards Act of 1938, 52 Stat. 1065, both became law the same day, June 25, 1938. Yet the immunity provision of the former contains the "after having claimed, etc." clause, and that of the latter does not. It is only

fair to Congress to assume that if there was a purpose to make a difference in the demands upon citizens when they appear as witnesses under one statute rather than the other, that purpose would have been stated somewhere in the course of the legislative history. But there is a total absence of any indication anywhere that any Congressman had any notion that the enforcement of the Motor Carrier Act of 1935, the Industrial Alcohol Act, or the Fair Labor Standards Act of 1938, called for a different treatment of witnesses in proceedings under these Acts than in enforcement proceedings under the other fourteen Acts. The explanation seems obvious. There are no expressions in the legislative materials to indicate that the legislative purpose varied in this respect between these Acts because there was no difference in purpose.

But the variations in the phraseology employed in the Acts are not to be explained away as just caprices of a single draftsman. The explanation is likely to be found in the manner in which Congress usually acts in adopting regulatory legislation. If a single draftsman had drafted each of these provisions in all seventeen statutes, there might be some reason for believing that the difference in language reflected a difference in meaning. But it is common knowledge that these measures are frequently drawn, at least in the first instance, by specialists (perhaps connected with interested government departments) in the various fields. Provisions in different measures dealing with the same procedural problem not unnaturally, therefore, lack uniformity of phrasing.

We do not have to look very far in order to see how Congress happened to use one form of immunity provision in some of these statutes and another form in others. Consider the evolution of the three statutes which followed the old, pre-1933 form. The Motor Carrier Act of 1935 was enacted as an amendment to the Interstate Commerce Act. What was more natural than that the

enforcement provisions of the old Act should be incorporated by reference in providing for the new powers of the Commission. §§ 201, 205e, 49 Stat. 543, 550. And the Industrial Alcohol Act of 1935, so far as its enforcement provisions were concerned, was patterned upon its predecessor, the National Prohibition Act of 1919, 41 Stat. 317, and the draftsman naturally took the immunity provision from that statute.

The Fair Labor Standards Act of 1938 has a more complicated but even more revealing history. Introduced first in the Senate on May 24, 1937, it carried the explicit provision that a person gains immunity "after having claimed his privilege against self-incrimination." It remained in this form throughout the course of the legislation in both the House and the Senate for nearly a year, when the whole conception of the bill was changed. Everything was struck out after the enacting clause, and the new measure was submitted to the House on April 21, 1938. As part of that new bill, the provision for the attendance of witnesses in the enforcement of the Act simply incorporated by reference the provision of the Federal Trade Commission Act—and obviously this was because the draftsmen of the new bill drew heavily upon the scheme of that Act. But there is an utter want of evidence to support the suggestion that after a year the proponents of this legislation, and the committees that grappled with its problems, changed their minds as to the extent of the immunity to be afforded to witnesses summoned in proceedings under the Act. Nor is there any evidence in the debates that when Congress finally passed the measure in its present form, it meant to give a greater immunity than that which was provided in the various bills that were before the Senate and the House for a year.

The course taken by the Securities Act of 1933 before it was finally enacted is revealing as to the significance of

its immunity provision, the first to depart from the old form. Up to the time that the bills which eventually became the Act emerged from conference, the immunity provision followed the old form. The new formula appears for the first time in the bill reported by the conference. But neither in the conference report nor elsewhere is there any suggestion that the introduction of this phrase imported any new legislative purpose or that it was anything more than a careful rephrasing of a conventional statutory provision. In the case of the Fair Labor Standards Act, as we have seen, the more meticulous phrase, "after having claimed his privilege against self-incrimination," was in all successive bills in both the House and the Senate but it disappeared at the final stage of the enactment of the measure. No one ever suggested, so far as the available materials show, that the change in the formula implied any change as to the intended scope of the immunity provision. Style, not substance, is obviously the explanation. In the case of one statute, Congress began with the new form and ended with the old one; in the case of the other, it began with the old one and ended with the new. Upon what rational basis can we attribute to Congress an intention to make the scope of the immunity provision of the one statute vitally different from that of the other?

To attribute caprice to Congress is not to respect its rational purpose when, as here, we find a uniform policy deeply rooted in history even though variously phrased but always directed to the same end of meeting the same constitutional requirement.

I am therefore of opinion that an appearance in response to a subpoena does not of itself confer immunity from prosecution for anything that a witness so responding may testify. There must be conscious surrender of the privilege of silence in the course of a testimonial inquiry. Of course no form of words is necessary to claim one's

privilege. Circumstances may establish such a claim. But there must be some manifestation of surrender of the privilege. The prosecutor's insistence upon disclosure which, but for immunity from prosecution, could be withheld is that for which alone the immunity is given. History and reason alike reject the notion that immunity from prosecution is to be squandered by giving it gratuitously for responding to the duty, owed by everyone, to appear when summoned as a witness.

Since the demurrers to the pleas should have been sustained, the case should be remanded to the district court for appropriate disposition in accordance with the views herein expressed.

MR. JUSTICE DOUGLAS joins in this dissent.

HARRIS, ADMINISTRATOR, *v.* ZION'S SAVINGS BANK & TRUST CO.

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

No. 268. Argued December 17, 1942.—Decided January 11, 1943.

1. Without leave of the state court which appointed him and which has jurisdiction over him, an administrator may not revive a proceeding instituted by his decedent under § 75 of the Bankruptcy Act, nor initiate proceedings to have the estate adjudged bankrupt and for other relief under § 75 (s) of that Act. P. 449.
2. Notwithstanding the provisions of § 75 (c) of the Bankruptcy Act providing that "a petition may be filed by any farmer" for the extension and composition of his debts, and of § 75 (r) declaring that "For the purposes of this section, . . . the term 'farmer' . . . includes the personal representative of a deceased farmer," where the law of a State prohibits an administrator from dealing with the real estate, or conditions his power so to do, Congress did not intend to override that law and confer upon an administrator—a mandatory of state power—a privilege at war with the law of his official being. P. 450.

3. Section 8 of the Bankruptcy Act is inapplicable. Order 50 (9) of the General Orders in Bankruptcy held applicable. P. 452.
127 F. 2d 1012, affirmed.

CERTIORARI, *post*, p. 609, to review the affirmance of a judgment dismissing the petition of an administrator to revive a proceeding under § 75 of the Bankruptcy Act, and rejecting an amended petition for relief under § 75 (s).

Mr. J. D. Skeen, with whom *Mr. E. J. Skeen* was on the brief, for petitioner.

Mr. Hadlond P. Thomas for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

December 20, 1937, Anna L. Harris filed her petition for relief under § 75 of the Bankruptcy Act[1] in the District Court for Utah. She made an offer of composition and, while this offer was pending, she died. January 16, 1939, the bankruptcy court ordered the proceeding abated because of her death. March 30, 1939, the petitioner was appointed administrator of her estate.

Thereafter the respondent instituted a foreclosure proceeding upon a mortgage on real estate of the decedent, obtained a judgment, and, August 1, 1939, purchased the mortgaged premises at foreclosure sale and received a sheriff's certificate.

February 13, 1940, two days before the period of redemption expired, the petitioner, as administrator, secured leave from the probate court to apply, as the decedent's personal representative, for an order reviving the debtor proceedings. The probate court's decree was stayed pending an appeal to the Supreme Court of Utah. Notwithstanding the stay, the petitioner applied to the bankruptcy court for a revivor.

[1] 11 U. S. C. § 203.

The Utah Supreme Court reversed the decree of the probate court, holding that, under the probate code, the court had no authority to authorize the administrator to petition the federal court under § 75.[2] This court granted certiorari to review the judgment [3] but, after hearing, dismissed the writ on the ground that the decision rested on an adequate non-federal ground.[4]

Pending hearing in this court, the petitioner, on September 18, 1940, lodged with the clerk of the bankruptcy court an amended petition to be adjudged a bankrupt under subsection (s) of § 75. The court ordered that the paper be not filed and also ordered that the petitioner show cause why his revivor petition should not be dismissed. August 29, 1941, the respondent moved to strike both the original and amended petition. September 30, 1941, the district judge entered an order dismissing the administrator's petition to revive and rejecting the amended petition.

October 10, 1941, the petitioner sought leave of the probate court to appeal from the bankruptcy court's order of dismissal and rejection. The prayer was denied, and the court held that the petitioner should not be authorized to appeal. The petitioner, nevertheless, appealed to the Circuit Court of Appeals, which affirmed the District Court's action.[5]

Subsection (c) of § 75 provides: ". . . a petition may be filed by any farmer" for the extension and composition of his debts. Subsection (r) declares: "For the purpose of this section . . . the term 'farmer' . . . includes the personal representative of a deceased farmer; . . ."

The question is whether an administrator may, in his representative capacity, initiate such proceedings without

[2] *In re Harris' Estate*, 99 Utah 464, 105 P. 2d 461.

[3] 312 U. S. 670.

[4] *Harris* v. *Zion's Savings Bank & Trust Co.*, 313 U. S. 541.

[5] 127 F. 2d 1012.

leave of the court which appointed him and has jurisdiction over him, or may do so where, as here, he has applied for leave and been denied it. The importance of this question, and a diversity of views amongst the federal courts,[6] led us to grant certiorari.

Put another way, the question is: if the law of a state prohibits an administrator from dealing with the real estate, or conditions his power so to do, did Congress intend to override that law and confer upon this mandatory of state power a privilege at war with the law of his official being? We must meet that question in this case, for the Supreme Court of Utah has told us that, under the law of that State, the petitioner has no such power. If such he possesses, it derives from a law which overrides the law of the petitioner's official creation.

Laying aside any issue of constitutional power, the question remains whether Congress intended so to override the law of a state and confer on the state's appointee, as *persona designata,* a function to be exercised not for the deceased farmer, not for the decedent's estate, the entity he represents under state law, not for the heirs who inherit the realty, but in a vacuum?

When we reflect that the settlement and distribution of decedents' estates, and the right to succeed to the ownership of realty and personalty are peculiarly matters of state law; that the federal courts have no probate jurisdiction and have sedulously refrained, even in diversity cases, from interfering with the operations of state tribunals invested with that jurisdiction, we naturally incline to a construction of § 75 consistent with these principles. We think the beneficent purpose of the legislation will not be defeated by such a construction.

---

[6] Compare *In re Buxton's Estate,* 14 F. Supp. 616; *In re Reynolds,* 21 F. Supp. 369; *Lemm* v. *Northern California National Bank,* 93 F. 2d 709; *Hines* v. *Farkas,* 109 F. 2d 289.

The section is a manifestation of the enlarged conception of the bankruptcy power as extending not alone to a seizure of an insolvent debtor's assets in the interest of an impartial application of them to his creditor's demands, but also as a means of relieving his distress and rehabilitating him financially while rendering his creditors all for which they may reasonably hope.[7]

So the opportunity of resort to § 75 enures not to creditors but to the debtor. His voluntary action, not theirs, determines whether the law shall be invoked. Congress extended him a privilege which he could exercise or renounce. By the provision that the term "farmer" should include a personal representative, Congress extended that privilege to an administrator. But, clearly, if that functionary elects not to avail himself of the privilege, the section is, as to him, inoperative. Moreover, if his election depends, under the law of his being, not alone on his choice but upon the exercise of the choice of his master, the state which gave him official life, and under whose tutelage he is, then the door of the bankruptcy court is open to him only when that choice has been exercised in the only way he can exercise it.

In this view, Congress has extended the benefits of the act only to administrators who can lawfully elect to avail of them. Thus conflict between federal and state power is avoided and the two are accommodated.

The opinion of the Supreme Court of Utah points out some of the many inconsistencies and difficulties an opposite conclusion would entail. Under the law of the State, realty descends directly to the heirs. The administrator does not represent them. In resorting to § 75 he

[7] *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 244; *Continental Illinois National Bank & T. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 667–675; *United States* v. *Bekins*, 304 U. S. 27, 47; *Wright* v. *Union Central Life Ins. Co.*, 304 U. S. 502, 514; *Wright* v. *Union Central Life Ins. Co.*, 311 U. S. 273, 279.

may, or may not, be acting in their true interests. The law of the State demands the speedy settlement of the estate. If, independently of that law, the administrator may apply under § 75, it may well happen that this state policy will be nullified. In other states, an administrator may succeed to the realty absolutely or in such measure and for such purpose that no state policy would be contravened by resort to § 75. But, in any case, the interests of those entitled to inherit ought to be considered before choice of action is determined. The probate court, not the bankruptcy court, is the appropriate forum for weighing the respective benefits or detriments to those who share in the equity of the decedent's estate.

We cannot accept the view that § 8 of the Bankruptcy Act [8] governs. That provision was part of the Act of 1898 and looked only to proceedings wherein title to the assets was transferred from the bankrupt as of the date of petition and vested in a trustee, and wherein the assets were to be liquidated promptly and the proceeds distributed amongst creditors. In other words, the purpose and effect of the proceeding in bankruptcy and that in the probate court were the same. Under § 75 they are or may be at war, the one preventing the liquidation which is the chief aim of the other. In other respects § 8 is inapplicable. Why, in a case like this, should the heirs, the owners of the equity in real estate, be made parties against their will? [9]

Congress, when the matter has come to its attention, has expressly recognized that if a moratorium proceeding such as this is to be brought or revived by an administrator, he ought to obtain leave from the probate court. So § 74, as amended, provides.[10] We think the same intent should be implied as to § 75.

[8] 11 U. S. C. § 26.

[9] See *Shute* v. *Patterson*, 147 F. 509.

[10] 11 U. S. C. § 202.

We believe that it was with these considerations in mind that this court adopted Order 50 (9) of the General Orders in Bankruptcy.[11] That order provides that the personal representative of a farmer shall annex to his petition filed under § 75, amongst other things, a copy of the order of the probate court authorizing him to file the petition. The court below thought the General Order applicable and felt bound to apply it. It is suggested that this portion of the Order is void as running counter to the clear mandate of the statute. And so it would be if the Act conferred upon the administrator the right, notwithstanding state law, to invoke the bankruptcy powers. But the rule comports with what we have endeavored to show is the natural and reasonable construction of § 75. If the state law permits resort to the remedy afforded by the section, no difficulty will be created by requiring the obtaining of such an order. If it forbids, then no conflict between the policies of state and nation will arise.

The judgment is

Affirmed.

MR. JUSTICE DOUGLAS, dissenting:

Sec. 75 (r) includes "the personal representative of a deceased farmer" within the definition of "farmer" as that term is used in the Act. Sec. 75 (n) provides that in these proceedings "the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer . . . shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt" was filed. Since that provision relates to the "jurisdiction

[11] General Orders in Bankruptcy of January 16, 1939, 305 U. S. 681, 11 U. S. C. A. following § 53.

and powers" of the bankruptcy court as well as to the "rights and liabilities" of creditors and "of all persons" with respect to the property, I do not see how we can escape the conclusion that it incorporates § 8 of the Bankruptcy Act. Practically identical provisions in old § 74 (m), dealing with compositions and extensions, were held to have that effect. *In re Morgan,* 15 F. Supp. 52. Cf. *Benitez* v. *Anciani,* 127 F. 2d 121. The function and purpose of § 74 and § 75 are comparable. No reason is apparent why a different result should obtain under § 75. Sec. 8 of the Bankruptcy Act states that death of a bankrupt "shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died." That section "makes no exception or qualification—after the proceedings have been commenced they are not to be abated by death." *Hull* v. *Dicks,* 235 U. S. 584, 588. It has long been considered mandatory. *Shute* v. *Patterson,* 147 F. 509; 1 Collier, Bankruptcy (14th ed.) § 8.02. On death of a bankrupt where his personal representative succeeds to the personalty and his heirs to the realty, the proper procedure is to make them parties. *Shute* v. *Patterson, supra,* p. 512; *Benitez* v. *Anciani, supra,* p. 125. And see *In re Schwab,* 83 F. 2d 526. And the death of a bankrupt does not prevent his discharge (Collier, *loc. cit.*) at the instance of the administrator. *In re Agnew,* 225 F. 650.

If this had been an ordinary bankruptcy case, there can be no doubt that the personal representative of this decedent would have been entitled to come in, that the heirs could have been joined, and that a discharge could have been obtained, provided the requirements of § 14 were met. The fact that the proceeding is under § 75 should not make a difference. Congress has specifically stated that a "personal representative" of a farmer may employ the machinery of § 75. The offer of composition made by the decedent before her death might or might

not have been accepted. But even though it were rejected, subsection (s) affords an alternative form of relief, one benefit of which is a discharge. § 75 (s) (3); *Wright* v. *Union Central Life Ins. Co.*, 311 U. S. 273. I think it clear that § 75 was designed to afford to the estate the opportunity to obtain these benefits. Those benefits may be just as considerable as they would be in ordinary bankruptcy. The fact that the heirs would be held at bay is no more significant in this instance than it is in other applications of § 8 of the Bankruptcy Act. To be sure, title to the property vests in the trustee in ordinary bankruptcy. But that circumstance has no relevancy to the scope of the jurisdiction of the bankruptcy court under § 75 which is in issue here and which we recently stated was "exclusive," carrying with it "complete and self-executing statutory exclusion of all other courts." *Kalb* v. *Feuerstein*, 308 U. S. 433, 443. Furthermore, Congress has not made participation of the personal representative dependent on authorization from the state probate court. Under old § 74 it did. Thus § 74 as amended by the Act of June 7, 1934 (48 Stat. 922, 11 U. S. C. 202a), an Act which also contained certain amendments to § 75 (48 Stat. 924, 925), included "the personal representative of a deceased individual for the purpose of effecting settlement or composition with the creditors of the estate: *Provided, however,* That such personal representative shall first obtain the consent and authority of the court which has assumed jurisdiction of said estate, to invoke the relief provided" by that Act. No such qualification appears in § 75. Its absence there and its presence in § 74 clearly indicate that, where Congress wished to curtail the power of bankruptcy courts over estates of decedents and to make the participation of a personal representative dependent on authorization from the state probate court, it said so. The view I urge would of course result in a collision between the Bankruptcy Act and state probate law. But that is no

more important here than was the collision in *Kalb* v. *Feuerstein, supra.* In this case, as in other situations (*In re Devlin,* 180 F. 170, 172) it is the Bankruptcy Act, not local probate law, which must control the administration of the estate. The bankruptcy power is supreme. Sec. 8 is a valid exercise of that power. The result is that General Order 50 (9) must give way insofar as it is inconsistent with this result. For those rules are intended merely "to execute the act" (*West Co.* v. *Lea,* 174 U. S. 590, 599), not to "authorize additions to its substantive provisions." *Meek* v. *Centre County Banking Co.,* 268 U. S. 426, 434.

MR. JUSTICE BLACK and MR. JUSTICE MURPHY join in this dissent.

PUBLIC UTILITIES COMMISSION OF OHIO ET AL. *v.* UNITED FUEL GAS CO. ET AL.

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

No. 87. Argued December 8, 1942.—Decided January 11, 1943.

Upon an appeal to the Public Utilities Commission of Ohio from a municipal ordinance establishing, in 1932, rates for natural gas sold in the city by a local utility, the Commission asserted jurisdiction to fix the rates paid by the local utility to an unaffiliated company for natural gas transported and sold in interstate commerce, and, in 1935, issued orders preliminary to fixing such rates. In a suit in equity begun by the interstate company prior to, and decided subsequently to, the Natural Gas Act of 1938, the federal District Court enjoined the enforcement of the orders. The state Commission had held no hearing, and had made no findings, with respect to the lawfulness or reasonableness of the interstate rates. *Held:*

1. Considerations of equity require the determination here of the question of local law as to the power of the state Commission to fix retroactively the rates to be charged by the interstate company for natural gas transported and sold in interstate commerce to the local utility. P. 462.

Where, as here, no state court ruling on local law could settle the federal questions that necessarily remain, and where, as here, the litigation has already been in the federal courts for an inordinately long time, considerations of equity require that the litigation be brought to an end as quickly as possible.

2. Under the law of Ohio, the state Commission, in the circumstances of this case, is without power to fix retroactively the rates to be charged by the interstate company for natural gas sold in interstate commerce to the local utility. P. 465.

3. The power to fix rates for natural gas transported and sold in interstate commerce has been vested by the Natural Gas Act of 1938 in the Federal Power Commission exclusively. P. 468.

4. The Natural Gas Act of 1938 does not bar a state commission, in the appropriate exercise of its jurisdiction, from compelling the production of data in the possession of the interstate company and relevant to the proceeding before the Commission. P. 468.

5. The injunction decree of the District Court can not, in the circumstances of this case, be set aside as an improper exercise of its equitable jurisdiction. P. 468.

6. The Johnson Act of May 14, 1934, is inapplicable here. P. 469.

7. The District Court's decree is to be read as an injunction against enforcement of the state Commission's orders only in so far as they assume jurisdiction to fix the rates to be charged for natural gas transported and sold in interstate commerce. P. 470.

46 F. Supp. 309, affirmed.

APPEAL from a decree of a District Court of three judges enjoining enforcement of certain orders of the state Commission.

Mr. Kenneth L. Sater, with whom *Mr. Thomas J. Herbert,* Attorney General of Ohio, was on the brief, for appellants.

Mr. Harold A. Ritz, with whom *Mr. Freeman T. Eagleson* was on the brief, for appellees.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is an appeal from a decree of the District Court for the Southern District of Ohio enjoining the enforce-

ment against appellee, United Fuel Gas Company (hereafter called United), of orders made by the Public Utilities Commission of Ohio, 46 F. Supp. 309.

The facts are not in dispute. The Portsmouth Gas Company, a public utility, sells natural gas at retail to the people of Portsmouth, Ohio. It purchases its entire supply of gas from United, a West Virginia corporation. The gas is conveyed through pipelines in a continuous flow from points of production in West Virginia and Kentucky into Ohio, and there delivered to the Portsmouth Gas Company. On February 24, 1932, the City of Portsmouth, under the authority given it by § 614–44 of the Ohio General Code, established the rates to be charged to Portsmouth consumers for natural gas distributed by the Portsmouth Gas Company. This ordinance did not purport to fix the charges made by United for the gas sold to the Portsmouth Gas Company. Claiming that the rates fixed by the city were unreasonable and unjust, the Portsmouth Gas Company challenged the ordinance before the Public Utilities Commission of Ohio. The Commission found that the complaint was justified, and that reasonable and just rates should be substituted for those prescribed by the ordinance. But it also found that it could not determine such rates in the absence of proof that the charges which United exacted from the Portsmouth Gas Company were just and reasonable. The Commission ruled that the sale of gas by United to the Portsmouth Gas Company for resale to consumers in Portsmouth was a public utility service within the meaning of § 614–2 of the Ohio General Code, and that the rates to be charged for such service were subject to its jurisdiction. Accordingly, on April 18, 1935, the Commission ordered that United prepare and present "all pertinent and relevant testimony and exhibits tending to prove a reasonable and just rate to be charged by it to the Portsmouth

Gas Company for the furnishing of natural gas for distribution within the City of Portsmouth, Ohio."

United thereupon filed a petition for rehearing with the Commission. The petition asserted that the gas sold by United to the Portsmouth Gas Company was in interstate commerce, that the two companies were wholly independent of one another, and that the Commission therefore went beyond the power of the state in asserting jurisdiction to fix the rates to be charged for gas sold by United to the Portsmouth Gas Company. United recognized, however, the authority of the Commission to compel it to produce evidence in its possession relevant to a determination of just and reasonable rates to be charged by the Portsmouth Gas Company for gas sold to its customers. This proffer of testimony by United, which was not accepted by the Commission, is relevant to the disposition of this controversy: "It [United] does not question the right of said Commission to call upon this petitioner for such evidence and facts as may be in its possession which may show or tend to show what would be a reasonable rate to be charged for gas to the consumers in the City of Portsmouth, and it offers to furnish to the Commission such facts and evidence as may be desired, or to permit any officers or agents of the Public Utilities Commission of Ohio to ascertain such facts and evidence as may be desired from its records and books for the purpose aforesaid, but denies and protests the right or power of said Commission to fix the rates at which petitioner shall sell the gas which it transports into the State of Ohio and delivers to the Portsmouth Gas Company."

On May 29, 1935, the Commission denied this petition. Its order expressly reaffirmed its previous assertion of jurisdiction to fix the rates to be charged for the sale of gas by United to the Portsmouth Gas Company.[1]

[1] "The Commission further finds that the furnishing of natural gas by the United Fuel Gas Company to the Portsmouth Gas Company

This suit to restrain enforcement of the two orders of the Commission followed. In its original bill, filed July 3, 1935, United alleged that the Commission's orders were an unconstitutional attempt to regulate interstate commerce; that compliance with the orders would entail an expenditure of more than one hundred thousand dollars in order to make the usual appraisals required in determining a rate base; that disobedience to the orders would subject United and its agents to fines of a thousand dollars a day. These allegations were denied by the Commission. But on September 23, 1935, the parties stipulated that "it will cost the plaintiff a substantial sum of money, in excess of three thousand dollars, to comply with the Commission's order."

The bill was still pending at the time of the enactment of the Natural Gas Act of June 21, 1938, 52 Stat. 821, 15 U. S. C. § 717, and the relevance of that statute to the present controversy was duly set forth in an amended bill filed March 8, 1939. The suit did not come to issue for more than two years thereafter. The death of one of the members of the District Court, necessitating reargument and reconsideration of the case, may explain, at least in part, why a case of such public importance should have proceeded at such a leaden-footed pace.[2] It was not until

for resale to consumers within the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614–2, General Code of Ohio; that the rates to be charged therefor are subject to the jurisdiction of this Commission; that such jurisdiction includes the right to regulate the rate or price to be charged for such service, and that the exercise of such jurisdiction is necessary for a determination of the matters and things herein at issue before this Commission."

[2] The bill was filed on July 3, 1935, and on the same day a temporary restraining order was issued by District Judge Hough. The case was submitted to a District Court of three judges on September 23, 1935, but on November 19, 1935, before it was decided, Judge Hough died. An amended complaint was filed on November 20, 1936, and a second amended complaint on March 8, 1939, to which answer was made on April 25, 1939. A third amended complaint filed on April 8, 1941,

January 16, 1942, that the decree now under review was entered. The District Court held that, regardless of what the situation might have been in the absence of the Natural Gas Act, that statute deprived the Ohio Commission of power to regulate the rates to be charged for gas transported and sold in interstate commerce. And so the court enjoined the enforcement of the Commission's orders against United.

The Commission contends that the issues of this case lie outside the scope of the Natural Gas Act because the Commission was concerned with the establishment of rates for the sale of gas by United to Portsmouth Gas Company prior to the effective date of the federal Act, and, more particularly, to fix rates retroactive to February 24, 1932, when the city of Portsmouth prescribed the rates for gas sold to consumers by the Portsmouth Gas Company in the ordinance which gave rise to the proceedings before the Commission. This contention, if correct, would require us to consider whether the Commerce Clause, of its own force, invalidated the Commission's assertion of jurisdiction over the rates upon gas shipped by United into Ohio.

---

was followed on April 24, 1941, by a motion to dismiss which was denied on July 8, 1941. On July 28, 1941, an application for leave to file an answer was made; this application was granted on August 4, 1941, and an answer was filed the same day. The cause having finally been submitted, the District Court filed an opinion on October 2, 1941, finding that the plaintiff was entitled to injunctive relief. And on January 16, 1942, the decree now under review was entered.

The 1942 Annual Report of the Director of the Administrative Office of the United States Courts (p. 7) discloses that "The median time which elapsed from filing to disposition of civil cases terminated in the district courts during the year 1942, which had been tried to court or jury, excluding land condemnation, habeas corpus, and forfeiture proceedings, was 10.7 months; and from issue to trial it was 6.1 months. . . . This compares with periods of 10.2 months and 5.3 months, respectively, in 1941."

But we must reject the contention of the Commission. It rests upon the assumption that under the Ohio law the state Commission can retroactively fix the rates of United. For it must be borne in mind that the ultimate issue in this suit is the assertion by the Ohio Commission in 1935 of power to fix appellee's rates; that the Commission has not yet exercised the power which it thus asserted; that it has not made the inquiry and the findings which must precede the establishment of new rates; that United has not posted any bond to secure refunds it might be ordered to make; that the Commission's jurisdiction to fix United's rates was denied by the District Court in its decree of January 16, 1942; and that, so far as rates in the past are concerned, the power of the Ohio Commission (apart from any limitations imposed by federal law, whether constitutional or statutory) is dependent upon the authority possessed by it under Ohio law. To sustain the Commission on this phase of the case we would have to find that it was the law of Ohio that the Commission had power to fix rates upon gas sold by United to the Portsmouth Gas Company which would be retroactive to February 24, 1932, when the city of Portsmouth prescribed the rates upon gas sold by the Portsmouth Gas Company to its customers.

Unfortunately we are not aided by a finding of the lower court on this question of state law. Since the District Court was composed of three Ohio judges, they may perhaps have taken Ohio law on this point so much for granted as not to require statement. Under ordinary circumstances we would prefer to leave to others the task of formulating local law. But this case has already been too long in the federal courts, and we do not think it comports with the public interest to remit the controversy for explicit findings by the District Court as to the power of the Ohio Commission to fix rates retroactively. The situation here is quite different from *Rail-*

road Comm'n v. *Pullman Co.*, 312 U. S. 496. Where the disposition of a doubtful question of local law might terminate the entire controversy and thus make it unnecessary to decide a substantial constitutional question, considerations of equity justify a rule of abstention. But where, as here, no state court ruling on local law could settle the federal questions that necessarily remain, and where, as here, the litigation has already been in the federal courts an inordinately long time, considerations of equity require that the litigation be brought to an end as quickly as possible.

The proceeding before the state Commission arose under § 614–44 *et seq.* of the Ohio General Code (Page, 1926), dealing with appeals to the Commission from municipal ordinances establishing rates to be charged by local utilities. Whenever such an appeal is taken, as it was taken here by the Portsmouth Gas Company, the Commission is required to hold a hearing. § 614–44. If, after such hearing, the Commission finds that the rate fixed by the ordinance is unjust or unreasonable, it must determine the just and reasonable rate to be charged "during the period so fixed by ordinance . . . and order the same substituted for the [ordinance] rate . . ." § 614–46. It is clear that under this section of the statute the Commission can establish just and reasonable rates in lieu of those fixed by the ordinance, and can make its order effective retroactively by ordering refunds of charges in excess of the substituted rates. In re Columbia Gas & Fuel Co., 1941 Rep. Ohio P. U. C. 22; In re Wheeling Electric Co., 1941 *id.* 69; In re East Ohio Gas Co., 1939 *id.* 15. The Commission undoubtedly has power, therefore, to establish a just and reasonable rate, retroactive to February 24, 1932, for gas sold by the Portsmouth Gas Company to the people of that community.

But whether the Commission has similar power with respect to rates for gas sold by United to the Ports-

mouth Gas Company—and that is the controlling inquiry here—is an entirely separate question. Section 614–46 is inapplicable because the rates to be established would not be in lieu of rates fixed by ordinance. The Commission's authority to inquire into the reasonableness of the rates charged by United for gas sold to the Portsmouth Gas Company is to be found in §§ 614–21 and 614–23, which provide as follows: "Upon complaint in writing, against any public utility, by any person, firm or corporation, or upon the initiative or complaint of the commission that any rate . . . is in any respect unjust unreasonable, unjustly discriminatory, or unjustly preferential or in violation of law, . . . the commission shall notify the public utility" and hold a hearing. If, after such hearing, the Commission finds that the rate or charge is unjust, unreasonable, or otherwise unlawful, it must "fix and determine the just and reasonable rate, fare, charge, toll, rental or service *to be thereafter* rendered, charged, demanded, exacted or collected for the performance or rendition of the service, and order the same substituted therefor." § 614–23 (italics added). The statute in terms thus gives the Commission power to prescribe such rates prospectively only. If, after notice and hearing, the Commission finds rates to be unlawful, it can then fix the just and reasonable rates "to be thereafter" charged. The establishment of new rates must be preceded by a finding that the old rates are unjust and unreasonable, and the new rates are prospective as of the date they are fixed. There is no basis in the statute for concluding that the Commission's orders can be retroactive to the date when the Commission's inquiry into the rates was begun; on the contrary, the explicit language of the statute precludes such a construction.

Its annual reports show that the Commission has consistently followed what would seem to be the plain mandate of the statute. See, e. g., In re Amherst Water Works

Co., 1941 Rep. Ohio P. U. C. 88; In re Cincinnati Gas & Electric Co., 1940 *id.* 14; In re Union Gas & Electric Co., 1936 *id.* 67. Whatever doubts there may have been about the matter appear to have been removed by the decision of the Supreme Court of Ohio in *Great Miami Valley Taxpayers Assn.* v. *Public Utilities Commission,* 131 Ohio St. 285, 2 N. E. 2d 777, which affirmed a ruling of the Commission that "it was without power to make a refund in a proceeding instituted under and by virtue of the provisions of Section 614–23, General Code." 131 Ohio St. 285, 286. It is not surprising, therefore, that counsel for the Commission did not contend before us that the Commission has power under Ohio law to establish retroactively just and reasonable rates to be charged by United for gas sold to the Portsmouth Gas Company. Our examination of the relevant Ohio materials convinces us that the Commission has not been given such authority.

The Commission in this case has not yet done more than assert its jurisdiction over United's rates. It has not yet held a hearing upon the reasonableness of United's present rates; it has made no finding whether these rates are unlawful and whether new rates should be substituted; it has not entered upon an inquiry to determine what rates would be just and reasonable. As of the date of the enactment of the Natural Gas Act, therefore, the proceeding before the Commission, so far as United was concerned, was still in an embryonic stage. And we can find no provision of Ohio law which would authorize the Commission to enter orders fixing United's rates retroactive to any date prior to June 21, 1938, when the federal Act became law. The Commission's orders must be treated here, therefore, for purposes of determining whether they are in conflict with federal law, constitutional or statutory, as if they had been made after the enactment of the Natural Gas Act. The case cannot now be disposed of on the basis that would have governed had it come here in

1935. To inquire into the powers the Commission had that year, or any other year prior to the enactment of the Natural Gas Act in 1938, would be to ascertain an abstract question of law. The question we are called upon to decide, and it is the only question, is whether the District Court properly entered the decree under review. That decree was entered on January 16, 1942, after the enactment of the Natural Gas Act, and after United, in filing an amended bill of complaint, based its claim for relief upon that Act. It is familiar doctrine that an appeal in an equity suit opens up inquiry as of the time of the ultimate decision. To decide this appeal on the basis of a legal situation that ceased to exist not only prior to the taking of this appeal but also before issue was finally joined in the District Court, would be to make a gratuitous advisory judgment. It is the case that is here now that must be decided, and it must be decided on the basis of the circumstances that exist now. Cf. *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538, 542–43, and cases there cited.

And as to rates effective in the future we agree with the District Court that the Natural Gas Act of 1938 governs. Congress by that Act, the constitutionality and scope of which we canvassed last Term in *Federal Power Comm'n* v. *Pipeline Co.*, 315 U. S. 575, and *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498, preëmpted the regulatory powers over the transportation and sale of natural gas in interstate commerce. Section 1, after declaring that "Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest," makes the Act applicable to "the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such

transportation or sale." Rates and charges in connection with the sale or transportation of gas in interstate commerce are required to be "just and reasonable." § 4 (a). Companies subject to the Act must, under § 4 (c), file with the Federal Power Commission schedules of rates and charges, and no changes in such schedules can be made without notice to the Commission and the public. § 4 (d). Acting upon either its own motion or complaint of a state or municipality, or a state regulatory body or gas distributing company, the Commission can inquire into the legality of rates and charges of companies subject to its jurisdiction, and can determine the just and reasonable rates and charges thereafter to be observed. § 5 (a).

It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere. See H. Rep. No. 2651, 74th Cong., 2d Sess., pp. 1–3; H. Rep. No. 709, 75th Cong., 1st Sess., pp. 1–4; Sen. Rep. No. 1162, 75th Cong., 1st Sess.

Upon the undisputed facts in this record, United is plainly subject to the exclusive jurisdiction of the Federal Power Commission with respect to the rates and charges for natural gas transported by it from West Virginia and Kentucky to Ohio. And, indeed, in compliance with the Act, United has submitted itself to the jurisdiction of the federal agency and filed schedules of its rates and charges. No changes in such schedules can be made without notice to the Power Commission. That Commission,

on its own motion, can inquire into the lawfulness of such rates; if the public interest so requires, rates found to be just and reasonable may be substituted. It is indisputable, therefore, that if the Ohio Commission today made the orders complained of in this suit, it would be intruding in a domain reserved to the federal regulatory body. The power to fix rates for natural gas transported and sold in interstate commerce has been entrusted solely to the Federal Power Commission. It does not follow, of course, that the Act bars a state commission, in the appropriate exercise of its jurisdiction, from compelling the production of evidence relevant to the proceeding before it. But the orders before us went beyond this limited purpose. They undertook to assert a jurisdiction which the state body does not possess. In our conclusion regarding Ohio law, we hold only that the assertion of power by the Public Utilities Commission of Ohio must be construed in the light of its authority under the Ohio statutes. And, as thus construed, the order cannot be reconciled with the action of Congress in enacting the Natural Gas Act of 1938. Because the orders are not an assertion of jurisdiction to fix the rates of United prior to the enactment of the federal Act, it is unnecessary to decide whether, in the absence of federal statute, the state could successfully attempt to fix the rates charged by an interstate natural gas company for gas transported and sold from one state to another.

Since these orders are invalid insofar as they impinge upon an authority which Congress has now vested solely in the Federal Power Commission, the decree below must stand unless we can fairly conclude that it was an abuse of discretion for the District Court to grant relief by way of injunction. It is perhaps unnecessary at this late date to repeat the admonition that the federal courts should be wary of interrupting the proceedings of state administrative tribunals by use of the extraordinary writ of in-

junction. But this, too, is a rule of equity and not to be applied in blind disregard of fact. And what are the commanding circumstances of the present case? First, and most important, the orders of the state Commission are on their face plainly invalid. No inquiry beyond the orders themselves and the undisputed facts which underlie them is necessary in order to discover that they are in conflict with the federal Act. If, therefore, United complies with these orders, it will be put to the expenditures incident to ascertaining the base for rate-fixing purposes—expenses which may ultimately be borne by the consuming public and which Congress, by conferring exclusive jurisdiction upon the federal regulatory agency, necessarily intended to avoid. If United does not comply with the orders, it runs the risk of incurring heavy fines and penalties or, at the least, in provoking needless, wasteful litigation. In either event, enforcement of the Commission's orders would work injury not assessable in money damages, not only to the appellee but to the public interest which Congress deemed it wise to safeguard by enacting the Natural Gas Act. In these circumstances, we cannot set aside the decree of the District Court as an improper exercise of its equitable jurisdiction. *Petroleum Co.* v. *Public Service Commission,* 304 U. S. 209, was a very different case. There the regulation of intrastate rates alone was involved, no conflict between federal and state authorities was in issue, and the appeal to equity sought to anticipate the appropriate exhaustion of the administrative process.

Two minor objections to the jurisdiction of the court below need not detain us long. The Johnson Act of May 14, 1934, 48 Stat. 775, 28 U. S. C. § 41 (1), is inapplicable here because the orders of the state Commission "interfere with interstate commerce" to the extent that they constitute an attempt to regulate matters in interstate commerce which Congress has lodged exclusively with the

Federal Power Commission. And, unlike the appellant in *Natural Gas Co.* v. *Slattery,* 302 U. S. 300, 310–11, United exhausted all administrative remedies available to it before bringing this suit. In its petition for rehearing, United requested the state Commission to modify its original order of April 19, 1935, so as to strike out those portions which we now hold to be in conflict with the federal Act. Only after the denial of this petition did United seek relief in the courts.

As we construe the decree of the District Court, it does not prevent the Public Utilities Commission of Ohio from requiring United to produce data in its possession which may be relevant to a determination of the just and reasonable rates to be charged by the Portsmouth Gas Company for gas sold to the consumers of that city. As has already been noted, United, in its petition for rehearing before the Commission, offered to produce such evidence. And apparently throughout this entire litigation it has held itself ready to do so. The orders of the Commission were assailed only insofar as they subjected United to the jurisdiction of the state Commission with respect to rates for gas imported by it into Ohio. We therefore read the decree of the District Court as an injunction against enforcement of the Ohio Commission's orders only to the extent that this assumption by the Commission of rate-making power over United has been resisted. So read, the decree is

Affirmed.

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

As a result of this decision, delays incident to obtaining a federal injunction have made wholly futile the diligent efforts of the State of Ohio to fix reasonable gas rates for

the people of Portsmouth, Ohio.[1] I cannot agree with the suggestion implied here that this results from any cause other than the unwarranted interposition by courts into the business of rate making. Cf. *McCart* v. *Indianapolis Water Co.*, 302 U. S. 419, 435. Here eight years after the Ohio Public Utilities Commission made United a party defendant in order to fix rates "to be charged" by it, Ohio is told that United may keep any sum collected, no matter how unjust or unreasonable the rates charged may have been; and Ohio's citizens are denied the right to recoup possible losses because the Commission "has not made the inquiry and the findings which must precede the establishment of new rates." There is one reason, and only one reason, why the Commission has not made such inquiry and findings—before any step could be taken toward establishing a final rate order, and even before a single witness could be heard, this federal injunction stopped the state Commission in its tracks. Had the Commission proceeded to make inquiry and findings in the face of the injunction it would have risked the possibility that its members, agents, and attorneys could have been seized and fined or imprisoned for contempt of court. *Ex parte Young*, 209 U. S. 123. If it be true, which I think dubious, that under Ohio law rates can never be fixed as of the date a proceeding begins even though delays are the consequence of improvident federal injunctions, such a legal situation makes it all the more essential that the court below should have abstained as a matter of "equi-

[1] The suggestion in the opinion of the Court that the State is free to continue its efforts to control the rate of the local company, Portsmouth Gas, so long as it does not interfere with United, the company which supplies Portsmouth Gas, accords a privilege of little meaning. The price charged Portsmouth Gas by United is about 70% of the amount which the City Council considered a reasonable rate for Portsmouth Gas to charge. It is obvious that the Portsmouth Gas rate cannot be materially affected without in turn altering the United charge.

table fitness or propriety," *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 229, from tying the Commission's hands and barring it from making the final order here held to be vital. To stop these proceedings at the threshold and thus bar all possible relief for the years during which the litigation crawled along its interminable course seems to me far less justifiable than the action condemned by this Court in *Petroleum Co.* v. *Public Service Commission,* 304 U. S. 209.

The federal action halting the Ohio rate-making process since 1935 is justified wholly on the ground that the Natural Gas Act, passed in 1938, bars regulation by Ohio of United's rates since 1938, while Ohio law is said to bar any regulation prior to 1938 because no final order has yet been made by the Public Utilities Commission. The Court refuses to hold categorically that Ohio law nullifies this order, asserting instead that Ohio law requires us to interpret the Commission's order as not attempting to lead to rate making for the period 1935–1938. This will doubtless prove some surprise to the Commission, which made the order in question in 1935, and which has argued both here and below that the Natural Gas Act is irrelevant because it took effect subsequent to the period in which the Commission is now interested. Whether the Court considers that Ohio law bars the Commission from making a valid order, or whether it uses its knowledge of Ohio law to tell the Commission what the Commission has attempted, is immaterial—in either case we press our conception of Ohio law on the Ohioans. But the local law question has never been squarely decided in Ohio. That question is whether United can successfully, by taking full advantage of the delays of the federal judicial system, jockey the City of Portsmouth and the State of Ohio into such a position that no one can now determine what were reasonable rates for the period prior to 1938.

Reference to state cases and particularly to *Great Miami Taxpayers Assn.* v. *Public Utilities Commission,* 131 Ohio St. 285, 2 N. E. 2d 777, does not solve this problem, for, in the first place, under the state law all appeals to the Ohio Supreme Court are explicitly conditioned upon the posting of bond by the utility to secure payment of any damage resulting from delay. § 548 Ohio Gen. Code. Such security for which the state law provided should have been exacted by the lower court here, *Inland Steel Co.* v. *United States,* 306 U. S. 153, 156; cf. *United States* v. *Morgan,* 307 U. S. 183, 197. "It is especially fitting that equity exert its full strength in order to protect from loss a state which has been injured by reason of a suspension of enforcement of state laws imposed by equity itself." *Public Service Commission* v. *Brashear Freight Lines,* 312 U. S. 621, 630. The Ohio Supreme Court might well conclude that this failure of the court below to require appropriate security justifies the Commission in establishing a rate for a period prior to 1938. In addition, the very fact that the State Public Utilities Commission and the legal representatives of the State of Ohio have vigorously fought this case for four years since the passage of the Natural Gas Act is indication that they at least do not suppose that the State is powerless to fix rates as of the date United was made a party defendant. We have been cited to no case in which the State Supreme Court has held that an injunction against rate proceedings must result in such inordinate returns as the respondent here may receive.

Under these circumstances our opinion as to the local law "cannot escape being a forecast rather than a determination." *Railroad Commission* v. *Pullman Co.,* 312 U. S. 496, 499. What was said by the Court there is equally applicable here: "The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the

district court but to the supreme court of Texas. . . . The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court." [2] Here as there "If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not arise." *Ibid.*, 500, 501.

Even assuming, with the Court, that this delay in the judicial process bars the petitioners from the particular relief sought under local law, I still think we should hold that this injunction was improvidently granted. We are given as the bases of federal equity jurisdiction these propositions: The State order is on its face "plainly invalid"; United will be put to considerable expense in complying with it; non-compliance will result in heavy penalties or in costly litigation. In my opinion none of these separately nor all taken together provide any ground for federal jurisdiction.

What has been said above concerning the necessity of allowing state courts to decide state law is in my view adequate answer to the argument that the order is "plainly invalid." Ohio law in this respect could be adequately interpreted and enforced in Ohio courts. In addition, I do not consider the order before us ripe for review. It is simply a declaration of status requiring nothing of United other than coöperation in exploration of the rate problem for the purpose of eventually setting United's rates, and is thus as properly outside the realm of review now as if this were "an attempt to review a valuation made by the Interstate Commerce Commission which has no immediate legal effect although it may be the basis of a subsequent rate order." *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 129. In this respect, the instant case is identical with *East Ohio Gas*

[2] For other cases exemplifying this viewpoint, see *Watson* v. *Buck*, 313 U. S. 387, 402.

Co. v. *Federal Power Commission,* 115 F. 2d 385, 388. Unless the other grounds of alleged equitable jurisdiction take it outside the scope of the *Rochester* case, this is not the appropriate time for review.

We are told that United will be put to great expense by compliance with the Commission's order, in that it must provide certain statistical data necessary so that the Commission may complete its study of the rate problem. It is not suggested that this cost in itself is any reason for enjoining the proceeding, nor could it be unless *Petroleum Co.* v. *Commission, supra,* 220, is to be overruled; but the special circumstance offered here is that Congress by passage of the Natural Gas Act sought to prevent such an expenditure. We are given no argument and cited to no legislative history indicating that Congress had any desire to preclude the states from protecting state consumers against unfair rates for the period prior to the passage of the federal Act.

I am not as sure as the majority of the Court that refusal of United to comply with the Commission's order will in fact subject it to heavy penalties.[3] But assuming that this order is backed by the penalty clause, the case should be governed by what we said recently in *Petroleum Co.* v. *Public Service Commission, supra,* 220: "No order has been entered fixing rates or regulating conduct. The necessity to expend for the investigation or to take the risk of non-compliance does not justify the injunction. It

[3] The penalty provisions of the Ohio statute, §§ 614–64 and 65 are applicable where a rate or refund order is disobeyed, *State ex rel. Ohio Bell Telephone Co.* v. *Court of Common Pleas,* 128 Ohio St. 553, 555, 192 N. E. 787, but it may be that orders of the sort here involved are covered by §§ 614–6 and 7, providing for the examination of records and the production of witnesses. If this is so, review may be obtained under Ohio practice without fear of penalty prior to a final judicial determination. See e. g. *Mouser* v. *Public Utilities Commission,* 124 Ohio St. 425, 179 N. E. 133. We are cited to no cases which indicate which of these procedures governs this order.

is not the sort of irreparable injury against which equity protects." Cf. *Dalton Machine Co.* v. *Virginia,* 236 U. S. 699.

That United may be subjected to a course of litigation before its rights under the Ohio law are fully determined is the least of all reasons for this use of equity jurisdiction. The compelling consideration here is that "Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact." *Myers* v. *Bethlehem Corp.,* 303 U. S. 41, 51.

The judgment below should be reversed and the State of Ohio permitted to continue as best it can in view of the long delay caused by the unfortunate intervention of the federal courts.

HARRISON, COLLECTOR OF INTERNAL REVENUE, *v.* NORTHERN TRUST CO. ET AL., EXECUTORS.

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

No. 103. Argued December 8, 1942.—Decided January 11, 1943.

1. In § 303 (a) of the Revenue Act of 1926 which, as amended by § 807 of the Revenue Act of 1932, provides that where the federal estate tax is "payable . . . out of the bequests, legacies, or devises otherwise deductible under this paragraph, then the amount deductible under this paragraph shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes," the words "payable out of" are used in the sense of "diminished or reduced by" the payment of the tax. P. 479.
2. The legislative history of a statute may be considered in ascertaining its meaning, no matter how clear its words may appear on superficial examination. P. 479.
3. Where a residuary estate is bequeathed to charities for which deduction is allowed by § 303 (a) of the Revenue Act of 1926, as amended by § 807 of the Revenue Act of 1932, and by the state law

the federal estate tax is a charge not against the residue but against the entire estate, the amount which, in computing the federal estate tax, may be deducted from the gross estate on account of the charities, is the amount of the residuary estate actually passing to the charitable beneficiaries after provision is made for the payment of the tax. P. 480.

4. The deduction here involved is one which Congress could have denied altogether, and the limitation placed upon it by § 807 is constitutional. P. 480.

125 F. 2d 893, reversed.

CERTIORARI, *post*, p. 612, to review the affirmance of a judgment for the present respondents in an action to recover an alleged overpayment of federal estate taxes.

Miss Helen R. Carloss argued the cause, and *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Arnold Raum, J. Louis Monarch,* and *Bernard Chertcoff* were on the brief, for petitioner.

Mr. Alexander F. Reichmann, with whom *Mr. Andrew J. Dallstream* was on the brief, for respondents.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Respondents, the executors under the will of Henry M. Wolf, brought this action to recover an alleged overpayment of federal estate taxes. The case turns upon whether, under the provisions of § 303 (a) of the Revenue Act of 1926, as amended by § 807 of the Revenue Act of 1932,[1] the amount to be deducted from decedent's gross

[1] Section 807 provides as follows:

Sections 303 (a) (3) and 303 (b) (3) of the Revenue Act of 1926 are amended by inserting after the first sentence of each a new sentence to read as follows:

"If the tax imposed by section 301, or any estate, succession, legacy, or inheritance taxes, are, either by the terms of the will, by the law of the jurisdiction under which the estate is administered, or by the law of the jurisdiction imposing the particular tax, payable in whole or in

estate on account of the bequest of his residuary estate to charity is the actual amount of such bequest, after payment of federal estate taxes, or what would have been the amount if there had been no such taxes.

Testator, a resident of Illinois, bequeathed the residue of his estate to four named charitable organizations. The will contained no provision as to the payment of federal or state death taxes except for a direction that all inheritance, legacy, succession and estate taxes upon certain specific bequests to individuals should be paid out of the general estate. The residuary estate, after deducting funeral and administration expenses and specific bequests but not the federal estate tax, amounted to $463,103.08, all of which sum respondents claim they are entitled to deduct from the statutory gross estate in computing the federal estate tax. The Commissioner of Internal Revenue ruled, however, that only that portion of the residue which was actually distributable to the charitable donees, i. e., the amount remaining after payment of the federal estate tax, was deductible as a charitable bequest. He determined that the total estate tax amounted to $459,879.57, which would be paid out of the residuary estate, and that respondents were therefore entitled to deduct only $3,223.51, the amount actually passing under the residuary bequests.

Respondents paid the assessed tax under protest and filed a claim for refund which the Commissioner rejected. This suit followed, and the district court entered judgment for respondents. The Circuit Court of Appeals affirmed. 125 F. 2d 893. We granted certiorari because of the importance of the question in the administration of the federal estate tax system.

---

part out of the bequests, legacies, or devises otherwise deductible under this paragraph, then the amount deductible under this paragraph shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes."

It is now part of § 812 (d) of the Internal Revenue Code.

Section 807 recognizes that the ultimate thrust of the federal estate tax is to be determined by state law, cf. *Riggs* v. *Del Drago, ante,* p. 95, and provides that where the tax is, either under the will or the applicable local law, "*payable . . . out of* the bequests, legacies, or devises otherwise deductible under this paragraph, then the amount deductible under this paragraph shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes." [2] The court below fixed upon the words "payable out of" and held § 807 inapplicable because the federal estate tax was a charge against the entire estate and not against the residue under Illinois law,[3] and therefore was not "payable out of" the residuary bequest. The court then followed *Edwards* v. *Slocum,* 264 U. S. 61, where, under substantially identical facts and in the absence of a statute such as § 807, the instant issue was resolved against the Government. In so doing, the court below refused to examine the legislative history of § 807, on the ground that the section was unambiguous.

But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how "clear the words may appear on 'superficial examination.' " *United States* v. *American Trucking Assns.,* 310 U. S. 534, 543–44. See also *United States* v. *Dickerson,* 310 U. S. 554, 562. So, accepting the Circuit Court's interpretation of Illinois law as to the incidence of the tax, we think it should have considered the legislative history of § 807 to determine in just what sense Congress used the words "payable out of." The committee reports on § 807 demonstrate that it was intended as "a legislative reversal of the decision" in *Edwards* v. *Slocum, supra* (H. Rep. No. 708, 72d Cong.,

[2] Emphasis added.

[3] The cases of *People* v. *Pasfield,* 284 Ill. 450, 120 N. E. 286; *People* v. *Northern Trust Co.,* 289 Ill. 475, 124 N. E. 662; and *People* v. *McCormick,* 327 Ill. 547, 158 N. E. 861, were cited for this proposition.

1st Sess., p. 50),[4] and that Congress used the words "payable out of" in the sense of "diminished or reduced by" the payment of the tax. Thus the House Report states:

"The purpose of this amendment is to limit the deduction for charitable bequests, etc., to the amount which the decedent has in fact and in law devised or bequeathed to charity. Under existing law no consideration can be given to any estate, succession, legacy, or inheritance taxes imposed with respect to a decedent's estate even though by the terms of his will or the local law they actually reduce the amount of such bequest or devise." p. 49.

And, in referring to the situation in *Edwards* v. *Slocum*, it was said:

"Under the State law the estate tax was payable generally out of the estate and so fell upon and reduced the residuary estate given to charity." p. 50.

That is the case here, for while the estate tax may be a charge against the entire estate under Illinois law, admittedly its payment will operate to reduce the amount of the residuary estate. This legislative history is conclusive in favor of the Government's contention that respondents are entitled to deduct only the amount of the residuary estate actually passing to the charitable beneficiaries after provision is made for the payment of the federal estate tax.

It is argued on behalf of respondents that this interpretation of § 807 results in a "tax upon a tax" and is therefore unconstitutional. We need not stop to consider the accuracy of this nomenclature, because this case involves only a charitable deduction which Congress could have denied altogether, and the limitations placed upon that

[4] See also S. Rep. No. 398, 68th Cong., 1st Sess., p. 35, and H. Conference Rep. No. 844, 68th Cong., 1st Sess., pp. 25–26, with reference to § 303 (a) of the Revenue Act of 1924 which contained the same sentence as § 807.

deduction by § 807 clearly do not go beyond the limits of permissible constitutional power. Respondents also object to the fact that the tax may have to be computed by an algebraic formula or by complicated arithmetical methods because of the two mutually dependent variables, the amount of the tax and the amount of the residue as reduced by the tax, and reference is made to the statements in *Edwards* v. *Slocum* that "algebraic formulae are not lightly to be imputed to legislators," 264 U. S. at 63. This contention loses all significance when it is remembered that § 807 was intended as a "legislative reversal" of *Edwards* v. *Slocum*. And compare *United States* v. *New York*, 315 U. S. 510.

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

Reversed.

LILLY *v.* GRAND TRUNK WESTERN RAILROAD CO.

CERTIORARI TO THE APPELLATE COURT, FIRST DISTRICT, OF ILLINOIS.

No. 124. Argued December 8, 9, 1942.—Decided January 11, 1943.

1. The Boiler Inspection Act imposes upon the carrier an absolute and continuing duty to maintain its locomotives, and all parts and appurtenances thereof, in proper condition, and safe to operate without unnecessary peril to life or limb. Negligence is not the basis of liability. P. 485.
2. The Boiler Inspection Act is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment. P. 486.
3. The use of a locomotive tender upon which an employee must go in the course of his duties, the top of which tender is covered with ice, involves "unnecessary peril to life or limb" within the meaning of the Boiler Inspection Act, as construed by Rule 153 of the Rules adopted pursuant thereto by the Interstate Commerce Commission;

503873—43——38

which rule provides that the "Top of tender behind fuel space shall be kept clean, and means provided to carry off waste water." P. 486.

4. A rule promulgated by the Interstate Commerce Commission in the exercise of its authority under the Boiler Inspection Act has the force of law and becomes an integral part of the Act to be judicially noticed. P. 488.

5. In an action for personal injuries, a railway employee relied upon infractions of the Boiler Inspection Act in the use of a locomotive which was in improper condition and unsafe to operate, constituting unnecessary peril to life and limb (1) in that the tender on the top where he was required to work was slippery with ice (this count being supplemented by a charge that the tender leaked there); and (2) in that the tender at the place in question was cracked, so as to permit leakage of water, liable to freeze and cause a dangerous condition on top of the tender. *Held* that the existence of a leak was not essential to the first charge, and that a general verdict for the plaintiff could be sustained, notwithstanding that by answer to a special interrogatory the jury also found that the alleged leak in the tender did not exist. P. 489.

6. In an action for personal injuries resulting from violations of the Boiler Inspection Act, the partial defense of contributory negligence and the bar of assumption of risk are not available under §§ 3 and 4 of the Federal Employers' Liability Act, as those sections read at the date of the accident here in question. P. 491.

312 Ill. App. 73, 37 N. E. 2d 888, reversed.

CERTIORARI, *post*, p. 612, to review a judgment for the present respondent, entered by the court below *non obstante veredicto* in an action under the Federal Employers' Liability and the Boiler Inspection Acts. The Supreme Court of Illinois refused leave to appeal.

Mr. William H. DeParcq, with whom *Mr. Samuel Cohen* was on the brief, for petitioner.

Mr. Harold A. Smith, with whom *Messrs. H. Victor Spike* and *Silas H. Strawn* were on the brief, for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Petitioner brought this action in an Illinois state court, under the Federal Employers' Liability Act[1] and the Boiler Inspection Act,[2] for personal injuries sustained on February 6, 1937, in the course of his employment as a brakeman in interstate commerce. A general verdict of $32,500 was returned in his favor by the jury, but on appeal the Appellate Court of Illinois for the First District entered judgment for respondent notwithstanding the verdict.[3] The Supreme Court of Illinois refused leave to appeal. We granted certiorari because of the important questions presented in the interpretation of the above-mentioned federal statutes.

Petitioner fell from the top of the locomotive tender while he was pulling a water spout, which was at the side of the track, over the tender's manhole by means of a rod and hook, preparatory to filling the tender's tank with water. As to the circumstances of the accident, petitioner testified that the top of the tender between the water manhole and the fuel space, an area of some six square feet, was covered with ice; that there was a small leak at the collar of the manhole from which water flowed onto the tender's surface; that the rod, used for pulling the water spout over the tender, was frozen in the ice, and he had to kick it free; that he stood on the ice and braced himself as he reached out with the rod to pull the spout; and that as he pulled, the rod's hook slipped on the spout, and his feet simultaneously slipped on the ice, causing him to fall to the ground.

Petitioner's complaint charged negligence generally with respect to the presence of ice on the tender and also

[1] 45 U. S. C. §§ 51 *et seq.*

[2] 45 U. S. C. §§ 22 *et seq.*

[3] 312 Ill. App. 73, 37 N. E. 2d 888.

alleged as separate violations of the "Federal Safety Appliance Act" (more properly the Boiler Inspection Act), first that respondent used "a locomotive and tender which was in improper condition and unsafe to operate in the service, and its condition constituted unnecessary peril to life and limb in that . . . the top where the plaintiff was required to work was slippery and covered with ice and other slippery materials to endanger his life or limb, and the tender leaked there, . . .," and secondly that respondent used "a locomotive and tender which was in improper condition and unsafe to operate in the service, and its condition constituted unnecessary peril to life and limb, in that the . . . tender . . . at the part where the water is supplied . . . to be [sic] cracked, worn and split, so as to occasion and permit the leaking of water from and through this crack, . . . rendering it likely and liable for the water to freeze and cause a dangerous condition, . . ." [4]

When the jury rendered its general verdict for petitioner, it also answered in the negative the following special interrogatory submitted by respondent:

"Was there, at the time of the accident in question, a leak in or near the manhole collar on the tender in question?"

Respondent then moved for judgment notwithstanding the verdict, on the ground that the answer to the special interrogatory removed all question of violation of the Boiler Inspection Act from the case, that there was no evidence of negligence, and that in any event petitioner assumed the risk. The trial court denied this motion, but on appeal it was held well taken in all respects.

[4] At the close of his case, petitioner voluntarily dismissed two additional counts charging general negligence in supplying a defective rod and hook, and general negligence in supplying a defective water spout.

For our purposes the case resolves into two questions: (1) Granting, as the jury found, that the tender did not leak, could the jury nevertheless find that the Boiler Inspection Act was violated by the presence of ice on the tender's top; and (2) Was the jury properly instructed that it might so find? We believe that both questions should be affirmatively answered and that the judgment below should be reversed.

The Boiler Inspection Act (§ 2) provides:

"It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." 45 U. S. C. § 23.

Negligence is not the basis for liability under the Act. Instead, it "imposes upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate . . . without unnecessary peril to life or limb." *Southern Ry. Co.* v. *Lunsford,* 297 U. S. 398, 401; *Baltimore & Ohio R. Co.* v. *Groeger,* 266 U. S. 521; cf. *Brady* v. *Terminal Railroad Assn.,* 303 U. S. 10. Any employee engaged in interstate commerce who is injured by reason of a violation of the Act may bring his action under the Federal Employers' Liability Act, charging the violation of the Boiler Inspection Act. *Moore* v. *C. & O. Ry. Co.,* 291 U. S. 205, 210–211; *Great Northern Ry. Co.* v. *Donaldson,* 246 U. S. 121; *Baltimore & Ohio R. Co.* v. *Groeger, supra.*

The Act, like the Safety Appliance Act, is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment. Cf. *Great Northern Ry. Co.* v. *Donaldson, supra; St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* 210 U. S. 281, 295–96; *Louisville & Nashville R. Co.* v. *Layton,* 243 U. S. 617, 621; *Swinson* v. *Chicago, St. P., M. & O. Ry. Co.,* 294 U. S. 529, 531. And, the Interstate Commerce Commission is broadly authorized to set the standards of compliance by prescribing "rules and regulations by which fitness for service [of locomotives, tenders and their appurtenances] shall be determined," *Napier* v. *Atlantic Coast Line,* 272 U. S. 605, 612, provided that, it has been said, the Commission finds such are required to remove unnecessary peril to life or limb. *United States* v. *B. & O. R. Co.,* 293 U. S. 454; cf. *Southern Ry. Co.* v. *Lunsford, supra.* With these considerations in mind, we turn to the first question.

The use of a tender, upon whose top an employee must go in the course of his duties, which is covered with ice seems to us to involve "unnecessary peril to life or limb"—enough so as to permit a jury to find that the Boiler Inspection Act has been violated. Fortunately, we are not left wholly to our own resources in construing the Act in the light of its humanitarian purpose. The Interstate Commerce Commission has set the standard here by promulgating a rule (No. 153) that the "Top of tender behind fuel space shall be kept clean, and means provided to carry off waste water." [5] From the phrasing of Rule 153 we think it aimed at requiring the top of the tender

[5] The full text of Rule 153 follows:

"153. Feed water tanks.—(a) Tanks shall be maintained free from leaks, and in safe and suitable condition for service. Suitable screens must be provided for tank wells or tank hose.

(b) Not less frequently than once each month the interior of the tank shall be inspected, and cleaned if necessary.

to be kept free of foreign matter which would render footing insecure, for example, coal, dust, debris, grease, waste water, and ice. While the locomotive inspection rules are generally devoted to details of construction and specification of materials, at least one other rule deals with the condition of surfaces upon which employees must stand.[6] In using the word "clean," the Commission must have meant something more than mere manner of construction or mechanical operation, because "clean" does not naturally lend itself to such a limited connotation. That something more is the continuing duty of promoting the safety of employees by removing from the top of the tender all extraneous substances which might make standing there hazardous.

From various cases denying recovery under the Act, respondent attempts to extract a general rule that the Act covers only defects in construction or mechanical operation and affords no protection against the presence of dangerous objects or foreign matter.[7] But there is no

---

(c) Top of tender behind fuel space shall be kept clean, and means provided to carry off waste water. Suitable covers shall be provided for filling holes."

See Official Pamphlet of Interstate Commerce Commission, Bureau of Locomotive Inspection, Orders dated October 11, 1915, to February 21, 1929; Roberts, Federal Liabilities of Carriers (2d ed.) vol. 2, p. 2069.

[6] Rule 117 provides:

"117. Cab aprons.—Cab aprons shall be of proper length and width to insure safety. Aprons must be securely hinged, maintained in a safe and suitable condition for service, and roughened, or other provision made, to afford secure footing."

See Official Pamphlet, *supra,* and Roberts, *op. cit.,* p. 2062.

[7] *Ford* v. *N. Y., N. H. & H. R. Co.,* 54 F. 2d 342 (grease on a locomotive grab-iron held no violation of Safety Appliance and Boiler Inspection Acts); *Reeves* v. *Chicago, St. P., M. & O. Ry. Co.,* 147 Minn. 114, 179 N. W. 689 (presence of coal upon a step leading to the locomotive cab held no violation of Safety Appliance and Boiler Inspection Acts); *Slater* v. *Chicago, St. P., M. & O. Ry. Co.,* 146

warrant in the language of the Act for construing it so narrowly, or for denying the Commission power to remedy shortcomings, other than purely mechanical defects, which may make operation unsafe. The Act without limitation speaks of equipment "in proper condition and safe to operate . . . without unnecessary peril to life or limb." Conditions other than mechanical imperfections can plainly render equipment unsafe to operate without unnecessary peril to life or limb. Whatever else may be said about the cases relied upon by respondent, they are sufficiently distinguishable in that they either did not involve or did not consider Rule 153 or any comparable regulation.

Respondent insists that reliance cannot be placed on Rule 153 because it was not called to the attention of the trial court or the jury and its injection now would involve deciding the case on issues not submitted to the jury. We do not regard this point as well taken. No claim is advanced that the rule is invalid, and we see no reason for questioning it. Adopted in the exercise of the Commission's authority, Rule 153 acquires the force of law and becomes an integral part of the Act (cf. *Napier* v. *Atlantic Coast Line, supra; United States* v. *B. & O. R. Co., supra*), to be judicially noticed. *Caha* v. *United States,* 152 U. S. 211, 221–22. The failure of petitioner's counsel to call

---

Minn. 390, 178 N. W. 813 (holding no cause of action under Safety Appliance Act for injuries caused by an ice bunker displaced by a trespasser so it projected upon the running board); *Chicago, R. I. & P. Ry. Co.* v. *Benson,* 352 Ill. 195, 185 N. E. 244 (Safety Appliance Act held not violated by wrapping wire around grab-irons); *Harlan* v. *Wabash Ry. Co.,* 335 Mo. 414, 73 S. W. 2d 749 (failure of fellow employees to close a trap door in the cab over the stoker held no violation of the Boiler Inspection and Safety Appliance Acts); *Riley* v. *Wabash Ry. Co.,* 328 Mo. 910, 44 S. W. 2d 136 (holding no cause of action existed under Boiler Inspection Act for injuries sustained because a clinker hook was misplaced on a tender top by a fellow servant).

Rule 153 to the attention of the trial court should no more deprive petitioner of its benefits than the failure to plead specifically the Federal Employers' Liability Act foreclosed the application of that Act on appeal to test the correctness of the trial judge's refusal to charge in *Grand Trunk Western Ry. Co.* v. *Lindsay,* 233 U. S. 42, especially when, as here, the rule only fortifies a result which we think the jury could probably have reached even in the absence of such a rule.

Concluding that the jury had a right to find a violation of the Boiler Inspection Act by reason of the presence of ice on the top of the tender even though there was no leak, we turn now to the second question: Was the jury properly instructed that it might so find? The court below held and respondent here earnestly insists that with regard to the Boiler Inspection Act the case was tried solely on the theory that the only violation of that Act charged was that the tender leaked, and the answer to the special interrogatory therefore removed all question of violation of the Act from the case. This was not the view of the trial judge, and, while the record is not as satisfactory as we might wish, we agree with him.

It is true that both charges of violation of the Act do allege the presence of a leak, and petitioner's counsel did say in his closing argument to the jury "So, as I say, gentlemen, don't find that there was no leak, or you put him (petitioner) out of court." But there is no reason to penalize petitioner for remarks of counsel uttered in an excess of zeal, and the full text of the complaint is such that it is fair to say that the presence of a leak was vital to only one charge of violation of the Act, being merely an incidental, nonessential allegation of the other.[8] This

[8] Thus, while a leak is alleged in paragraph 4 (d) of the complaint, the full text makes it clear that the gist of the charge is simply the presence of ice:

"d. Defendant did then and there unlawfully and contrary to the Federal Safety Appliance Act use and permit to be used on its line of

was the understanding of the trial judge, upon whom rests primarily the function of interpreting the pleadings. For, in overruling respondent's motion for judgment notwithstanding the verdict, the trial judge said: "Now, whether there was a crack or not, yet still the question of the Safety Appliance [Boiler Inspection Act] could remain in there if the Court did feel that it was the duty of

---

railway at Ferndale Yard a locomotive and tender which was in improper condition and unsafe to operate in the service, and its condition constituted unnecessary peril to life and limb in that the defendant required, caused and permitted plaintiff to work on the tender of the locomotive of his train on the occasion above charged, in the act of putting water in the tender of the locomotive, this tender was unsafe because the top where the plaintiff was required to work was slippery and covered with ice and other slippery materials to endanger his life or limb, and the tender leaked there, and while he was so at work, as above charged, he slipped on this slippery and unsafe condition on top of the tender and was thrown and caused to fall and be seriously injured."

On the other hand, the essence of Paragraph 4 (e) is the presence of a leak, as the following full quotation shows:

"e. Defendant did then and there unlawfully and contrary to the Federal Safety Appliance Act use and permit to be used on its line of railway at Ferndale Yard, Michigan, a locomotive and tender which was in improper condition and unsafe to operate in the service, and its condition constituted unnecessary peril to life and limb, in that the defendant did operate this locomotive and tender with the tender of this locomotive at the part where the water is supplied to and poured into the locomotive to be cracked, worn and split, so as to occasion and permit the leaking of water from and through this crack, hole and aperture and to flood, seep and cover the top of the tender where plaintiff was required to be in the performance of his duties as employee, rendering it likely and liable for the water to freeze and cause a dangerous condition, and thereby, by reason of this violation on the part of the defendant of this Federal Safety Appliance Act, the water in this tender did leak through this defective place onto the top of the tender, and did freeze, and it thereby caused plaintiff, while he was so at work, as above charged, on the top of this tender, to slip and be thrown and seriously injured."

the defendant to keep the tender clear so that the man might operate."

In his instructions to the jury, the judge read the Boiler Inspection Act and stated:

"You are instructed that under the law the defendant was bound to furnish to the plaintiff a locomotive, at the time in question, which was safe to be used, and to keep and maintain the same in such condition at all times so as not to expose the plaintiff to any hazard or risk."

Respondent took no exception. We think this charge sufficiently informed the jury that it could find a violation of the Act from the presence of ice, even if there were no leak. Evidently this was the understanding of the jury, because it found nothing incongruous in simultaneously answering the special interrogatory negatively and returning a general verdict for petitioner despite counsel's statement that a finding of no leak would put his client out of court.

Since petitioner's injuries were the result of respondent's violation of the Boiler Inspection Act, the partial defense of contributory negligence and the bar of assumption of risk are not available to respondent under §§ 3 and 4 of the Federal Employers' Liability Act, 45 U. S. C. §§ 53, 54, as those sections existed at the date of the accident. This disposition of the case makes it unnecessary to consider either whether respondent was generally negligent, or the merits of petitioner's contention, based on the premise that respondent was so negligent, that the 1939 amendment to § 4 of the Federal Employers' Liability Act, 53 Stat. 1404, completely abolishing the defense of assumption of risk in actions under that Act, should be given retroactive application.

Under the facts of this case and the applicable law, the jury could rightfully find for petitioner. The benefits of that rightful determination should not have been taken from him.

The judgment below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE FRANKFURTER concurs in the result.

SPIES *v.* UNITED STATES.

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

No. 278. Argued December 18, 1942.—Decided January 11, 1943.

Section 145 (b) of the Internal Revenue Code, making it a felony willfully to attempt to evade or defeat a tax, is not violated by willful omissions to make a return and pay a tax, defined in § 145 (a) as misdemeanors. P. 497.

128 F. 2d 743, reversed.

CERTIORARI, *post*, p. 610, to review the affirmance of a conviction upon an indictment under 26 U. S. C. § 145 (b) for attempting to evade and defeat a federal income tax.

Mr. David V. Cahill for petitioner.

Assistant Attorney General Clark, with whom *Solicitor General Fahy* and *Messrs. Sewall Key* and *Earl C. Crouter* were on the brief, for the United States.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Petitioner has been convicted of attempting to defeat and evade income tax, in violation of § 145 (b) of the Revenue Act of 1936, 49 Stat. 1648, 1703, now § 145 (b) of the Internal Revenue Code. The Circuit Court of Appeals found the assignment of error directed to the charge to the jury the only one of importance enough to notice. The charge followed the interpretation put upon this section of the statute in *O'Brien* v. *United States*, 51 F. 2d 193 (C. C. A. 7), and *United States* v. *Miro*, 60 F. 2d 58 (C. C.

A. 2), which followed it. The Circuit Court of Appeals affirmed, stating that "we must continue so to construe the section until the Supreme Court decides otherwise." 128 F. 2d 743. One Judge said that as a new matter he would decide otherwise and expressed approval of the dissent in the *O'Brien* case. As the construction of the section raises an important question of federal law not passed on by this Court, we granted certiorari.

Petitioner admitted at the opening of the trial that he had sufficient income during the year in question to place him under a statutory duty to file a return and to pay a tax, and that he failed to do either. The evidence during nearly two weeks of trial was directed principally toward establishing the exact amount of the tax and the manner of receiving and handling income and accounting, which the Government contends shows an intent to evade or defeat the tax. Petitioner's testimony related to his good character, his physical illness at the time the return became due, and lack of willfulness in his defaults, chiefly because of a psychological disturbance, amounting to something more than worry but something less than insanity.

Section 145 (a) makes, among other things, willful failure to pay a tax or make a return by one having petitioner's income at the time or times required by law a misdemeanor.[1] Section 145 (b) makes a willful attempt in any

[1] "Any person required under this title to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this title, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution,"

manner to evade or defeat any tax such as his a felony.[2] Petitioner was not indicted for either misdemeanor. The indictment contained a single count setting forth the felony charge of willfully attempting to defeat and evade the tax, and recited willful failure to file a return and willful failure to pay the tax as the means to the felonious end.

The petitioner requested an instruction that "You may not find the defendant guilty of a willful attempt to defeat and evade the income tax, if you find only that he had willfully failed to make a return of taxable income and has willfully failed to pay the tax on that income." This was refused, and the Court charged that "If you find that the defendant had a net income for 1936 upon which some income tax was due, and I believe that is conceded, if you find that the defendant willfully failed to file an income tax return for that year, if you find that the defendant willfully failed to pay the tax due on his income for that year, you may, if you find that the facts and circumstances warrant it find that the defendant willfully attempted to evade or defeat the tax." The Court refused a request to instruct that an affirmative act was necessary to constitute a willful attempt, and charged that "Attempt means to try to do or accomplish. In order to find an attempt it is not necessary to find affirmative steps to accomplish the prohibited purpose. An attempt may be found on the basis of inactivity or on refraining to act, as well."

It is the Government's contention that a willful failure to file a return, together with a willful failure to pay the

[2] "Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

tax, may, without more, constitute an attempt to defeat or evade a tax within § 145 (b). Petitioner claims that such proof establishes only two misdemeanors under § 145 (a), and that it takes more than the sum of two such misdemeanors to make the felony under § 145 (b). The legislative history of the section contains nothing helpful on the question here at issue, and we must find the answer from the section itself and its context in the revenue laws.

The United States has relied for the collection of its income tax largely upon the taxpayer's own disclosures rather than upon a system of withholding the tax from him by those from whom income may be received. This system can function successfully only if those within and near taxable income keep and render true accounts. In many ways, taxpayers' neglect or deceit may prejudice the orderly and punctual administration of the system as well as the revenues themselves. Congress has imposed a variety of sanctions for the protection of the system and the revenues. The relation of the offense of which this petitioner has been convicted to other and lesser revenue offenses appears more clearly from its position in this structure of sanctions.

The penalties imposed by Congress to enforce the tax laws embrace both civil and criminal sanctions. The former consist of additions to the tax upon determinations of fact made by an administrative agency and with no burden on the Government to prove its case beyond a reasonable doubt. The latter consist of penal offenses enforced by the criminal process in the familiar manner. Invocation of one does not exclude resort to the other. *Helvering* v. *Mitchell*, 303 U. S. 391.

The failure in a duty to make a timely return, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, is punishable by an addition to the tax of 5 to 25 per cent thereof, depending on

the duration of the default. § 291 of the Revenue Act of 1936 and of the Internal Revenue Code. But a duty may exist even when there is no tax liability to serve as a base for application of a percentage delinquency penalty; the default may relate to matters not identifiable with tax for a particular period; and the offense may be more grievous than a case for civil penalty. Hence the willful failure to make a return, keep records, or supply information when required, is made a misdemeanor, without regard to existence of a tax liability. § 145 (a). Punctuality is important to the fiscal system, and these are sanctions to assure punctual as well as faithful performance of these duties.

Sanctions to insure payment of the tax are even more varied to meet the variety of causes of default. It is the right as well as the interest of the taxpayer to limit his admission of liability to the amount he actually owes. But the law is complicated, accounting treatment of various items raises problems of great complexity, and innocent errors are numerous, as appears from the number who make overpayments.[3] It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care. Such errors are corrected by the assessment of the deficiency of tax and its collection with interest for the delay. §§ 292 and 294 of the Revenue Act of 1936 and of the Internal Revenue Code. If any part of the deficiency is due to neg-

[3] The following statistics are given by the Commissioner of Internal Revenue for the fiscal year 1941: 73,627 certificates of overassessment of income tax issued, for 39,730 of which no claims had been filed; 236,610 assessments of additional income taxes made; 871 investigations made of alleged evasion of income and miscellaneous taxes, with recommendation for prosecution in 239 cases involving 446 individuals, of whom 192 were tried and 156 convicted. The total number of income tax returns filed was 16,052,007, of which number 7,867,319 reported a tax. Annual Report of the Commissioner of Internal Revenue (1941), pp. 17, 20, 21, 22, 52, 108.

ligence or intentional disregard of rules and regulations, but without intent to defraud, five per cent of such deficiency is added thereto; and if any part of any deficiency is due to fraud with intent to evade tax, the addition is 50 per cent thereof. § 293 of the Revenue Act of 1936 and of the Internal Revenue Code. Willful failure to pay the tax when due is punishable as a misdemeanor. § 145 (a). The climax of this variety of sanctions is the serious and inclusive felony defined to consist of willful attempt in any manner to evade or defeat the tax. § 145 (b). The question here is whether there is a distinction between the acts necessary to make out the felony and those which may make out the misdemeanor.

A felony may, and frequently does, include lesser offenses in combination either with each other or with other elements. We think it clear that this felony may include one or several of the other offenses against the revenue laws. But it would be unusual and we would not readily assume that Congress by the felony defined in § 145 (b) meant no more than the same derelictions it had just defined in § 145 (a) as a misdemeanor. Such an interpretation becomes even more difficult to accept when we consider this felony as the capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency.

The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be willful, and willful, as we have said, is a word of many meanings, its construction often being influenced by its context. *United States* v. *Murdock*, 290 U. S. 389. It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purpose-

ful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer.

Had § 145 (a) not included willful failure to pay a tax, it would have defined as misdemeanors generally a failure to observe statutory duties to make timely returns, keep records, or supply information—duties imposed to facilitate administration of the Act even if, because of insufficient net income, there were no duty to pay a tax. It would then be a permissible and perhaps an appropriate construction of § 145 (b) that it made felonies of the same willful omissions when there was the added element of duty to pay a tax. The definition of such nonpayment as a misdemeanor, we think, argues strongly against such an interpretation.

The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term "attempt," as used in the felony subsection. It is not necessary to involve this subject with the complexities of the common-law "attempt."[4] The attempt made criminal by this statute does not consist of conduct that would culminate in a more serious crime but for some impossibility of completion or interruption or frustration. This is an independent crime, complete in its most serious

[4] Holmes, The Common Law, pp. 65–70; Hall, Criminal Attempt—A Study of Foundations of Criminal Liability, 49 Yale Law Journal 789; Arnold, Criminal Attempts—The Rise and Fall of an Abstraction, 40 Yale Law Journal 53.

form when the attempt is complete, and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder. Although the attempt succeed in evading tax, there is no criminal offense of that kind, and the prosecution can be only for the attempt. We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues, Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.

Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished "in any manner." By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime.

In this case there are several items of evidence apart from the default in filing the return and paying the tax which the Government claims will support an inference of willful attempt to evade or defeat the tax. These go to

establish that petitioner insisted that certain income be paid to him in cash, transferred it to his own bank by armored car, deposited it, not in his own name but in the names of others of his family, and kept inadequate and misleading records. Petitioner claims other motives animated him in these matters. We intimate no opinion. Such inferences are for the jury. If on proper submission the jury found these acts, taken together with willful failure to file a return and willful failure to pay the tax, to constitute a willful attempt to evade or defeat the tax, we would consider conviction of a felony sustainable. But we think a defendant is entitled to a charge which will point out the necessity for such an inference of willful attempt to defeat or evade the tax from some proof in the case other than that necessary to make out the misdemeanors; and if the evidence fails to afford such an inference, the defendant should be acquitted.

The Government argues against this construction, contending that the milder punishment of a misdemeanor and the benefits of a short statute of limitation should not be extended to violators of the income tax laws such as political grafters, gamblers, racketeers, and gangsters. We doubt that this construction will handicap prosecution for felony of such flagrant violators. Few of them, we think, in their efforts to escape tax, stop with mere omission of the duties put upon them by the statute, but if such there be, they are entitled to be convicted only of the offense which they have committed.

Reversed.

ENDICOTT JOHNSON CORP. ET AL. *v.* PERKINS, SECRETARY OF LABOR.

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

No. 142. Argued November 20, 1942.—Decided January 11, 1943.

1. Upon an application by the Secretary of Labor to a federal District Court for enforcement of a subpoena duces tecum, issued by the Secretary in pursuance of an investigation of alleged violations of the Walsh-Healey Public Contracts Act and requiring the production of payroll and similar records relating to plants of the contractor other than those specified in the contract, the District Court, in the circumstances of this case, was without authority to proceed to hear and determine whether the Act and contract covered such plants, and it was its duty to order enforcement of the subpoena. P. 506.
2. The delegation to the Secretary of Labor of the subpoena power, as here exercised, was within the authority of Congress. P. 510.

128 F. 2d 208, affirmed.

CERTIORARI, *post*, p. 607, to review the reversal of orders of the District Court, 37 F. Supp. 604 and 40 F. Supp. 254, refusing enforcement of subpoenas duces tecum issued by the Secretary of Labor pursuant to the Walsh-Healey Public Contracts Act.

Mr. Howard A. Swartwood, with whom *Messrs. William H. Pritchard, Edward H. Green*, and *John C. Bruton* were on the brief, for petitioners.

Mr. Paul Freund, with whom *Solicitor General Fahy, Assistant Attorney General Shea*, and *Messrs. Sidney J. Kaplan* and *Irving J. Levy* were on the brief, for respondent.

MR. JUSTICE JACKSON delivered the opinion of the Court.

This case concerns the validity of a subpoena issued by the Secretary of Labor in administrative proceedings against the petitioner under the Walsh-Healey Public Con-

tracts Act.[1] The petitioner successfully resisted the Secretary's petition for enforcement in the District Court,[2] whose judgment was in turn reversed by the Circuit Court of Appeals for the Second Circuit.[3] We granted certiorari because of the importance of the questions in the enforcement of the Act, and because of probable conflict with a holding of the Circuit Court of Appeals for the Sixth Circuit.[4]

The Walsh-Healey Act requires that contracts with the Government for the "manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000" shall represent and stipulate, *inter alia*, for the payment of "not less than the minimum wages as determined by the Secretary of Labor" (§ 1 (b)), and that "no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week" (§ 1 (c)); but provides that the Secretary may allow exemptions from the minimum wage provisions, and permit increases in the stipulated maximum hours on payment of wages at "not less than one and one-half times the basic hourly rate received by any employee affected." (§ 6.)

The Act provides for liquidated damages for violations of required stipulations in the contract (§ 2); and, further, that "unless the Secretary of Labor otherwise recommends" no government contract shall be awarded to the

---

[1] 49 Stat. 2036; 41 U. S. C. § 35–45.

The proceedings were instituted against both petitioners, the Endicott Johnson Corporation and its secretary, and both participated in the subsequent litigation. For convenience we refer to both as "the petitioner."

[2] 37 F. Supp. 604 and 40 F. Supp. 254.

[3] 128 F. 2d 208.

[4] *General Tobacco & Grocery Co.* v. *Fleming*, 125 F. 2d 596.

firm or subsidiaries of the firm which he finds to have defaulted in its obligation under the Act "until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred." (§ 3.)

The Secretary is directed "to administer the provisions of this Act" and empowered to "make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions." (§ 4.) And that he may the better and the more fairly discharge his functions, he is authorized to hold hearings "on complaint of a breach or violation of any representation or stipulation" and "to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. . . . In case of contumacy, failure, or refusal of any person to obey such an order," the District Court of the United States "shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof." The Secretary is directed to make "findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor . . . shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act." (§ 5.)

Pursuant to her authority under the Act, the Secretary in 1937 defined by rulings the coverage of the Act. She provided, *inter alia,* that "employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment used in the performance of the con-

tract" might be employed overtime, at "one and one-half times the basic hourly rate or piece rate received by the employee." [5] Stipulations as to minimum wages were made to "apply only to purchases or contracts relating to such industries as have been the subject of a determination by the Secretary of Labor." [6] Thereafter, and on December 21, 1937, she made a determination of minimum wages to be paid employees "engaged in the performance of contracts . . . for the manufacture or supply of men's welt shoes." On September 29, 1939, and after the completion of the contracts involved in this case, the Secretary issued rulings specifically dealing with "integrated establishments." [7]

From the pleadings in the District Court and admitted statements in affidavits filed, there appear the following facts:

Between October 26, 1936, and June 8, 1938, petitioner was awarded several contracts for boots, shoes, gymnasium shoes and arctic overshoes. Each was for an amount in excess of $10,000, and each contract included representations and stipulations in accordance with the Act and the

[5] Rulings and Interpretations under the Walsh-Healey Public Contracts Act, No. 1, § 4 (2) (a).

[6] *Ibid.* § 4 (1).

[7] Rulings and Interpretations No. 2, providing in § 1 (2):

"When a contractor to whom a contract subject to the Act is awarded operates an integrated establishment which manufactures or produces materials or supplies that are incorporated into or otherwise used in the manufacture or supply of the materials, supplies, articles, or equipment called for by the contract, the Act is applicable to those departments which are engaged in the manufacture or production of the materials or supplies to be so incorporated into or used in the manufacture or processing of the ultimate product to be delivered to the Government as well as to the employees engaged in the manufacture or processing of that ultimate product. For example: The processing of the leather and rubber for the shoes supplied under Government contracts subject to the Act is within the purview of the Act and Regulations, and compliance therewith is essential."

Secretary's rulings thereunder set out above. Bids for and awards of the contracts designated the places of manufacture, and manufacture elsewhere was forbidden.[8] In the plants so specified, notices required by the contract were posted,[9] and there the petitioner admitted an obligation and apparently intended to comply with the Act and contract. The violations claimed in those plants are minor, if any; petitioner offered to adjust any violation found there and it has willingly furnished complete records and information as to those plants and those employed in them. But there ended, the petitioner claims, both the investigatory power of the Secretary and its obligation to make its records available.

The Secretary did not agree, and instituted an administrative proceeding against petitioner, charging violation

---

[8] The bid stated:

"Bidders must state in space provided below names and locations of the factories where manufacture of the item bid upon will be performed. The performing of any of the work contracted for in any place other than that named in the bid is prohibited unless the same is specifically approved in advance by the Contracting Officer. If more than one place of manufacture is named, the quantity to be manufactured in each place must be given."

A typical statement in response is:

Names and locations of factories:	*Quantities*
"George F. Tabernacle" Factory (item 1).....	133,524 pairs
East side of Washington Street (item 2).....	182,256 pairs
(South of corner Susquehanna Street), Binghamton, N. Y., (total items 1 and 2).....	315,780 pairs

A typical notice of award stated:

For 133,524 pairs Shoes, Service; Special Type "B" with Full Middle sole and Rubber Heel; 182,256 pairs Shoes, Service, Special Type "B," with Corded Rubber Sole and Uncorded Rubber Heel.

To be manufactured at or supplied from Geo. F. Tabernacle,
(Name and location of plants)
Binghamton, N. Y.

[9] Article 18 (g).

of the stipulations in the contract by virtue of payments by petitioner of less than the minimum wages determined by her on December 21, 1937, for the "manufacture or supply of men's welt shoes," and of failure to make required additional payments for overtime work, in other and physically separate plants owned and operated by the petitioner. In those plants, it manufactured parts such as counters and rubber heels, tanned leather for uppers and soles, and made cartons for packaging shoes for the Government, as well as for its civilian customers. The subpoena in question issued in this proceeding called for records chiefly relating to payrolls in such plants, and as to them the petitioner refused to comply.

To obtain the compliance to the subpoena which petitioner refused, the Secretary had resort to the District Court as provided by § 5, alleging the foregoing facts and that "following an investigation by representatives of the Department of Labor, and it having appeared to the plaintiff upon the basis of such investigation that defendant" had violated these stipulations of the contracts, she commenced such proceeding; and that "plaintiff has reason to believe, and said amended (administrative) complaint alleges, that the persons employed" and alleged to have been underpaid "in its Calfskin Tannery, Upper Leather Tannery, Sole Leather Tannery, Paracord Factory, Sole Cutting Department (Johnson City), Sole Cutting Department (Endicott), Counter Department (Johnson City), and Carton Department (Johnson City) were employed by it in performance of the contracts specified," and that such allegations were denied by the answer in the administrative proceedings.

The Corporation pleaded to the District Court its ownership and management of the plants in question and that the rubber heels and soles, the counters, cartons, and all except a portion of the leather soles "used in the manufacture" of the government footwear, "were manufac-

tured" in its several separate plants or departments. It also set forth in full its answer in the administrative proceeding and reasons why it considered "arbitrary, artificial, unreasonable, discriminatory, and capricious" the ruling of the Secretary that the Act and contract applied to the plants other than those specifically named in the contracts. It denied that the payroll and similar records sought as to such plants were relevant to the determination of any matter confided to the Secretary's determination.

The District Court denied the Secretary's motion on the pleadings and accompanying affidavits for an enforcement order, overruled her contention that it was for her to decide this issue in the administrative proceeding, and set the case down for trial on the question of whether the Act and contracts under the circumstances covered the separate plants.

We think that the admitted facts left no doubt that under the statute determination of that issue was primarily the duty of the Secretary.

The Act directs the Secretary to administer its provisions. It is not an Act of general applicability to industry. It applies only to contractors who voluntarily enter into competition to obtain government business on terms of which they are fairly forewarned by inclusion in the contract. Its purpose is to use the leverage of the Government's immense purchasing power to raise labor standards.

Congress submitted the administration of the Act to the judgment of the Secretary of Labor, not to the judgment of the courts.[10] One of her principal functions is the conclusive determination of questions of fact for the guidance of procurement officers in withholding awards of govern-

[10] Cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, and cases there cited.

ment contracts to those she finds to be violators for three years from the date of the breach.

The matter which the Secretary was investigating and was authorized to investigate was an alleged violation of this Act and these contracts. Her scope would include determining what employees these contracts and the Act covered. It would also include whether the payments to them were lower than the scale fixed pursuant to the Act. She could not perform her full statutory duty until she examined underpayments wherever the coverage extended, because underpayment is an indispensable, albeit not the only, element of proof of violation. It is the only basis on which she can compute liquidated damage as she is required to do, and it is necessary to find the date of the last underpayment to fix the beginning of the three-year period of disqualification for further contracts. Thus the payrolls are clearly related to the violation. Indeed, the underpayment is itself the violation under investigation.

Of course another indispensable element of violation is that the underpaid employee be included within the benefits of the Act and contracts. This, too, was a matter under investigation in the administrative proceeding. But because she sought evidence of underpayment before she made a decision on the question of coverage and alleged that she "had reason to believe" the employees in question were covered, the District Court refused to order its production, tried the issue of coverage itself, and decided it against the Secretary. This ruling would require the Secretary, in order to get evidence of violation, either to allege she had decided the issue of coverage before the hearing or to sever the issues for separate hearing and decision. The former would be of dubious propriety, and the latter of doubtful practicality. The Secretary is given no power to investigate mere coverage, as such, or to make findings thereon except as incident to trial of the issue of violation. No doubt she would have discretion to take

up the issues of coverage for separate and earlier trial if she saw fit. Or, in a case such as the one revealed by the pleadings in this one, she might find it advisable to begin by examining the payroll, for if there were no underpayments found, the issue of coverage would be academic. On the admitted facts of the case, the District Court had no authority to control her procedure or to condition enforcement of her subpoenas upon her first reaching and announcing a decision on some of the issues in her administrative proceeding.

Nor was the District Court authorized to decide the question of coverage itself. The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act, and it was the duty of the District Court to order its production for the Secretary's consideration. The Secretary may take the same view of the evidence that the District Court did, or she may not. The consequence of the action of the District Court was to disable the Secretary from rendering a complete decision on the alleged violation as Congress had directed her to do, and that decision was stated by the Act to be conclusive as to matters of fact for purposes of the award of government contracts. Congress sought to have the procurement officers advised by the experience and discretion of the Secretary rather than of the District Court. To perform her function she must draw inferences and make findings from the same conflicting materials that the District Court considered in anticipating and foreclosing her conclusions.

The petitioner has advanced many matters that are entitled to hearing and consideration in its defense against the administrative complaint, but they are not of a kind that can be accepted as a defense against the subpoena.[11]

[11] These relate to: the meaning of the contract and the Act as implemented by administrative rulings in existence at the time of the making and performance of the contract; the question of possible retro-

The subpoena power delegated by the statute as here exercised is so clearly within the limits of Congressional authority that it is not necessary to discuss the constitutional questions urged by the petitioner, and on the record before us the cases on which it relies [12] are inapplicable and do not require consideration.

Affirmed.

MR. JUSTICE MURPHY, dissenting:

Because of the varied and important responsibilities of a quasi-judicial nature that have been entrusted to administrative agencies in the regulation of our political and economic life, their activities should not be subjected to unwarranted and ill-advised intrusions by the judicial branch of the government. Yet, if they are freed of all restraint upon inquisitorial activities and are allowed uncontrolled discretion in the exercise of the sovereign power of government to invade private affairs through the use of the subpoena, to the extent required or sought in situations like the one before us and other inquiries of much broader scope, under the direction of well-meaning but over-zealous officials they may at times become instruments of intolerable oppression and injustice. This is not to say that the power to enforce their subpoenas should never be entrusted to administrative agencies, but thus far Congress, for unstated reasons, has not seen fit to confer such authority upon any agency which it has

---

active effect of Rulings and Regulations No. 2, *supra*, note 7; the nature of petitioner's business organization; and practices of procurement, manufacture, storage, consumption and distribution obtaining at petitioner's plants.

[12] *Boyd* v. *United States*, 116 U. S. 616; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407; *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434; *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298.

created.[1] So here, while the Secretary of Labor is empowered to administer the Walsh-Healey Act, to "prosecute any inquiry necessary to his functions," and "to issue orders requiring the attendance and the testimony of witnesses and the production of evidence under oath," he alone cannot compel obedience of those orders. "Jurisdiction" so to do is conferred upon the district courts of the United States and it is our immediate task to delineate the proper function of those courts in the exercise of this jurisdiction.[2] Specifically the question is: What is the duty of the courts when the witness or party claims the proceeding is without authority of law?

---

[1] The disregard of subpoenas issued by some agencies is punishable by fine and imprisonment in a criminal proceeding, but apparently no federal agency has ever been given the power to punish disobedience as a contempt of its authority. (See Final Report of the Attorney General's Committee on Administrative Procedure, Appendix K.) The common method of enforcing subpoenas is to punish disregard of the subpoena as contempt of the issuing body. It has been held in some states that the power to punish for contempt cannot be conferred upon a body of a non-judicial character. See *Langenberg* v. *Decker,* 131 Ind. 471, 31 N. E. 190; *In re Whitcomb,* 120 Mass. 118, 21 Am. Rep. 502. Contra, *In re Hayes,* 200 N. C. 133, 156 S. E. 791. Compare statements in *Interstate Commerce Comm'n* v. *Brimson,* 154 U. S. 447, at 485 and 489.

[2] Section 5 of the Act provides in part: "In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; . . ."

Criminal sanctions are not provided.

This Court, in recognition of the drastic nature of the subpoena power and the possibilities of severe mischief inherent in its use, has insisted that it be kept within well-defined channels. Cf. *Boyd* v. *United States,* 116 U. S. 616; *Hale* v. *Henkel,* 201 U. S. 43; *Federal Trade Comm'n* v. *American Tobacco Co.,* 264 U. S. 298; *Cudahy Packing Co.* v. *Holland,* 315 U. S. 357, 363. In conditioning enforcement of the Secretary's administrative subpoenas upon application therefor to a district court, Congress evidently intended to keep the instant subpoena power within limits, and clearly must have meant for the courts to perform more than a routine ministerial function in passing upon such applications. If this were not the case, it would have been much simpler to lodge the power of enforcement directly with the Secretary, or else to make disregard of his subpoenas a misdemeanor. So we have said that "appropriate defense may be made" to such an application for enforcement. *Myers* v. *Bethlehem Corp.,* 303 U. S. 41, 49.

The Government concedes that the district courts are more than mere rubber stamps of the agencies in enforcing administrative subpoenas and lists as examples of appropriate defenses, claims that a privilege of the witness, like that against self-incrimination, would be violated; [3] or that the subpoena is unduly vague or unreasonably oppressive; [4] or that the hearing is not of the kind authorized; [5] or that the subpoena was not issued by the person vested with the power; [6] or that it is plain on the pleadings that the evidence sought is not germane to any lawful subject of inquiry. But the Government insists that the issue

[3] Cf. *Boyd* v. *United States,* 116 U. S. 616.

[4] Cf. *Hale* v. *Henkel,* 201 U. S. 43; *Federal Trade Comm'n* v. *American Tobacco Co.,* 264 U. S. 298.

[5] Cf. *Harriman* v. *Interstate Commerce Comm'n,* 211 U. S. 407; *Ellis* v. *Interstate Commerce Comm'n,* 237 U. S. 434.

[6] Cf. *Cudahy Packing Co.* v. *Holland,* 315 U. S. 357.

of "coverage," i. e., whether the Act extends to plants of petitioner's establishment which manufactured materials used in making complete shoes but not named in the contracts, is not a proper ground for attack in this case. I think it is.

If petitioner is not subject to the Act as to the plants in question, the Secretary has no right to start proceedings or to require the production of records with regard to those plants. In other words, there would be no lawful subject of inquiry, and under present statutes giving the courts jurisdiction to enforce administrative subpoenas, petitioner is entitled to a judicial determination of this issue before its privacy is invaded. Cf. *Interstate Commerce Comm'n* v. *Brimson*, 154 U. S. 447, 479; *Harriman* v. *Interstate Commerce Comm'n*, 211 U. S. 407; *Ellis* v. *Interstate Commerce Comm'n*, 237 U. S. 434; *General Tobacco & Grocery Co.* v. *Fleming*, 125 F. 2d 596.

Of course, the courts should not arrogate to themselves the functions of administrative agencies. It is trite but truthful to say that administrative agencies render valuable and very necessary services in the solution of the complex governmental and economic problems of our time. In the making of investigations, the determination of policy, the collection of evidence, and its current evaluation, preparatory or incidental to administrative action, experience and special training are valuable aids. But after all, as pointed out by Gellhorn, Federal Administrative Proceedings, pp. 27–29, the administrator is only an expert ex-officio.[7] Just as the courts should not usurp

[7] "When reference is made to the 'expert administrative agency,' it is surely not intended to mean that the necessary expertness is lodged in the head or heads of the agency or that they, in their own person, possess every *expertise* needed for the informed discharge of the manifold duties imposed upon the modern administrative organization. . . . We must look beyond the heads to find the talents which make the agency expert in its assigned tasks. This is a central

the prerogatives of the agencies, neither should the word "administrative" and its companion "expertness" overawe them into abdicating responsibilities imposed upon them by Congress.

The legal propriety of instituting proceedings is a question which an agency is authorized if not obliged to determine, provisionally at least, before instituting the proceedings. But while the decision may be the agency's in the first place, it is not a decision which it is ordinarily more competent to make than the courts and judges, who (at least in theory) should be more qualified than administrative officers, many of whom are laymen, to determine whether a statute extends to a certain set of facts. If the preliminary determinations by an agency of the scope of its power and jurisdiction are sacrosanct, why did Congress subject their final determination to judicial scrutiny, as it has done in the Walsh-Healey Act with regard, at least, to the enforcement of the wage and hour requirements on behalf of the employees? And if the courts are qualified to pass final judgment on the "quasi-judicial" findings and conclusions of the administrators, which they are ordinarily permitted to do to a greater or lesser extent,[8] they are no less qualified to determine whether the evidence which moved the administrator to enter a formal complaint is sufficient in law to show probable cause that the statute under which the administrator is proceeding covers the case. Without such a showing of probable cause, the district courts ought not to be required as a matter of mere routine to lend their aid to the proceeding by compelling obedience to the subpoena.

---

reality. . . . The administrative agency as now organized is a vehicle for bringing the judgments of numerous specially qualified officials to bear upon a single problem."

[8] The Walsh-Healey Act provides in § 5 that the Secretary's findings of fact shall be conclusive in any court of the United States "if supported by the preponderance of the evidence."

It is to be understood, of course, that if the matter is in doubt and if there is a reasonable legal basis for the charge, the court should not substitute its judgment on the law or the facts for that of the agency. The court's duty is to assist the agency in the performance of its functions and the discharge of its responsibilities, in the absence of a clear and convincing showing that it is proceeding without legal warrant. But it is hardly its duty to assist in the face of such a showing. So, when it becomes necessary for the Secretary in the course of a proceeding under the Walsh-Healey Act to appeal to the district court for the exercise of its jurisdiction over subpoena enforcement, it is within the competence and authority of the court to inquire and satisfy itself whether there is probable legal justification for the proceeding, before it exercises its judicial authority to require a witness or a party to reveal his private affairs or be held in contempt.

Considerations of practical advantage and elementary justice support this conclusion. Such a rule carries out what must have been the statutory intent, and would permit a timely and reasonable measure of judicial control over administrative use of the drastic subpoena power, subject to prompt review if the control were abused to the detriment of the agency. If administrative agencies may be temporarily handicapped in some instances by frivolous objections, the public will be protected in other instances against the needless burden and vexation of proceedings which may be instituted without legal justification. There is an obvious difference between the present case, wherein the district court exercises a jurisdiction expressly given to it by the statute, and those cases, such as *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, and *Newport News Co.* v. *Schauffler*, 303 U. S. 54, in which without express statutory authority a court is asked to enjoin an administrative proceeding as being contrary to law. Indeed, the very difference is noted in the *Myers* case, where it is said that

"appropriate defense may be made" to an application for the enforcement of an administrative subpoena. 303 U.S. at 49.

Just how much of a showing of statutory coverage should be required to satisfy the district court, and just how far it should explore the question, are difficult problems, to be solved best by a careful balancing of interests and the exercise of a sound and informed discretion. If the proposed examination under the subpoena or the proceeding itself would be relatively brief and of a limited scope, any doubt should ordinarily be resolved in favor of the agency's power. If it promises to be protracted and burdensome to the party, a more searching inquiry is indicated. A formal finding of coverage by the agency, which the Secretary did not make here, should be accorded some weight in the court's deliberation, unless wholly wanting in either legal or factual support, but it should not be conclusive. In short, the responsibility resting upon the court in this situation is not unlike that of a committing magistrate on preliminary examination to determine whether an accused should be held for trial.

With these considerations in mind, let us turn to the facts of this case. Petitioner has willingly complied with all demands of the Secretary relating to the plants of its establishment, named in the contracts, in which the shoes were manufactured. It resists the application for enforcement of the subpoenas directing the production of records of other plants, not named in the contracts, in which some component parts for the shoes were manufactured, on the ground that the Walsh-Healey Act does not extend to those plants. It is true that petitioner voluntarily entered into the contracts with the Government, but those referred only to the specific plants where the finished product was made. And, it was not until 1939, after all the contracts were completed, that the Secretary issued rulings specifically deal-

ing with "integrated establishments." [9] The mere fact that petitioner voluntarily contracted with reference to some plants does not necessarily mean that the Secretary is free to investigate petitioner's entire business without let or hindrance. That depends upon whether or not the Act extends to those other plants. Petitioner was entitled to have this question determined by the district court before the subpoena was enforced over its objection.

In view of the opinion of the Court, there is no reason for discussing whether the district court correctly construed the scope of the Walsh-Healey Act, or whether it conducted its examination in accordance with the principles I have attempted to outline in the course of this opinion. It is enough to say that I am of opinion that under the facts of this case the district court should not be compelled mechanically to enforce the Secretary's subpoena, in the exercise of its statutory jurisdiction. It should first satisfy itself that probable cause exists for the Secretary's contention that the Act covers the plants in question.

MR. JUSTICE ROBERTS joins in this dissent.

[9] Rulings and Interpretations under the Walsh-Healey Public Contracts Act, No. 2.

HOLLEY *v.* LAWRENCE, WARDEN.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 600. Decided January 18, 1943.

The decision of the state court that failure to offer the testimony of a wife at the trial of her husband barred a later claim of the unconstitutionality of a state statute making such testimony incompetent, *held* a non-federal ground adequate to support the judgment.

Appeal dismissed.

Mr. Benjamin E. Pierce for appellant.

PER CURIAM.

The motion for leave to proceed in forma pauperis is granted. The Court has examined all the federal questions raised by appellant. In so far as the appeal challenges the validity of Georgia Code § 38–1604, which makes incompetent the testimony of a wife at the trial of her husband, the judgment of the court below rests upon a non-federal ground adequate to support it, namely, that the failure to tender such testimony at the trial barred any later claim of the alleged constitutional right (*Atlantic Coast Line R. Co.* v. *Mims*, 242 U. S. 532, 535). The Court finds that no other federal question presented by the appeal warrants review by this Court. The appeal is accordingly dismissed.

Dismissed.

Syllabus.

AMERICAN MEDICAL ASSOCIATION *v.* UNITED STATES.*

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

No. 201. Argued December 11, 14, 1942.—Decided January 18, 1943.

Petitioners, the American Medical Association and the Medical Society of the District of Columbia (corporations), were indicted and convicted of conspiring to violate § 3 of the Sherman Act by restraining trade or commerce in the District of Columbia. Two unincorporated associations and twenty-one individuals (some of whom were officers or employees of one or the other of the petitioners; others were physicians practicing in the District of Columbia and members of the petitioners) were codefendants but were acquitted by directed verdict or found not guilty. The indictment charged that, to prevent Group Health—a nonprofit corporation organized by Government employees to provide medical care and hospitalization on a risk-sharing prepayment basis, and employing full-time physicians on a salary basis—from carrying out its objects, the defendants conspired to coerce practicing physicians, members of the petitioners, from accepting employment under Group Health; to restrain practicing physicians, members of the petitioners, from consulting with Group Health's doctors who might desire to consult with them; and to restrain hospitals in and about Washington from affording facilities for the care of patients of Group Health's physicians. *Held:*

1. It is unnecessary here to decide, and the Court does not decide, whether a physician's practice of his profession constitutes trade under § 3 of the Sherman Act. P. 528.

2. Group Health is engaged in "trade" within the meaning of § 3 of the Sherman Act, notwithstanding that it is coöperative and procures service and facilities on behalf of its members only. P. 528.

3. The indictment in this case charges a conspiracy to restrain and obstruct the business of Group Health, and therefore a conspiracy in restraint of trade or commerce in violation of § 3 of the Sherman Act. P. 528.

---

*Together with No. 202, *Medical Society of the District of Columbia* v. *United States,* also on writ of certiorari, *post,* p. 613, to the United States Court of Appeals for the District of Columbia.

4. The fact that the defendants were physicians and medical organizations is of no significance, if the purpose and effect of their conspiracy was obstruction and restraint of the business of Group Health, since § 3 prohibits "any person" from imposing the proscribed restraints. P. 528.

5. The courts below correctly construed the indictment in this case as charging a single conspiracy to obstruct and restrain the business of Group Health—the recited "purposes" constituting merely different steps toward the accomplishment of that end—and the cause was submitted to the jury on this theory. Petitioners' challenge of the validity of the general verdict of guilty—based in effect on the contention that the indictment charged five separate conspiracies, and that the defendants were entitled to have the trial court rule upon the sufficiency in law of each of the charges—therefore fails. P. 532.

6. The evidence in the case was sufficient for submission to the jury. P. 533.

7. The dispute between petitioners (and their members) and Group Health (and its members) was not one "concerning terms and conditions of employment," and therefore petitioners' activities were not exempted, by § 20 of the Clayton Act as expanded by § 13 of the Norris-LaGuardia Act, from the operation of the Sherman Act. P. 533.

130 F. 2d 233, affirmed.

CERTIORARI, *post*, p. 613, to review the affirmance of convictions for violation of the Sherman Antitrust Act.

Messrs. Seth W. Richardson and *William E. Leahy*, with whom *Messrs. Edward M. Burke* and *Charles S. Baker* were on the brief, for petitioners.

The word "trade" in § 3 of the Sherman Act does not include the practice of medicine and the rendering of medical services as described in the indictment, because they are not "commercial" in nature. The natural meaning and judicial definitions of the word "trade" exclude the professions. *Federal Club* v. *National League*, 259 U. S. 200; *Federal Trade Comm'n* v. *Raladam Co.*, 283 U. S. 643.

Apex Hosiery Co. v. *Leader,* 310 U. S. 469, held in substance and effect that no activity could be in "trade" within the meaning of either § 1 or § 3 of the Sherman Act unless it was a "commercial" activity.

None of the five activities alleged to have been restrained were "trade" under the Sherman Act. Group Health was organized under sections of the District of Columbia Code providing for the incorporation of charitable, educational, and religious associations. Its sole activities are to collect dues from its members, pay rent for and maintain a suite of doctors' offices, with the usual appurtenances thereto, employ doctors to render medical services, within limits, to its members and to pay, within limits, the hospital bills of its members. Such activities are not "commercial" or "business" activities.

The members of Group Health are not engaged in a "commercial" or "business" activity; the activity of the doctors employed by Group Health is not "commercial" or "business" activity; the practice of medicine by the medical profession generally is not a "commercial" or "business" activity; and the Washington hospitals, or that part of their activities here involved, are not "commercial" or "business" activities.

If any one of the five activities alleged to have been restrained was not "trade" under § 3 of the Sherman Act, then no one is able to determine whether or not the jury returned its verdict based on a restraint of an activity that was not "trade" under § 3 of the Sherman Act. *Stromberg* v. *California,* 283 U. S. 359, 367–370; *Thornhill* v. *Alabama,* 310 U. S. 88, 96; *Garland* v. *Davis,* 4 How. 131; *Baltimore & Ohio R. Co.* v. *Reeves,* 10 F. 2d 329, 330, 331; *Patton* v. *Wells,* 121 F. 337, 340; *St. Louis, I. M. & S. Ry. Co.* v. *Needham,* 63 F. 107, 113, 114; *Manderville* v. *Cookenderfer,* 3 Cranch, C. C. (3 D. C.) 257, Fed. Cas. No. 9,009. Furthermore, if any one of the five activities alleged to have been restrained was not "trade"

under § 3 of the Sherman Act, the court erroneously charged the jury that restraint on any one of the five classes alleged to have been restrained was sufficient to convict. *Stromberg* v. *California, supra; Maryland* v. *Baldwin,* 112 U. S. 490, 493.

The word "restraint" in § 3 of the Sherman Act does not include any restraint that does not fix prices or suppress competition to the extent that market prices are substantially affected to the injury of the public. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469; *International Union* v. *Donnelly Garment Co.,* 119 F. 2d 892, 898; *Gundersheimer's* v. *Bakery Workers' Union,* 73 App. D. C. 352, 353, 119 F. 2d 205, 206; *United States* v. *Local 807,* 118 F. 2d 684–689, affirmed 315 U. S. 521; *International Assn.* v. *Pauly Jail Bldg. Co.,* 118 F. 2d 615, 621; *United States* v. *Gold,* 115 F. 2d 236–238; *Konecky* v. *Jewish Press,* 288 F. 179; and *Swartz* v. *Forward Assn.,* 41 F. Supp. 294.

The indictment herein did not attempt to charge price fixing or suppression of competition that affected market prices to the injury of the public. No such contention ever appeared until after the opinion in the *Apex* case.

A dispute concerning terms and conditions of employment of doctors, which was within the Clayton and Norris-LaGuardia Acts, was involved, in which petitioners were interested. The case is therefore not within the Sherman Act.

The dispute concerning terms and conditions of employment of doctors arose in the following manner: When a committee of the executive committee of the District Society and representatives of Group Health conferred for the first time, a controversy arose, the matrix of which was the terms and conditions of employment by Group Health of members of the District Society to perform Group Health's corporate medical work. Group Health rejected an offered basis of employment of members of the District Society, insisted upon dictating the terms, con-

ditions, and method of payment of compensation and of employing members of the District Society, regardless of whether Group Health's plans were illegal or in conflict with the constitution and employment rules of the District Society. This controversy over terms and conditions of employment continued throughout the indictment period and was involved in all of the activities charged or proven. See *United States* v. *Hutcheson,* 312 U. S. 219; *United States* v. *Carrozzo,* 37 F. Supp. 191, affirmed, 313 U. S. 508; *New Negro Alliance* v. *Sanitary Grocery Co.,* 303 U. S. 552; *Drivers Union* v. *Lake Valley Co.,* 311 U. S. 91; *Gundersheimer's* v. *Bakery Workers' Union,* 73 App. D. C. 352, 353, 119 F. 2d 205, 206; *International Union* v. *Donnelly Garment Co.,* 119 F. 2d 892, 898; *Internationl Assn.* v. *Pauly Jail Bldg. Co.,* 118 F. 2d 615, 621.

Mr. John Henry Lewin and *Assistant Attorney General Arnold,* with whom *Solicitor General Fahy* and *Messrs. Charles H. Weston* and *Richard S. Salant* were on the brief, for the United States.

Petitioners conspired to boycott Group Health in order to prevent it from marketing medical services in competition with petitioners' doctor members. Such a boycotting combination to exclude a competitor from the market is a restraint of trade prohibited by the Sherman Act. The decisions have not been rested upon the ground that there had been price-fixing or that competition had been suppressed to the extent that market prices were substantially affected. *Montague & Co.* v. *Lowry,* 193 U. S. 38; *Straus* v. *American Publishers' Assn.,* 231 U. S. 222; *Eastern States Retail Lumber Dealers' Assn.* v. *United States,* 234 U. S. 600; *Binderup* v. *Pathe Exchange,* 263 U. S. 291; *Paramount Famous Lasky Corp.* v. *United States,* 282 U. S. 30; *United States* v. *First National Pictures,* 282 U. S. 44; *Sugar Institute* v. *United*

States, 297 U. S. 553, 587–589, 601; *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U. S. 457.

Apex Hosiery Co. v. *Leader*, 310 U. S. 469, did not hold that the restraints of trade condemned by the Sherman Act are limited to those involving price-fixing or a suppression of competition which substantially affects market prices. The case held only that the restraints prohibited by the Act are those which suppress or substantially restrict competition in the marketing of goods or services and price-fixing was referred to merely as one conspicuous example of the type of restraint declared illegal. This interpretation of the *Apex* case is confirmed by *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U. S. 457, which held that an intent to increase prices is not "an ever-present essential" of conduct constituting a violation of the Sherman Act.

The conspiracy to prevent Group Health from successfully carrying on its business of furnishing medical service to members of the consuming public was a restraint of trade prohibited by the Sherman Act. The Act applies to restraints upon competition in providing services as well as goods and Congress cannot be presumed to have intended to exclude consumers of medical service from the protection extended generally to purchasers and consumers of goods or services.

Group Health was engaged in a large-scale undertaking to provide medical service in exchange for payment of dues. This exchange of service for money is trade in the primary and most usual meaning of the word. The fact that Group Health is a non-profit corporation is immaterial. Its business operations were trade, although carried on for the benefit of its consumer-members rather than for the benefit of stockholders.

The district court advised the jury that the indictment alleged that petitioners conspired to restrain Group Health, the doctors on its staff, other doctors, and the

Washington hospitals. But it further advised the jury that the indictment alleged that the "plan and purpose" of the conspiracy was to "hinder and obstruct" Group Health and the doctors on its staff, in certain specified ways.

The jury, in order to convict, was required to find not only that there was a conspiracy to restrain trade in one of the several ways mentioned by the court (*i. e.*, to restrain Group Health, its doctors, other doctors, or the hospitals) but also that the plan and purpose of the conspiracy was to obstruct and interfere with Group Health in its business of providing medical care for its members. The jury was instructed, in other words, that restraint upon the business of Group Health was an essential element of the conspiracy charged against petitioners.

Under the district court's charge to the jury, petitioners' convictions must be sustained if the restraints upon the trade of Group Health are within the ban of the statute. But if the application of the Act to restraints upon individual doctors in the pursuit of their calling is an essential issue in this case, such restraints are within the scope of the common-law concept, embodied in the Sherman Act, of restraint of trade.

Section 20 of the Clayton Act grants immunity only where there is dispute concerning some question of employment involving the employer-employee relationship. Petitioners cannot subsume themselves under the class of employee representatives under the Act since petitioners' members were not employees and did not want to be employees. Rather, petitioners are analogous to a trade association representing independent business units. Nor was the controversy itself of a kind contemplated by the Clayton Act. The dispute between petitioners and Group Health was as to whether the latter's method of providing medical services should be permitted to operate. A controversy of this kind, between competitors and

concerning competition, is not within the scope of § 20. *Columbia River Packers Assn.* v. *Hinton,* 315 U. S. 143. A further factor establishing the inapplicability of the Clayton Act is that, even assuming that petitioners were "employee representatives," there was no employer-employee relationship in respect of Group Health and its doctors. Group Health's doctors are independent contractors, not employees. Therefore the relationship which was of concern to Congress in its enactment of the Clayton and Norris-LaGuardia Acts is entirely lacking here.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Petitioners have been indicted and convicted of conspiring to violate § 3 of the Sherman Act,[1] by restraining trade or commerce in the District of Columbia. They are respectively corporations of Illinois and of the District of Columbia. Joined with them as defendants were two unincorporated associations and twenty-one individuals, some of whom are officers or employes of one or other of the petitioners, the remainder being physicians practicing in the District of Columbia and members of the petitioners serving, as to some of them, on various committees of the petitioners having to do with professional ethics and with the practice of medicine by petitioners' members.

For the moment it is enough to say that the indictment charged a conspiracy to hinder and obstruct the operations of Group Health Association, Inc., a nonprofit corporation organized by Government employes to provide medical care and hospitalization on a risk-sharing prepayment basis. Group Health employed physicians on a full time salary basis and sought hospital facilities for the treatment of members and their families. This plan was contrary to the code of ethics of the petitioners. The in-

[1] Act of July 2, 1890, § 3, c. 647, 26 Stat. 209, 15 U. S. C. § 3.

dictment charges that, to prevent Group Health from carrying out its objects, the defendants conspired to coerce practicing physicians, members of the petitioners, from accepting employment under Group Health, to restrain practicing physicians, members of the petitioners, from consulting with Group Health's doctors who might desire to consult with them, and to restrain hospitals in and about the City of Washington from affording facilities for the care of patients of Group Health's physicians.

The District Court sustained a demurrer to the indictment on the grounds, amongst others, that neither the practice of medicine nor the business of Group Health is trade as the term is used in the Sherman Act.[2] On appeal the Court of Appeals reversed, holding that the restraint of trade prohibited by the statute may extend both to medical practice and to the operations of Group Health.[3]

The case then went to trial in the District Court. Certain defendants were acquitted by direction of the judge. As to the others, the case was submitted to the jury, which found the petitioners guilty and all the other defendants not guilty. From judgments of conviction the petitioners appealed to the Court of Appeals, which reiterated its ruling as to the applicability of § 3 of the Sherman Act, considered alleged trial errors, and affirmed the judgments.[4]

We granted certiorari limited to three questions which we thought important: 1. Whether the practice of medicine and the rendering of medical services as described in the indictment are "trade" under § 3 of the Sherman Act. 2. Whether the indictment charged or the evidence

[2] *United States* v. *American Medical Association,* 28 F. Supp. 752.

[3] *United States* v. *American Medical Association,* 72 App. D. C. 12, 110 F. 2d 703, 710, 711.

[4] *American Medical Association* v. *United States,* 76 U. S. App. D. C. 70, 130 F. 2d 233.

proved "restraints of trade" under § 3 of the Sherman Act. 3. Whether a dispute concerning terms and conditions of employment under the Clayton and Norris-La-Guardia Acts was involved, and, if so, whether petitioners were interested therein, and therefore immune from prosecution under the Sherman Act.

First. Much argument has been addressed to the question whether a physician's practice of his profession constitutes trade under § 3 of the Sherman Act. In the light of what we shall say with respect to the charge laid in the indictment, we need not consider or decide this question.

Group Health is a membership corporation engaged in business or trade. Its corporate activity is the consummation of the coöperative effort of its members to obtain for themselves and their families medical service and hospitalization on a risk-sharing prepayment basis. The corporation collects its funds from members. With these funds physicians are employed and hospitalization procured on behalf of members and their dependents. The fact that it is coöperative, and procures service and facilities on behalf of its members only, does not remove its activities from the sphere of business.[5]

If, as we hold, the indictment charges a single conspiracy to restrain and obstruct this business it charges a conspiracy in restraint of trade or commerce within the statute. As the Court of Appeals properly remarked, the calling or occupation of the individual physicians charged as defendants is immaterial if the purpose and effect of their conspiracy was such obstruction and restraint of the business of Group Health. The court said:[6] "And, of

[5] Compare *Associated Press* v. *Labor Board,* 301 U. S. 103, 128–9; *In re Duty on Estate of Incorporated Council,* 22 Q. B. 279, 293; *Maryland & Virginia Milk Producers' Assn.* v. *District of Columbia,* 119 F. 2d 787, 790; *La Belle* v. *Hennepin County Bar Assn.,* 206 Minn. 73 App. D. C. 399, 119 F. 2d 787, 790; *La Belle* v. *Hennepin County Bar Assn.,* 206 Minn. 290, 294; 288 N. W. 788, 790.

[6] 110 F. 2d 711.

course, the fact that defendants are physicians and medical organizations is of no significance, for Sec. 3 prohibits 'any person' from imposing the proscribed restraints . . ." It is urged that this was said before this Court decided *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469. But nothing in that decision contradicts the proposition stated. Whether the conspiracy was aimed at restraining or destroying competition, or had as its purpose a restraint of the free availability of medical or hospital services in the market, the *Apex* case places it within the scope of the statute.[7]

Second. This brings us to consider whether the indictment charged, or the evidence proved, such a conspiracy in restraint of trade. The allegations of the indictment are lengthy and detailed. After naming and describing the defendants and the Washington hospitals, it devotes many paragraphs to a recital of the plan adopted by Group Health and alleges that, principally for economic reasons, and because of fear of business competition, the defendants have opposed such projects.

The indictment then recites the size and importance of the petitioners, enumerates means by which they can prevent their members from serving Group Health plans, or consulting with physicians who work for Group Health, and can prevent hospitals from affording facilities to Group Health's doctors.

In charging the conspiracy, the indictment describes the organization and operation of Group Health and states that, from January 1937 to the date of the indictment, the defendants, the Washington hospitals, and others cognizant of the premised facts, "have combined and conspired together for the purpose of restraining trade in the District of Columbia, . . ." In five paragraphs the pleading states the purposes of the conspiracy.

[7] Compare *Fashion Originator's Guild* v. *Federal Trade Commission* 312 U. S. 457, 465, 466, 467.

The first is the purpose of restraining Group Health from doing business; the second, that of restraining members of Group Health from obtaining adequate medical care according to Group Health's plan; the third, that of restraining doctors serving Group Health in the pursuit of their calling; the fourth, that of restraining doctors not on Group Health's staff from practicing in the District of Columbia in pursuance of their calling; and the fifth, that of restraining the Washington hospitals in the business of operating their hospitals.

After reciting certain of the proceedings and plans adopted to forward the conspiracy, the indictment alleges that the conspiracy, and the intended restraints which have resulted from it, have been effectuated "in the following manner and by the following means"; and alleges that the defendants have combined and conspired "with the plan and purpose to hinder and obstruct Group Health Association, Inc. in procuring and retaining on its medical staff qualified doctors and to hinder and obstruct the doctors serving on that staff from obtaining consultations with other doctors and specialists practicing in the District of Columbia." It states that, pursuant to this plan and purpose, the defendants have resorted to certain means to accomplish the end, and recounts them.

In another paragraph, the defendants are charged to have conspired with "the plan and purpose to hinder and obstruct Group Health Association, Inc. in obtaining access to hospital facilities for its members and to hinder and obstruct the doctors on the medical staff of Group Health from treating and operating upon their patients in Washington hospitals." It is alleged that, pursuant to this plan and purpose, defendants have done certain acts to deter hospitals with which they were connected and over which they exercised influence, from affording hospital facilities to Group Health's doctors.

The petitioners' contention is, in effect, that the indictment charges five separate conspiracies defined by their separate and recited purposes, namely, conspiracy to obstruct the business of Group Health, to obstruct its members from obtaining the benefit of its activities, to obstruct its doctors from serving it, to obstruct other doctors in the practice of their calling, and to restrain the business of Washington hospitals. The petitioners say that they were entitled to have the trial court rule upon the sufficiency in law of each of these charges and, as this was not done, the general verdict of guilty cannot stand. They urge that even though some of the named purposes relate to the business of Group Health, and that business be held trade within the meaning of the statute, yet, as the practice of medicine by doctors not employed by Group Health is not trade, and the operations of Washington hospitals are not trade, the last two purposes specified cannot constitute violations of § 3 and the jury should have been so instructed. In this view they insist that the jury may have convicted them of restraining physicians unconnected with Group Health, or of restraining hospitals, and, if so, the verdict and judgment cannot stand.

If in fact the indictment charges a single conspiracy to obstruct and restrain the business of Group Health, and if the recited purposes are really only subsidiary to that main purpose or aim, or merely different steps toward the accomplishment of that single end, and if the cause was submitted to the jury on this theory, these contentions fail.

When the case first went to the Court of Appeals that tribunal construed the indictment as charging but a single conspiracy. It said: [8] "The charge, stated in condensed form, is that the medical societies combined and conspired to prevent the successful operation of Group Health's

[8] 110 F. 2d 711.

plan, and the steps by which this was to be effectuated were as follows: (1) to impose restraints on physicians affiliated with Group Health by threat of expulsion or actual expulsion from the societies; (2) to deny them the essential professional contacts with other physicians; and (3) to use the coercive power of the societies to deprive them of hospital facilities for their patients."

In the trial, the District Court conformed its rulings to this decision and submitted the case to the jury on the theory that the indictment charged but one conspiracy.

We think the courts below correctly construed the indictment. It is true that, in describing the conspiracy, five purposes are stated which the conspiracy was intended to further, but, in a later paragraph, still in the charging part of the instrument, it is alleged that the purpose was to hinder and obstruct Group Health in various ways and by various coercive measures, which are identical with the "purposes" before stated. The trial judge, after calling the jury's attention to the juxtaposition of these two formulations of the charge, added:

"These purposes, it is alleged, were to be attained by certain coercive measures against the hospitals and doctors designed to interfere with employment of doctors by Group Health and use of the hospitals by members of its medical staff and their patients. . . ."

In immediate context the judge added:

"To sustain that charge the Government must prove beyond a reasonable doubt that a conspiracy did in fact exist to restrain trade in the District in at least one of the several ways alleged, and according to the particular purpose and plan set forth."

At another point, the trial judge summarized the Government's claim that the evidence in the case showed opposition by the petitioners to Group Health and its plan; that they feared competition between the plan and the

organized physicians and that, to obstruct and destroy such competition, the petitioners conspired with certain officers and members and hospitals to prevent successful operation of Group Health's plan by imposing restraints upon physicians affiliated with Group Health, by denying such physicians professional contact and consultation with other physicians, and by coercing the hospitals to deny facilities for the treatment of their patients. Again the judge charged: "Was there a conspiracy to restrain trade in one or more of the ways alleged?" And again: "If it be true . . . that the District Society, acting only to protect its organization, regulate fair dealing among its members, and maintain and advance the standards of medical practice, adopted reasonable rules and measures to those ends, not calculated to restrain Group Health, there would be no guilt, though the indirect effect may have been to cause some restraint against Group Health."

We need add but a word as to the sufficiency of the proof to sustain the charge. The petitioners in effect challenge the sufficiency, in law, of the indictment. They hardly suggest that if the pleading charges an offense there was no substantial evidence of the commission of the offense. But, however the argument is viewed, we agree with the courts below that the case was one for submission to a jury. No purpose would be served by detailed discussion of the proofs.

Third. We hold that the dispute between petitioners and their members, and Group Health and its members, was not one concerning terms and conditions of employment within the Clayton [9] and the Norris-LaGuardia [10] Acts.

Section 20 of the Clayton Act, as expanded by § 13 of the Norris-LaGuardia Act, is the only legislation which

[9] 38 Stat. 730, §§ 6 and 20, 15 U. S. C. 17, 29 U. S. C. 52.

[10] 47 Stat. 70, §§ 4, 5, 6, 8 and 13, 29 U. S. C. §§ 104, 105, 106, 108 and 113.

can have any bearing on the case. Section 20 applies to cases between "an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment . . ."; and provides that none of the acts specified in the section shall "be considered or held to be violations of any law of the United States."

Section 13 of the Norris-LaGuardia Act defines a labor dispute as including "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." It also provides that "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 defined in this section) of 'persons participating or interested' therein (as defined in this section)."

Citing these provisions, the petitioners insist that their dispute with Group Health was as to terms and conditions

of employment of the doctors employed by Group Health since the District Medical Society objected to its members, or other doctors, taking employment under Group Health on the terms offered by that corporation. They assert that § 20 of the Clayton Act, as expanded by § 13 of the Norris-LaGuardia Act, includes all persons and associations involved in a dispute over terms and conditions of employment who are engaged in the same industry, trade, craft, or occupation, or have direct or indirect interests therein. And they rely upon our decisions in *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552, and *Drivers' Union* v. *Lake Valley Co.*, 311 U. S. 91, as bringing within the coverage of the acts a third party, even though that party be a corporation not in trade, and employers and employers' associations even though they be only indirectly interested in the controversy. They insist that as the petitioners and Group Health, its members and doctors, other doctors and the hospitals, were either directly or indirectly interested in a controversy which concerned the terms of employment of doctors by Group Health, the case falls within the exemption of the statutes and they cannot be held criminally liable for a violation of the Sherman Act.

It seems plain enough that the Clayton and Norris-LaGuardia Acts were not intended to immunize such a dispute as is presented in this case. Nevertheless, it is not our province to define the purpose of Congress apart from what it has said in its enactments, and, if the petitioners' activities fall within the classes defined by the acts, we are bound to accord petitioners, especially in a criminal case, the benefit of the legislative provisions.

We think, however, that, upon analysis, it appears that petitioners' activities are not within the exemptions granted by the statutes. Although the Government asserts the contrary, we shall assume that the doctors having

contracts with Group Health were employes of that corporation. The petitioners did not represent present or prospective employes. Their purpose was to prevent anyone from taking employment under Group Health. They were interested in the terms and conditions of the employment only in the sense that they desired wholly to prevent Group Health from functioning by having any employes. Their objection was to its method of doing business. Obviously there was no dispute between Group Health and the doctors it employed or might employ in which petitioners were either directly or indirectly interested.

In truth, the petitioners represented physicians who desired that they and all others should practice independently on a fee for service basis, where whatever arrangement for payment each had was a matter that lay between him and his patient in each individual case of service or treatment. The petitioners were not an association of employes in any proper sense of the term. They were an association of individual practitioners each exercising his calling as an independent unit. These independent physicians, and the two petitioning associations which represent them, were interested solely in preventing the operation of a business conducted in corporate form by Group Health. In this aspect the case is very like *Columbia River Packers Assn.* v. *Hinton,* 315 U. S. 143. What was there decided requires a holding that the petitioners' activities were not exempted by the Clayton and the Norris-LaGuardia Acts from the operation of the Sherman Act.

The judgments are

Affirmed.

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

Syllabus.

UNITED STATES EX REL. MARCUS ET AL. *v.* HESS ET AL.*

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

No. 173. Argued December 10, 1942.—Decided January 18, 1943.

1. Section 5438 of the Revised Statutes, which subjects to the penalties therein prescribed "Every person who . . . causes to be presented, for payment . . . any claim upon or against the Government of the United States, . . . knowing such claim to be . . . fraudulent . . .," *held* applicable to contractors who, by collusive bidding, obtained contracts with municipalities and school districts of a State for work on federal Public Works Administration projects, and who were paid for their work under the contracts largely with funds granted by the federal Public Works Administrator. P. 542.

   Competitive bidding was a federal requirement; all bidders were fully advised that these were P. W. A. projects; and many if not most of the contractors certified that their bids were "genuine and not sham or collusive." While payment itself, in the sense of the direct transferring of checks, was done in the name of local authorities, monthly estimates for payment were submitted by the contractors to the local sponsors on P. W. A. forms which showed the Government's participation in the work and called attention to other federal statutes prohibiting fraudulent claims. It was a prerequisite to the contractors' payment by the local sponsors that these estimates be filed, transmitted to, and approved by, the P. W. A. authorities. Payment was then made from a joint construction bank account containing both federal and local funds. The work was done under constant federal supervision.
2. R. S. § 5438 is to be construed, not with the "utmost strictness," but according to its fair intendment. P. 541.
3. The substantive language of R. S. § 5438 can not be said to have one meaning in criminal prosecutions and another in *qui tam* suits. P. 542.
4. The first, second, and third clauses of R. S. § 5438, taken together, indicate a purpose to reach any person who knowingly assisted in causing the Government to pay claims which were grounded in fraud, without regard to whether the person had direct contractual relations with the Government. P. 544.

*See also Ostrager's case, *post*, p. 562.

503873—43——41

5. The *qui tam* action which R. S. §§ 3491–3493 authorizes "any person" to bring for the recovery of the sums which R. S. § 3490 provides shall be forfeited and paid to the United States by violators of R. S. § 5438, is not barred by the fact that the offenders have been indicted and, on pleas of *nolo contendere*, fined for defrauding the Government in connection with the same transactions; nor by the fact that the complainant may have obtained his information from the indictment and may have contributed nothing to the discovery of the crime. P. 545.
6. Considerations of policy in permitting *qui tam* actions in the circumstances of this case are for Congress and not the courts. P. 546.
7. A respondent on certiorari may urge in support of the judgment a ground which was rejected by the District Court and not considered in the Circuit Court of Appeals. P. 548.
8. Persons who have previously been indicted and convicted under 18 U. S. C. § 88 for conspiracy to defraud the Government, are not subjected to double jeopardy in violation of the Fifth Amendment by a subsequent *qui tam* action under R. S. §§ 3490–3493, though arising out of the same transactions. P. 548.
9. The proceedings under R. S. §§ 3490–3493 here involved are remedial and impose a civil sanction. P. 549.
10. The proceeding authorized by R. S. §§ 3490–3493 does not lose its quality as a civil action though more than the precise amount of so-called actual damage be recovered. P. 550.
11. The words "forfeit and pay" in R. S. § 3490 are not inconsistent with the conclusion that the action authorized by §§ 3490–3493 is civil. P. 551.
12. In the circumstances of this case, the lump sum in damages authorized by R. S. § 3490 ($2,000 forfeit for doing "any" of the acts prohibited by R. S. § 5438) was properly assessed for each Public Works Administration project involved. P. 552.

127 F. 2d 233, reversed.

CERTIORARI, *post*, p. 613, to review the reversal of a judgment, 41 F. Supp. 197, against the defendants in a *qui tam* action under R. S. §§ 3490–3493.

Messrs. William Stanley and *Charles J. Margiotti*, with whom *Mr. Homer Cummings* was on the brief, for petitioners.

Messrs. William H. Eckert and *Eugene B. Strassburger,* with whom *Mr. John B. Nicklas, Jr.,* was on the brief, for respondents.

At the request of the Court, *Solicitor General Fahy* filed a brief (on which also were *Messrs. Robert L. Stern* and *Fred E. Strine*) on behalf of the United States, as *amicus curiae.*

Mr. Justice Black delivered the opinion of the Court.

Respondents, electrical contractors, were employed to work on P. W. A. projects in the Pittsburgh area. Their contracts were made with local governmental units rather than with the United States government, but a substantial portion of their pay came from the United States. Charging the respondents with defrauding the United States through the device of collusive bidding on these projects,[1] the petitioner, in the name of the United States and on his own behalf brought this action under § 5438 and §§ 3490–3493 (31 U. S. C. §§ 231–234) of the Revised Statutes.

These sections, now distributed through the statutes, are parts of what was originally the Act of March 2, 1863, 12 Stat. 696. Section 5438 contains that portion of the original Act which makes certain efforts to defraud the government a crime punishable by fine and imprison-

[1] The nature of the collusive bidding scheme was described by the court below as follows: "The appellants, the officers and members of the Electrical Contractors Association of Pittsburgh, conspired to rig the bidding on these projects. The pattern of the collusion was the informal and private averaging of the prospective bid which might have been submitted by each appellant. An appellant chosen by the others would then submit a bid for the averaged amount and the others all submitted higher estimates. The government was thereby defrauded in that it was compelled to contribute more for the electric work on the projects than it would have been required to pay had there been free competition in the open market." 127 F. 2d 233, 234.

ment.[2] Section 3490 separately provides that whoever commits "any" of the prohibited acts shall "forfeit and pay to the United States the sum of two thousand dollars, and in addition, double the amount of damages . . . sustained . . . together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit." Under §§ 3491, 3493, this latter action may be instituted by "any" person in behalf of the government, and where such a qui tam action is brought, half the amount of the recovery is paid to the person instituting the suit while the other half goes to the government.

In the instant case, verdict and judgment for $315,000 were rendered against the defendants, of which $203,000 was for double damages and $112,000 was an aggregate of $2,000 sums for 56 violations of § 5438. 41 F. Supp. 197. The Circuit Court of Appeals was of the opinion that the government had been defrauded—a conclusion not challenged here[3]—but held that the particular fraud was not reached by § 5438. It accordingly reversed. 127 F. 2d 233.

First. The court below, construing § 5438 with "utmost strictness" on the premise that qui tam or informer

---

[2] Section 5438 includes three categories of acts subject to the penalty which it prescribes. The first of these clauses, which in our opinion governs the instant case, covers "Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent . . ." The second clause governs the use of false certificates, etc., for the purpose of obtaining or aiding to obtain payment of such a claim, and the third covers conspiracy to defraud the government by obtaining or aiding to obtain the payment of a claim. This section, with amendments not relevant to actions under § 3490, now appears as 18 U. S. C. §§ 80, 83.

[3] Cf. *McMullen* v. *Hoffman,* 174 U. S. 639, 649. For the general federal competitive bidding statute see 41 U. S. C. § 5.

actions "have always been regarded with disfavor" by the courts, emphasized the absence of a direct contractual relationship between the respondents and the United States, and held that "The claims of the defendants then were simply against the local municipalities. Since the defendants had no claim upon or against the United States, this action was not authorized by the informer statutes."

We cannot accept either the interpretive approach or the actual decision of the court below. Qui tam suits have been frequently permitted by legislative action,[4] and have not been without defense by the courts.[5] Moreover, this interpretation of "utmost strictness" narrows

[4] "Statutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government," *Marvin* v. *Trout*, 199 U. S. 212, 225. Some such statutes are 18 U. S. C. § 23 (arming vessels against friendly powers); 31 U. S. C. §§ 155, 163 (breaches of duty by the Treasurer or the Register of the United States); 25 U. S. C. §§ 193, 201 (protection of Indians); and see footnote 9, *infra*. For a statute dealing with the allocation of costs in penal actions brought by an informer, see 28 U. S. C. § 823. Statutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue, *Adams* v. *Woods*, 2 Cranch 336.

[5] In support of the view of the court below, see *Taft* v. *Stevens Lith. and Eng. Co.*, 38 F. 28; but cf. *United States* v. *Griswold*, 24 F. 361, 366, in which the Court speaking of this section says: "The statute is a remedial one. It is intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel."

not only the qui tam aspect of the Act, but also the criminal provisions. The decision below treats the language of § 5438 in such fashion that no criminal proceedings could be brought against the respondents, a result to which the policy on qui tam actions is immaterial even if it exists or could properly be applied. This "qui tam policy" cannot be used to detract from the meaning of the language in the criminal section; and we cannot say that the same substantive language has one meaning if criminal prosecutions are brought by public officials and quite a different meaning where the same language is invoked by an informer.

Congress has power to choose this method to protect the government from burdens fraudulently imposed upon it; to nullify the criminal statute because of dislike of the independent informer sections would be to exercise a veto power which is not ours. Sound rules of statutory interpretation exist to discover and not to direct the Congressional will. True, § 5438 is criminal and for that reason in interpreting so much of its language as it shares in common with § 3490 we must give it careful scrutiny lest those be brought within its reach who are not clearly included; but after such scrutiny we must give it the fair meaning of its intendment. Cf. *United States* v. *Raynor*, 302 U. S. 540, 552.

We think the conduct of these respondents comes well within the prohibition of the statute, which includes "every person who . . . causes to be presented, for payment . . . any claim upon or against the Government of the United States . . . knowing such claim to be . . . fraudulent." This can best be seen upon consideration of the exact nature of respondents' relation to the government. The contracts found to have been induced by the respondents' frauds were made between them and local municipalities and school districts of Allegheny County, Pennsylvania. A large portion of the money

paid the respondents under these contracts was federal in origin, granted by the Federal Public Works Administrator, an official of the United States. 40 U. S. C. 401 (a). The jury and both courts have found that the contracts were obtained by a successfully executed conspiracy to remove all possible competition from "competitive bidding." The bidding itself was a federal requirement; all bidders were fully advised that these were P. W. A. projects; and many if not most of the respondents certified that their bids were "genuine and not sham or collusive." While payment itself, in the sense of the direct transferring of checks, was done in the name of local authorities, monthly estimates for payment were submitted by the respondents to the local sponsors on P. W. A. forms which showed the government's participation in the work and called attention to other federal statutes prohibiting fraudulent claims. It was a prerequisite to respondents' payment by the local sponsors that these estimates be filed, transmitted to, and approved by, the P. W. A. authorities. Payment was then made from a joint construction bank account containing both federal and local funds. The work was done under constant federal supervision.

The government's money would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive. By their conduct, the respondents thus caused the government to pay claims of the local sponsors in order that they might in turn pay respondents under contracts found to have been executed as the result of the fraudulent bidding. This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid by the P. W. A. into the joint fund for the benefit of respondents. The initial fraudulent action and every step thereafter taken pressed ever to the ultimate goal—payment

of government money to persons who had caused it to be defrauded.

Government money is as truly expended whether by checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to states. While at the time of the passage of the original 1863 Act, federal aid to states consisted primarily of land grants, in subsequent years the state aid program has grown so that in 1941 approximately 10% of all federal money was distributed in this form.[6] These funds are as much in need of protection from fraudulent claims as any other federal money,[7] and the statute does not make the extent of their safeguard dependent upon the bookkeeping devices used for their distribution. The Senatorial sponsor of this bill broadly asserted that its object was to provide protection against those who would "cheat the United States." [8] The fraud here could not have been any more of an effort to cheat the United States if there had been no state intermediary.

The conclusion that the first clause of § 5438 includes this form of "causing to be presented" a "claim upon or against the government" is strengthened by consideration of the other clauses of the statute. Clause 2 includes those who do the forbidden acts for the purpose of "aiding to obtain" payment of fraudulent claims; Clause 3 covers "any agreement, combination or conspiracy" to defraud the government by "obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim." These provisions, considered together, indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud,

---

[6] Key, The Administration of Federal Grants to States, Introduction; Bureau of the Census State and Local Government Special Study No. 19, Federal and State Aid 1941, 4.

[7] See Key, *supra*, Chapter 4, "The Audit."

[8] Congressional Globe, 37th Cong., 3rd Sess., 952.

without regard to whether that person had direct contractual relations with the government.

The situation here is in no sense like that discussed in *United States* v. *Cohn*, 270 U. S. 339, 345–347, where the government acted solely as bailee and no person had any claim against it for a payment. The Court in the *Cohn* case held that there had been no "wrongful obtaining of money . . . of the government's," while there has been such a "wrongful obtaining" here on claims which were presented either directly or indirectly to the government with full knowledge by the claimants of their fraudulent basis.

We conclude that these acts are covered by the statute under consideration.

Second. Previous to the filing of this action these respondents were indicted for defrauding the government and on a plea of nolo contendere were fined $54,000. They and the government, which has filed a brief amicus curiae at our request, assert that the petitioner received his information not by his own investigation, but from the previous indictment; and both argue that §§ 3490–93 should not under such circumstances be construed as permitting suit by the petitioner. The petitioner denies that he relied upon the information contained in the indictment, asserts that he spent money in conducting an investigation of his own, and claims that he presented more evidence than the government had discovered.

Even if, as the government suggests, the petitioner has contributed nothing to the discovery of this crime, he has contributed much to accomplishing one of the purposes for which the Act was passed. The suit results in a net recovery to the government of $150,000, three times as much as the fines imposed in the criminal proceedings; and this recovery was obtained at the risk of a considerable loss to the petitioner since § 3491 explicitly

provides that the informer must bear the risk of having to pay the full cost of the litigation.

Neither the language of the statute nor its history lends support to the contention made by respondents and the government. "Suits may be brought and carried on by any person," says the Act, and there are no words of exception or qualification such as we are asked to find.[9] The Senate sponsor of the bill explicitly pointed out that he was not offering a plan aimed solely at rewarding the conspirator who betrays his fellows, but that even a district attorney, who would presumably gain all knowledge of a fraud from his official position, might sue as the informer:

"The bill offers, in short, a reward to the informer who comes into court and betrays his co-conspirator, if he be such; but it is not confined to that class. Even the district attorney, who is required to be vigilant in the prosecution of such cases, may be also the informer, and entitle himself to one half the forfeiture under the qui tam clause, and to one half of the double damages which may be recovered against the persons committing the act." [10]

The government presses upon us strong arguments of policy against the statutory plan, but the entire force of these considerations is directed solely at what the government thinks Congress should have done rather than at

---

[9] There is of course no reason why Congress could not, if it had chosen to do so, have provided specifically for the amount of new information which the informer must produce to be entitled to reward. Simple informers who merely give information without formally instituting actions may collect an award for aiding in the conviction of narcotic law violators "if so directed by the court." 21 U. S. C. § 183. Cf. The authority of the Secretary of Labor who is authorized to approve awards to informers in contract labor cases. 8 U. S. C. §§ 139–140. The right of action itself may be subject to control by an administrative official, as are actions under 18 U. S. C. § 642 concerning violations of shipping laws.

[10] Cong. Globe, *supra*, 955, 956.

what it did. It is said that effective law enforcement requires that control of litigation be left to the Attorney General;[11] that divided control is against the public interest; that the Attorney General might believe that war interests would be injured by filing suits such as this; that permission to outsiders to sue might bring unseemly races for the opportunity of profiting from the government's investigations; and finally that conditions have changed since the Act was passed in 1863. But the trouble with these arguments is that they are addressed to the wrong forum. Conditions may have changed, but the statute has not.

Furthermore, one of the chief purposes of the Act, which was itself first passed in war time, was to stimulate action to protect the government against war frauds.[12] To that end, prosecuting attorneys were enjoined to be diligent in enforcement of the Act's provisions, and large rewards were offered to stimulate actions by private parties should the prosecuting officers be tardy in bringing the suits.

The very fact that Congress passed this statute shows that it concluded that other considerations of policy outweighed those now emphasized by the government; for most of the arguments made here militate against any informer action at all. Had the government filed a suit

---

[11] This consideration is apparently directed solely at the Department of Justice's desire to control the institution of these actions rather than their settlement. Sec. 3491 provides that the informer suits "shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court *and the district attorney*, first filed in the case, setting forth their reasons for such consent." The authority thus given the district attorney is presumably aimed at prevention of fraudulent settlements.

[12] For a discussion of the situation which gave rise to the Act, see Report of the House Committee on Government Contracts, March 3, 1863; the discussion in the Senate on this bill, Cong. Globe, *supra*, 952, *et seq.*; the opinion of the court below, 127 F. 2d at 235; and Randall, Civil War and Reconstruction, 419, 427, 633.

prior to that instituted by this petitioner, a different question would be presented. Cf. *Francis* v. *United States,* 5 Wall. 338. Under the circumstances here, we could not, without materially detracting from its clear scope, decline to recognize the petitioner's right to sue under the Act.

Third. As noted above, respondents had previously been indicted and fined for defrauding the government in connection with the same transactions for which they are now being sued. They contend that the present action should be barred because of the "double jeopardy" provision of the Fifth Amendment which provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The previous indictment was brought under a general statute dealing with conspiracy to defraud the government, 18 U. S. C. § 88, and is clearly criminal in nature. For violation of it respondents were liable for a fine up to $10,000 or imprisonment for two years, or both. For failure to pay their fines, they could have been sentenced to prison. *Ex parte Watkins,* 7 Pet. 568. The punishment given in that action was not intended to compensate the government, in any manner, for damages it suffered as a result of successful execution of the conspiracy. Respondents' contention was overruled by the District Court and was not considered in the Court of Appeals. It is now urged upon us as an independent ground of support for the judgment reached below. Cf. *Helvering* v. *Gowran,* 302 U. S. 238, 245.

The application of the double jeopardy clause to particular cases has not been an easy task for the courts. The subject has recently been thoroughly explored in *Helvering* v. *Mitchell,* 303 U. S. 391, in which the Court analyzed the cases now pressed upon us and emphasized the line between civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate

public justice. Only the latter subject the defendant to "jeopardy" within the constitutional meaning. *Ibid.*, 397, 398. We may start therefore with the language of the *Mitchell* case: "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether . . . [the statute in question] . . . imposes a criminal sanction. That question is one of statutory construction." *Ibid.*, 399. Is the action now before us, consisting of double damages and the $2,000 forfeiture, criminal or remedial?

It is enough for present purposes if we conclude that the instant proceedings are remedial and impose a civil sanction. The statutes on which this suit rests make elaborate provision both for a criminal punishment and a civil remedy. Violators of § 5438 may "be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars." We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete indemnity for the injuries done it. *Helvering* v. *Mitchell, supra*, 401.

It is, of course, well accepted that for one act a person may be liable both to pay damages and to suffer a criminal penalty. Long ago, this Court said, "A man may be compelled to make reparations in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance to be twice punished for the same offense." *Moore* v. *Illinois*, 14 How. 13, 19, 20. Congress has "power to give an action for damages to an individual who suffers by breach of the law." *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390, 396, 397. And it has this same

power when it, rather than some private individual, is injured by a fraud. Quite aside from its interest as preserver of the peace, the government when spending its money has the same interest in protecting itself from fraudulent practices as it has in protecting any citizen from frauds which may be practiced upon him. "The powers of the United States as a sovereign, dealing with offenders against their laws, must not be confounded with their rights as a body politic. It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection." *Cotton* v. *United States,* 11 How. 229, 231.

This remedy does not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered. As to the double damage provision, it cannot be said that there is any recovery in excess of actual loss for the government, since in the nature of the qui tam action the government's half of the double damages is the amount of actual damages proved. But in any case, Congress might have provided here as it did in the anti-trust laws for recovery of "threefold damages . . . sustained and the cost of suit, including a reasonable attorney's fee." 15 U. S. C. § 15.[13] Congress could remain fully in the common law tradition and still provide punitive damages. "By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of civil action and the damages inflicted by way of penalty or punishment given to the party injured." *Day* v. *Woodworth,* 13 How. 363, 371. This Court has noted the general practice in state statutes of allowing double or treble or even quadruple

[13] This Court in *Meeker* v. *Lehigh Valley R. Co.,* 236 U. S. 412, 432–33, sustained the validity of §§ 8 and 16 of the Interstate Commerce Act which authorized payment of attorney fees to shippers injured as a result of violation of the Act by railroads.

damages. *Missouri Pacific Ry. Co.* v. *Humes,* 115 U. S. 512, 523. Punitive or exemplary damages have been held recoverable under a statute like this which combines provision for criminal punishment with others which afford a civil remedy to the individual injured. *O'Sullivan* v. *Felix,* 233 U. S. 318, 324, 325. The law can provide the same measure of damage for the government as it can for an individual.

It is argued that the $2,000 "forfeit and pay" provision is "criminal" rather than "civil," even if the double damage feature is not. The words "forfeit and pay" relate alike to the $2,000 sum and the double damages. The use of the word "forfeit" in conjunction with the word "pay" does not force the conclusion that the provision is criminal. No one doubts that Congress could have accomplished the same result by authorizing "double" or "quadruple" or "punitive" damages or a lump sum payment for attorney's fees, or by definition of the elements of "actual damages." Special consequence cannot be drawn from the use of the word "forfeit." While this might under other circumstances be an appropriate word to suggest a fine upon the failure to pay which an individual might be imprisoned, no such punishment is provided here upon default in payment. The words "forfeit and pay" are wholly consistent with a civil action for damages. *Atchison, T. & S. F. Ry. Co.* v. *Nichols,* 264 U. S. 348, 350–352; cf. *Hepner* v. *United States,* 213 U. S. 103, 104–111.

It is true that "Punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrong-doer is concerned," but this is not enough to label it as a criminal statute. *Brady* v. *Daly,* 175 U. S. 148, 157. We think the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make

sure that the government would be made completely whole. This conclusion is consistent with a statement made immediately before final passage of the bill. A Senator discussing these sections said: "The government ought to have the privilege of coming upon him [a fraudulent contractor] or his estate and his heirs and recovering the money of which it is defrauded." [14] The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress.

Fourth. Section 3490 requires that the $2,000 forfeit be paid for doing "any" of the acts prohibited by § 5438. Before the District Court, petitioner contended that this sum should be exacted for every form submitted by respondents in the course of their enterprise, while respondents argued that there should be merely one $2,000 sum collected for all the acts done. The District Court concluded that the lump sum in damages should be assessed for each separate P. W. A. project. Petitioner does not object to this decision and we conclude that under the circumstances of this case each project can properly be counted separately. The incidence of the fraud on each additional project is as clearly individualized as is the theft of mail from separate bags in a post office, *Ebeling* v. *Morgan,* 237 U. S. 625; and see *Blockburger* v. *United States,* 284 U. S. 299. Cf. *Gavieres* v. *United States,* 220 U. S. 338, 342. Under respondents' view the lump sum to be paid would be about $30.00 a project; and we cannot suppose that Congress meant thus to reduce the damages recoverable for respondents' fraud and thereby allow them to spread the burden progressively thinner over projects each of which individually increased their profit.

We have examined the other contentions of the respondents and approve of the disposition of them by the courts

[14] Cong. Globe, *supra,* 958.

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

Reversed.

MR. JUSTICE MURPHY took no part in the consideration or disposition of this case.

MR. JUSTICE FRANKFURTER, concurring:

I agree with the decision of the Court. But it seems to me that the plea of double jeopardy should be rejected on a ground other than that taken by the Court. In all other respects I join in its opinion.

This is a *qui tam* action under R. S. § 3490 to recover a "forfeiture" and "double the amount of damages which the United States may have sustained" by reason of the same acts of fraud for which the respondents were previously indicted under § 37 of the Criminal Code, 18 U. S. C. § 88, and for which substantial fines were imposed upon them. The Fifth Amendment guarantees that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The respondents invoke this provision as a bar to this suit; and as I understand its holding, the Court rejects this plea of double jeopardy by treating the present action as one merely to make the United States whole for actual loss, and therefore without any punitive elements. The Court reaches this conclusion by applying the distinction taken in *Helvering* v. *Mitchell,* 303 U. S. 391, 400, between "sanctions that are remedial and those that are punitive." The argument seems to run thus: Double jeopardy means attempting to punish criminally twice; this is not an attempt to punish criminally because it is a civil proceeding; it is a civil proceeding because, as a matter of "statutory construction," it is a "civil sanction" which is being enforced here; and the sanction is "civil" because it is "remedial" and not "punitive" in nature.

Such dialectical subtleties may serve well enough for purposes of explaining away uncritical language in earlier cases. See, for instance, *United States* v. *Chouteau,* 102 U. S. 603, *Coffey* v. *United States,* 116 U. S. 436, and *United States* v. *La Franca,* 282 U. S. 568. But they are too subtle when the problem is one of safeguarding the humane interests for the protection of which the double jeopardy clause was written into the Fifth Amendment.

Punitive ends may be pursued in civil proceedings, and, conversely, the criminal process is frequently employed to attain remedial rather than punitive ends. It is for this reason that *scienter* has not been deemed to be a requirement in some criminal prosecutions. "Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes . . ." *United States* v. *Balint,* 258 U. S. 250, 252.

The protection against twice being punished for the same offense should hardly be made to depend upon the necessarily speculative judgment of a court whether a "forfeiture" and "double the amount of damages which the United States may have sustained" constitutes an extra penalty, or merely an indemnity for loss suffered. If that is the issue on which the protection against double jeopardy turns, those who invoke the Constitution, as do the respondents here, ought to be allowed to prove that, as a matter of fact, the forfeiture and the double damages are punitive because they exceed any amount that could reasonably be regarded as the equivalent of compensation for the Government's loss. That in civil actions punitive damages are, as a matter of due process, sometimes allowed, see *Shevlin-Carpenter Co.* v. *Minnesota,* 218 U. S. 57, 69–70, or that there may be distinct penal and remedial provisions for the same wrong, see *O'Sullivan* v. *Felix,* 233

U. S. 318, 325, does not help solve our present problem, which arises when a second separate proceeding against the same persons for the same misconduct results in a plea based upon the double jeopardy clause. We must also put to one side the doctrine of *res judicata*. This is largely a judicial doctrine, though partly reflected in the Full Faith and Credit Clause, Article IV, § 1, and is aimed at avoiding the waste and vexation of relitigating issues already decided between the same parties. The doctrine of double jeopardy has a different history. It is part of the protection of the Constitution against pressures and penalties that offend civilized notions of justice.

In my view the proper approach to the problem of double jeopardy in a situation like this, where Congress has imposed two sanctions for misconduct, however one may label them, and has provided for their enforcement in two separate proceedings, is that which was taken by Judge (later Mr. Justice) Blatchford in *In re Leszynsky*, 16 Blatchf. 9. The short of it is that where two such proceedings merely carry out the remedies which Congress has prescribed in advance for a wrong, they do not twice put a man in jeopardy for the same offense. Congress thereby merely allows the comprehensive penalties which it has imposed to be enforced in separate suits instead of in a single proceeding. By doing this Congress does not impose more than a single punishment. And the double jeopardy clause does not prevent Congress from prescribing such a procedure for the vindication of punitive remedies.

This view commends itself to reason. It is confirmed by history. For legislation of this character, providing two sanctions for the same misconduct, enforceable in separate proceedings, one a conventional criminal prosecution, and the other a forfeiture proceeding or a civil action as upon a debt, was quite common when the Fifth Amendment was framed by Congress. See, *e. g.*, the ma-

terials referred to in *In re Leszynsky, supra,* at 16–19. Like other specific provisions of the Constitution, the double jeopardy clause must be read in the context of its times. It would do violence to proper regard for the framers of the Fifth Amendment to assume that they contemporaneously enacted and continued to enact legislation that was offensive to the guarantees of the double jeopardy clause which they had proposed for ratification.

If it be suggested that a succession of separate trials for the enforcement of a great number of criminal sanctions, even though set forth in advance in a single statute, might be a form of cruelty or oppression, the answer is that the Constitution itself has guarded against such an attempt "to wear the accused out by a multitude of cases with accumulated trials," see *Palko* v. *Connecticut,* 302 U. S. 319, 328, by prohibiting "cruel and unusual punishments." Amendment VIII. But short of that which would offend the Eighth Amendment, statutes prescribing cumulative remedies have been commonplaces in the history of federal legislation. The Sherman Law, for example, allows four means of redressing a single offense—criminal prosecution, injunction, seizure of goods, and treble damages. If a *qui tam* action like the one now before us were to be provided by Congress as a further deterrent against violation of the Sherman Law, it would certainly be commonly regarded as an additional punishment. But the double jeopardy clause would nevertheless not come into play.

It is for these reasons that I think the plea of double jeopardy in this case cannot be sustained.

MR. JUSTICE JACKSON, dissenting:

I am constrained to dissent from the second division of the opinion and from the conclusion it supports.

I cannot deny that on a literal reading the statute says what the Court's opinion renders it to say. That being

the case, one cannot be critical of those who stay close to the words of the statute because guiding principles as to where to depart and in what direction to depart and how far to depart from the literal words of a statute are so conflicting.

But that we have in these matters considerable, although ill-defined, freedom is certain. I could not better state my attitude toward the present statute as applied to this case than in the language of the present Chief Justice in *United States* v. *Katz,* 271 U. S. 354, 357:

"All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

Nor was he announcing unorthodox or unconventional doctrine. In *American Tobacco Co.* v. *Werckmeister,* 207 U. S. 284, 293, Mr. Justice Day said:

"But in construing a statute we are not always confined to a literal reading, and may consider its object and purpose, the things with which it is dealing, and the condition of affairs which led to its enactment so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact.

"It is true, and the plaintiff in error cites authorities to the proposition, that where the words of an act are clear and unambiguous they will control. But while seeking to gain the legislative intent primarily from the language used we must remember the objects and purposes sought to be attained." [1]

If ever we are justified in reading a statute, not narrowly as through a keyhole, but in the broad light of the evils it aimed at and the good it hoped for, it is here. The

[1] See, also, *Ozawa* v. *United States,* 260 U. S. 178, 194; *Helvering* v. *New York Trust Co.,* 292 U. S. 455, 464–5; *United States* v. *Cooper Corp.,* 312 U. S. 600.

only disadvantage therefrom falls on one who sues, not to be made whole for injuries he has sustained, or to recover for goods he has delivered, or services he has performed, but solely to make profitable to himself the wrong done by others. We should, of course, fully sustain informers in proceedings where Congress has utilized their self-interest as an aid to law enforcement. Informers who disclose law violations even for the worst of motives play an important part in making many laws effective. But there is nothing in the text or history of this statute which indicates to me that Congress intended to enrich a mere busybody who copies a Government's indictment as his own complaint and who brings to light no frauds not already disclosed and no injury to the Treasury not already in process of vindication.

In this case the Government investigated respondents and on November 3, 1939, indicted them for conspiracy to defraud. On January 5 and February 6, 1940, the de- [*post, p.* 562] the Government indicted and pleas of *nolo contendere,* and fines were imposed. While the criminal case was still pending, and on January 25, 1940, petitioner commenced his informer proceeding, the averments in his complaint being substantially a copy of the indictment. It is not shown that he had any original information, that he had added anything by investigations of his own, or that his recovery is based on any fact not disclosed by the Government itself. In the companion case [*post,* p. 562] the Government indicted and pleas of *nolo contendere* were entered on January 15, 1940, and two weeks thereafter Ostrager filed his complaint alleging facts substantially identical with those in the indictment, some of the paragraphs being almost verbatim copies. We are informed that these cases have already stimulated a number of other private individuals to intervene with similar action after Government criminal proceedings had disclosed frauds.

I am sure it was never in the mind of Congress to authorize this misuse of the statute. If ever there was a case where the letter killeth but the spirit giveth life, it is this. Construed to the letter as the Court does, it becomes an instrument of abuse and corruption which can only be stopped by the timely intervention of Congress. If it were construed according to its spirit to reward those who disclose frauds otherwise concealed or who prosecute frauds otherwise unpunished, it would serve a useful purpose in the enforcement of the law and protection of the Treasury.

Since 1863 this law has been upon the statute books. Never until now has the bar dreamed that it permitted such use. When once it was attempted to commence an informer action under a similar statute after the Government had brought a civil action, this Court promptly limited the statute to preclude that sort of abuse. *Francis* v. *United States,* 5 Wall. 338. There was no specific language in the statute to support that court-made limitation, and although I find no specific language in this statute to support another, I should now say that the same limitation exists where the Government has already possessed itself of the facts and disclosed them in criminal proceedings. This is what I think the profession has generally assumed this statute to mean. If the statute has all these eighty years authorized this sort of proceeding, the legal profession of the United States has been strangely unresponsive to a Congressional proffer of windfall income.

We are justified in determining whether we will accept a new interpretation not before sustained in the history of this statute by reference to the condition of our own times rather than to those of former ones. Nothing better illustrates the difference between the conditions of 1863 and the present than the statement quoted by the Court, made by the Senate sponsor of the Informer Act, "Even

the district attorney, who is required to be vigilant in the prosecution of such cases, may be also the informer, and entitle himself to one half the forfeiture under the qui tam clause, and to one half of the double damages which may be recovered against the persons committing the act." I do not understand the Court to hold that a prosecuting attorney may now sue, but in construing the statute as applied to the plaintiff now before us we must not forget that the Senator was then speaking of law-enforcement in a nation which had not yet established a Federal Department of Justice, which did not then have a Federal Bureau of Investigation, or a Treasury investigating force, and in which the activities of the Federal Government were so circumscribed that they had not been found necessary. To accept the view of 1863 to mean that today law-enforcement officials could use information gleaned in their investigations to sue as informers for their own profit, would make the law a downright vicious and corrupting one. Fortunately no one in the executive department has ever suspected that such an interpretation as the Court now indulges could be placed upon this statute. If we were to add motives of personal avarice to other prompters of official zeal the time might come when the scandals of law-enforcement would exceed the scandals of its violation.

But even as to non-officials, to permit the informer to recover when he has not actually informed seems to me an evil result unintended by the Act. The Court's interpretation means that the Government cannot institute a criminal action that is not subject to seizure of some interloper who thereby wrests control of its course from the Government itself. As lawyers not without experience in the practicalities of law-enforcement, we know that the trial of a criminal case can be wrecked by pre-trial of the issues on the civil side of the court, particularly if the civil trial is conducted by those not interested in the criminal

prosecution. By trial, by taking of depositions, by other devices, the informer may force the premature disclosure of the Government's case, and it is certain that by collusion between one who acts as an informer and the party guilty of fraud the latter could obtain a disclosure of the case against him. We know, too, that the chance of conviction may well be prejudiced if the defendant may go before the jury and point to pending proceedings in which adequate reparations will be made. Every person prosecuted for crime, as a part of the strategy of defeating conviction, wants civil actions brought against him, and oftentimes wants to confess them or settle them in order to plead that he has squared his accounts with the law.

Moreover, we know that the assets of men engaged in criminal activities are rarely equal to the discharge of their obligations and in that event by sharing the available assets with an informer, the Government's financial recovery is diminished.

Also it has been found necessary to vest in someone the power to compromise claims of the Government, either where they are of doubtful collectibility or where the claim itself is of questionable validity. What becomes of the Attorney General's control over litigation in this respect if an informer may be admitted to share in the control of the case and may act in collusion with the guilty party? May he no longer make a compromise of a case that will withstand subsequent attack by an informer?

It must be borne in mind that this is not a case where we are adhering to a construction of a statute which has been continuously applied over its long life. In such event I should not unlikely join with my colleagues. This, however, is the case of a new construction upon an eighty-year-old statute, one so farfetched that no member of the bar has ever before ventured to offer it in any reported case.[2]

[2] Cf. *United States* v. *Cooper Corp.*, 312 U. S. 600, 613–614.

I would hold that the rich rewards of this kind of proceeding are reserved for those who actually and in good faith have contributed something to the enforcement of the law and the protection of the United States.

UNITED STATES EX REL. OSTRAGER ET AL. *v.* NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS, INC. ET AL.

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

No. 236. Argued December 10, 11, 1942.—Decided January 18, 1943.

Decided upon the authority of *United States ex rel. Marcus* v. *Hess*, *ante*, p. 537.

127 F. 2d 649, reversed.

CERTIORARI, *post*, p. 613, to review the affirmance of a judgment dismissing the complaint in a *qui tam* action under R. S. §§ 5438 and 3490–3493.

Mr. William Katz, with whom *Mr. Burnett Wolfson* was on the brief, for petitioners.

Mr. R. Emmett Kerrigan, with whom *Mr. Eberhard P. Deutsch* was on the brief, for respondents.

At the request of the Court, *Solicitor General Fahy* filed a brief (on which also were *Messrs. Robert L. Stern* and *Fred E. Strine*) on behalf of the United States, as *amicus curiae*.

MR. JUSTICE BLACK delivered the opinion of the Court.

This action is substantially similar to that in *United States ex rel. Marcus* v. *Hess*, *ante*, p. 537. Relying on §§ 5438 and 3490–93, Revised Statutes, the petitioner charges that the respondents caused the government

$7,620 damages by submitting fraudulent collusive bids on a hospital constructed with Federal Public Works Administration financial assistance. The petitioner in a qui tam action asks double damages plus $2,000 from each of seventeen respondents. The respondents had previously been indicted by the United States government in a criminal action and had paid fines totalling $5,000.

The respondents answered on the merits, made other pleadings not relevant at this stage of the case, and offered two special defenses: that the action placed them in double jeopardy in violation of the Fifth Amendment and that the statutes involved did not provide a basis for such a cause of action. The District Court, without reaching the merits, dismissed the complaint on the theory of double jeopardy. The Circuit Court of Appeals affirmed the dismissal of the complaint but rested its conclusion on the belief that no claim against the United States was involved since the United States was not a party to the contract. It relied heavily on the *Hess* case as decided by the Circuit Court.

For the reasons set forth in our opinion in the *Hess* case, we believe that the decision below should be reversed.

Reversed.

MR. JUSTICE FRANKFURTER joins in this opinion but concurs on the question of double jeopardy for the reasons set forth in his opinion in *United States ex rel. Marcus* v. *Hess, ante,* p. 537. MR. JUSTICE JACKSON dissents for the reasons set forth in his opinion in the same case.

MR. JUSTICE MURPHY took no part in the consideration or disposition of this case.

WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, U. S. DEPT. OF LABOR, *v.* JACKSONVILLE PAPER CO.

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

No. 336. Argued November 19, 20, 1942.—Decided January 18, 1943.

1. The Fair Labor Standards Act is applicable to employees of a wholesale paper company who are engaged in the delivery, from company warehouses within a State to customers within the same State, after a temporary pause at such warehouses, of goods procured outside of the State upon prior orders from, or pursuant to contracts or understandings with, such customers. P. 567.
2. Such goods retain their character as goods in interstate commerce until finally delivered to the customer; and they are not divested of that character by the temporary pause at the warehouse, or by the fact that the company regards them as stock in trade, or by the circumstance that title to them passes to the company upon their delivery at its warehouse. P. 569.
3. As to the company's business in other goods procured from outside of the State and delivered from the warehouses to customers within the State—it being claimed that such business is "in commerce" within the meaning of the Act because the customers form a fairly stable group whose needs can be anticipated with considerable precision—the evidence lacks that particularity necessary to show that the status of the goods in question was different from that of goods acquired and held by a local merchant for local disposition. P. 569.
4. That a wholesaler whose business is intrastate is in competition with wholesalers doing interstate business is of no significance in determining the applicability of the Fair Labor Standards Act, since that Act does not extend to activities "affecting" commerce, but only to such as are "in" commerce. P. 570.
5. That the Fair Labor Standards Act is applicable to a wholesaler who makes purchases of goods outside of the State, though selling intrastate exclusively, is not to be implied from the exception from the Act, by §§ 13 (a) (1) and 13 (a) (2), of employees of retailers. P. 571.

6. The applicability of the Fair Labor Standards Act does not depend on whether a wholesaler's business is wholly interstate, but rather on the character of the employee's activities. P. 571.

128 F. 2d 395, affirmed.

CERTIORARI, *post*, p. 615, to review the reversal of a judgment in a suit brought by the Wage and Hour Administrator to enjoin violations of the Fair Labor Standards Act.

Mr. Robert L. Stern, with whom *Solicitor General Fahy* and *Messrs. Irving J. Levy, Mortimer B. Wolf*, and *Peter Seitz* were on the brief, for petitioner.

Mr. Louis Kurz for respondent.

Mr. Charles B. Rugg filed a brief on behalf of the American Retail Federation, as *amicus curiae*, urging reversal in part.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a suit brought by the Administrator to enjoin respondent from violating provisions of the Fair Labor Standards Act. 52 Stat. 1060, 29 U. S. C. § 201. Respondent is engaged in the wholesale business, distributing paper products and related articles. Its business covers a large area embraced within a number of states in the southeastern part of the country. The major portion of the products which it distributes comes from a large number of manufacturers and other suppliers located in other states and in foreign countries. Five of respondent's twelve branch houses deliver goods to customers in other states and it is not contended that the Act does not apply to delivery employees at those establishments. The sole issue here is whether the Act applies to employees at the seven other branch houses which, though constantly receiving merchandise on interstate shipments and dis-

tributing it to their customers, do not ship or deliver any of it across state lines.

Some of this merchandise is shipped direct from the mills to respondent's customers. Some of it is purchased on special orders from customers, consigned to the branches, taken from the steamship or railroad terminal to the branches for checking, and then taken to the customer's place of business. The bulk of the merchandise, however, passes through the branch warehouses before delivery to customers. There is evidence that the customers constitute a fairly stable group and that their orders are recurrent as to the kind and amount of merchandise. Some of the items carried in stock are ordered only in anticipation of the needs of a particular customer as determined by a contract or understanding with respondent. Frequently orders for stock items whose supply is exhausted are received. Respondent orders the merchandise and delivers it to the customer as soon as possible. Apparently many of these orders are treated as deliveries from stock in trade. Not all items listed in respondent's catalogue are carried in stock but are stocked at the mill. Orders for these are filled by respondent from the manufacturer or supplier. There is also some evidence to the general effect that the branch manager before placing his orders for stock items has a fair idea when and to whom the merchandise will be sold and is able to estimate with considerable precision the immediate needs of his customers even where they do not have contracts calling for future deliveries.

The District Court held that none of respondent's employees in the seven branch houses in question were subject to the Act. The Circuit Court of Appeals reversed. 128 F. 2d 395. (1) It held that employees who are engaged in the procurement or receipt of goods from other states are "engaged in commerce" within the meaning of § 6 (a) and § 7 (a) of the Act. (2) It also held that where

respondent "takes an order" from a customer and fills it outside the state and the goods are shipped interstate "with the definite intention that those goods be carried at once to that customer and they are so carried, the whole movement is interstate" and the entire work of delivery to their final destination is an employment "in commerce." Those were the only types of transactions which the court held to be covered by the Act.

The Administrator contends, in the first place, that under the decision below any pause at the warehouse is sufficient to deprive the remainder of the journey of its interstate status. In that connection it is pointed out that prior to this litigation respondent's trucks would pick up at the terminals of the interstate carriers goods destined to specific customers, return to the warehouse for checking and proceed immediately to the customer's place of business without unloading. That practice was changed. The goods were unloaded from the trucks, brought into the warehouse, checked, reloaded, and sent on to the customer during the same day or as early as convenient. The opinion of the Circuit Court of Appeals is susceptible of the interpretation that such a pause at the warehouses is sufficient to make the Act inapplicable to the subsequent movement of the goods to their intended destination. We believe, however, that the adoption of that view would result in too narrow a construction of the Act. It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce.[1] There is no indication

[1] See for example the statement by Senator Borah speaking for the Senate conferees on the Conference Report, ". . . if the business is such as to occupy the channels of interstate commerce, any of the employees who are a necessary part of carrying on that business are within the terms of this bill, and, in my opinion, are under the Constitution of the United States." 83 Cong. Rec., 75th Cong., 3d Sess., Pt. 8, p. 9170.

(apart from the exemptions contained in § 13) that, once the goods entered the channels of interstate commerce, Congress stopped short of control over the entire movement of them until their interstate journey was ended. No ritual of placing goods in a warehouse can be allowed to defeat that purpose. The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer "in commerce" within the meaning of the Act. As in the case of an agency (cf. *De Loach* v. *Crowley's Inc.*, 128 F. 2d 378) if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain "in commerce" until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce.

Secondly, the Administrator contends that the decision below excludes from the category of goods "in commerce" certain types of transactions which are substantially of the same character as the prior orders which were included. Thus it is shown that there is a variety of items printed at the mill with the name of the customer. It is also established that there are deliveries of certain goods which are obtained from the manufacturer or supplier to meet the needs of specified customers. Among the latter are certain types of newsprint, paper, ice cream cups, and cottage cheese containers. The record reveals, however, that the goods in both of these two categories are ordered pursuant to a preëxisting contract or understanding with the customer. It is not clear whether the decision of the Circuit Court of Appeals includes these two types of transactions in the group of prior orders which it held

were covered by the Act. We think they must be included. Certainly they cannot be distinguished from the special orders which respondent receives from its customers. Here also, a break in their physical continuity of transit is not controlling. If there is a practical continuity of movement from the manufacturers or suppliers without the state, through respondent's warehouse and on to customers whose prior orders or contracts are being filled, the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse. The fact that respondent may treat the goods as stock in trade or the circumstance that title to the goods passes to respondent on the intermediate delivery does not mean that the interstate journey ends at the warehouse. The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate. Numerous authorities are pressed on us for the contrary view and for the conclusion that when the goods enter the warehouse, they are no longer "in commerce." But as we stated in *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 520–521, decisions dealing with various assertions of state or federal power in the commerce field are not particularly helpful in determining the reach of this Act.

Finally, the Administrator contends that most of the customers form a fairly stable group, that their orders are recurrent as to the kind and amount of merchandise, and that the manager can estimate with considerable precision the needs of his trade. It is therefore urged that the business with these customers is "in commerce" within the meaning of the Act. Some of the instances to which we are referred are situations which we have discussed in connection with goods delivered pursuant to a prior order, contract, or understanding. For the reasons stated they must be included in the group of transactions held to be "in commerce." As to the balance, we do not think

the Administrator has sustained the burden which is on a petitioner of establishing error in a judgment which we are asked to set aside. We do not mean to imply that a wholesaler's course of business based on anticipation of needs of specific customers, rather than on prior orders or contracts, might not at times be sufficient to establish that practical continuity in transit necessary to keep a movement of goods "in commerce" within the meaning of the Act. It was said in *Swift & Co.* v. *United States*, 196 U. S. 375, 398, that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." While that observation was made apropos of the constitutional scope of the commerce power, it is equally apt as a starting point for inquiry whether a particular business is "in commerce" within the meaning of this Act. We do not believe, however, that on this phase of the case such a course of business is revealed by this record. The evidence said to support it is of a wholly general character and lacks that particularity necessary to show that the goods in question were different from goods acquired and held by a local merchant for local disposition.

In this connection we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states. S. Rep. No. 884, 75th Cong., 1st Sess., p. 5; 83 Cong. Rec., 75th Cong., 3d Sess., Pt. 8, p. 9169. Moreover as we stated in *Kirschbaum Co.* v. *Walling, supra*, p. 522–523, Congress did not exercise in this Act the full scope of the commerce power. We may assume the validity of the argument that since wholesalers doing a local business are in competition with wholesalers doing an interstate business, the latter would be prejudiced if their competitors were not required to comply with the same labor standards. That consideration, however, would be pertinent only if the Act extended to businesses or transactions "affecting com-

merce." But as we noted in the *Kirschbaum* case the Act did not go so far. It is urged, however, that a different result obtains in case of wholesalers. The argument is based on the fact that the Act excepts from § 6 and § 7 "any employee employed in a . . . local retailing capacity" (§ 13 (a) (1)) and "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." § 13 (a) (2). Since retailers are excluded by reason of these express provisions, it is thought that the inclusion of wholesalers should be implied. There is, however, no indication in the legislative history that but for the exemption of retailers it was thought that all movement of goods from manufacturers to wholesalers and on to retailers would be "in commerce" within the meaning of the Act, where the wholesalers and retailers were in the same state. It is quite clear that the exemption in § 13 (a) (2) was added to eliminate those retailers located near the state lines and making some interstate sales. 83 Cong. Rec., 75th Cong., 3d Sess., Pt. 7, pp. 7281–7282, 7436–7438.[2] And the exemption for retailers contained in § 13 (a) (1) was to allay the fears of those who felt that a retailer purchasing goods from without the state might otherwise be included. *Id.* Hence we cannot conclude that all phases of a wholesale business selling intrastate are covered by the Act solely because it makes its purchases interstate. The use of the words "in commerce" entails an analysis of the various types of transactions and the particular course of business along the lines we have indicated.

The fact that all of respondent's business is not shown to have an interstate character is not important. The applicability of the Act is dependent on the character of the employees' work. *Kirschbaum Co.* v. *Walling, supra,*

[2] And see Joint Hearings, Senate Committee on Education and Labor, House Committee on Labor, 75th Cong., 1st Sess., on S. 2475 and H. R. 7200, Pt. 1, p. 35.

p. 524. If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established by the test we have described, he is covered by the Act. Here as in other situations (*Kirschbaum Co.* v. *Walling, supra,* p. 523) the question of the Act's coverage depends on the special facts pertaining to the particular business. The Circuit Court of Appeals remanded the cause to the District Court so that new findings could be made and an appropriate decree be framed. Whether additional evidence must be taken on any phase of the case so that a decree may be drawn is a question for the District Court. We merely hold that the decision of the Circuit Court of Appeals as construed and modified by this opinion states the correct view of the law. As so modified, the judgment below is

Affirmed.

HIGGINS *v.* CARR BROTHERS CO.

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE.

No. 97. Argued November 19, 1942.—Decided January 18, 1943.

1. The record in this case does not warrant setting aside the conclusion of the court below that, when merchandise coming from other States was unloaded at the place of business of the wholesaler here (selling intrastate exclusively), its interstate movement had ended, and that an employee whose activities related to the goods thereafter was not covered by the Fair Labor Standards Act. *Walling* v. *Jacksonville Paper Co., ante,* p. 564, distinguished. P. 574.
2. That a wholesaler whose business is exclusively intrastate is in competition with wholesalers doing interstate business is of no significance in determining the applicability of the Fair Labor Standards Act, since that Act does not extend to activities "affecting" commerce, but only to such as are "in" commerce. P. 574.

25 A. 2d 214, affirmed.

CERTIORARI, 316 U. S. 658, to review the affirmance of a judgment denying recovery of alleged unpaid wages and for damages, in a suit brought by an employee against his employer, under the Fair Labor Standards Act.

Mr. Edward B. Perry, with whom *Mr. Franz U. Burkett* was on the brief, for petitioner.

Messrs. Clement F. Robinson and *Francis W. Sullivan* submitted for respondent.

Mr. Charles B. Rugg filed a brief on behalf of the American Retail Federation, as *amicus curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a companion case to *Walling* v. *Jacksonville Paper Co., ante,* p. 564, and is here on certiorari to the Supreme Judicial Court of Maine. Higgins claims minimum wages and overtime compensation alleged to be due him under §§ 6 (a) and 7 (a) of the Fair Labor Standards Act between January 1939 and July 1940. Prior to that time, respondent, which conducts a wholesale fruit, grocery and produce business in Portland, Maine, had been selling and delivering its merchandise not only to the local trade in Maine but also to retailers in New Hampshire. For the period here in question the New Hampshire trade had been discontinued and all sales and deliveries were solely to retailers in Maine. The only additional facts which we know about respondent's course of business are accurately summarized in the following excerpt from the opinion of the Supreme Judicial Court: "It buys its merchandise from local producers and from dealers in other states, has it delivered by truck and rail, unloaded into its store and warehouse and from there sells and distributes it to the retail trade. While some of the produce

and fruit is processed, much of it is sold in the condition in which it is received. The corporation owns all of its merchandise and makes its own deliveries. It makes no sales on commission nor on order with shipments direct from the dealer or producer to the retail purchaser." Higgins' employment involved work as night shipper putting up orders and loading trucks for delivery to retail dealers in Maine or driving a truck distributing merchandise to the local trade.

Petitioner in his brief describes the business in somewhat greater detail and seeks to show an actual or practical continuity of movement of merchandise from without the state to respondent's regular customers within the state. But here, unlike *Walling* v. *Jacksonville Paper Co.*, there is nothing in the record before us to support those statements nor to impeach the accuracy of the conclusion of the Supreme Judicial Court of Maine that when the merchandise coming from without the state was unloaded at respondent's place of business its "interstate movement had ended." Some effort is made to show that the court below applied an incorrect rule of law in the sense that it gave the Act too narrow a construction. In that connection it is argued that respondent is in competition with wholesalers doing an interstate business and that it can by underselling affect those businesses and their interstate activities. As we indicated in *Walling* v. *Jacksonville Paper Co.*, that argument would be relevant if this Act had followed the pattern of other federal legislation such as the National Labor Relations Act (see 29 U. S. C. § 152 (7), § 160 (a)) and extended federal control to business "affecting commerce." But as we pointed out in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, this Act did not go so far but was more narrowly confined.

Thus petitioner has not maintained the burden of showing error in the judgment which he asks us to set aside.

Affirmed.

Counsel for Parties.

BRADY, ADMINISTRATRIX, *v.* ROOSEVELT STEAMSHIP CO.

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

No. 269. Argued December 18, 1942.—Decided January 18, 1943.

1. An action to recover for a death resulting from injuries sustained when a rung of a ladder broke as the decedent, a United States customs inspector in the course of his official duties, was climbing to board a vessel docked at a pier, is within the admiralty jurisdiction. Pp. 576–577.
2. The Suits in Admiralty Act does not preclude a suit against a private corporation (none of whose stock is owned directly or indirectly by the United States) to recover damages for a maritime tort arising out of the negligent operation of a vessel owned by the United States Maritime Commission, and which the corporation operates under a contract made pursuant to § 707 (c) of the Merchant Marine Act of 1936, even though the contract may give to the corporation in such case a right of exoneration or indemnity against the Commission. *Fleet Corporation* v. *Lustgarten,* 280 U. S. 320, overruled *pro tanto.* Pp. 578, 582.

   The Suits in Admiralty Act does not restrict the remedy in such case to a libel *in personam* against the United States or the Maritime Commission.

128 F. 2d 169, reversed.

CERTIORARI, *post,* p. 609, to review the reversal of a judgment for the plaintiff in a suit against the steamship company to recover damages for the death of plaintiff's intestate.

Mr. Simone N. Gazan for petitioner.

Mr. Vernon Sims Jones, with whom *Mr. Raymond Parmer* was on the brief, for respondent.

Solicitor General Fahy, Assistant Attorney General Shea, and *Mr. Sidney J. Kaplan* filed a memorandum on behalf of the United States, as *amicus curiae.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

S. S. Unicoi was a vessel owned by the United States Maritime Commission and operated for it by respondent under a contract covering this and other vessels. The contract [1] recites that it was made pursuant to § 707 (c) of the Merchant Marine Act of 1936 (49 Stat. 2009, 46 U. S. C. § 1197 (c); see § 704, 46 U. S. C. § 1194), the Commission having advertised the line for charter and having failed to receive satisfactory bids. Respondent is a private corporation, none of whose stock is owned directly or indirectly by the United States.

The deceased was a United States customs inspector. While boarding the vessel on his official duties in July 1938, a rung of the ladder which he was climbing broke. The injuries which resulted caused his death. At the time of the injury the vessel was docked at a pier in New York City.

[1] Respondent was designated as a managing agent for the Commission as owner "to manage, operate, and conduct the business of the Line . . . for and on behalf of the Owner and under its supervision and direction." Respondent agreed "to man, equip, victual, supply and operate the vessels, subject to such restrictions and in such manner as the Owner may prescribe" and "to conduct its operations with respect to the vessels . . . in full compliance with the applicable provisions of law." Respondent agreed "subject to such regulations or methods of supervision and inspection as may be required or prescribed" by the Commission to "exercise reasonable care and diligence to maintain the vessels in a thoroughly efficient state of repair, covering hull, machinery, boilers, tackle, apparel, furniture, equipment, and spare parts." Respondent did not share in profits but was entitled to reimbursement for expenses under a provision of the contract which stated: "The Owner agrees to pay to the Managing Agent the actual overhead expenses of the Managing Agent determined by the Owner to have been fairly and reasonably incurred and to be properly applicable to the management and operation of the Commission's vessels under this agreement."

Petitioner, the widow, sued as administratrix to recover damages for the benefit of herself and the children. That suit was brought in the New York Supreme Court but removed to the federal District Court. Respondent moved to dismiss on the authority of *Johnson* v. *Emergency Fleet Corp.*, 280 U. S. 320. That motion was denied and a trial to a jury on the law side of the court was had. A verdict for petitioner was returned. On appeal the judgment was reversed with directions to dismiss the complaint, one judge dissenting. The Circuit Court of Appeals stated in reaching that result that the Suits in Admiralty Act (41 Stat. 525, 46 U. S. C. §§ 741, 742) as construed by the decision in the *Johnson* case made the remedies afforded by that Act the exclusive ones, viz. a libel *in personam* against the United States or the Maritime Commission. 128 F. 2d 169. We granted the petition for a writ of certiorari because of the public importance of the problem.

We agree with the court below that this was a maritime tort over which the admiralty court has jurisdiction. *Vancouver S. S. Co.* v. *Rice*, 288 U. S. 445; *The Admiral Peoples*, 295 U. S. 649. And we may assume that petitioner could have sued either the United States or the Commission under the Suits in Admiralty Act. In any event, such a suit would be the exclusive remedy in admiralty against either of them. *Eastern Transportation Co.* v. *United States*, 272 U. S. 675; *Emergency Fleet Corp.* v. *Rosenberg Bros. & Co.*, 276 U. S. 202. And it is likewise clear that the action in admiralty afforded by § 2 of the Suits in Admiralty Act is the only available remedy against the United States or a corporation whose entire outstanding capital stock is owned by the United States or its representatives. *Johnson* v. *Emergency Fleet Corp., supra.* The sole question here is whether the Suits in Admiralty Act makes private operators such as respondent non-suable for their torts.

503873—43——44

Emergency Fleet Corp. v. *Lustgarten,* 280 U. S. 320, one of the three companion cases to the *Johnson* case, supports the view that it does. In that case a merchant vessel, Coelleda, was owned by the United States and operated for it by the Consolidated Navigation Co. pursuant to a contract made through the Fleet Corporation. A seaman employed thereon sued the Fleet Corporation and the Consolidated Navigation Co. to recover damages for personal injuries sustained in that service. There was a judgment for the plaintiff which was affirmed on appeal. This Court reversed and remanded the cause with directions to dismiss. The *Johnson* case and the other two companion cases were suits against the Fleet Corporation or the United States. In one opinion dealing with all four cases, this Court said: "Directly or mediately, the money required to pay a judgment against any of the defendants in these cases would come out of the United States. It is the real party affected in all of these actions." 280 U. S. pp. 326–327. It added that the aim of uniformity would not be established "if suits under the Tucker Act and in the Court of Claims be allowed against the United States and actions at law in state and federal courts be permitted against the Fleet Corporation or other agents for enforcement of the maritime causes of action covered by the Act." p. 327. Accordingly it concluded that "the remedies given by the Act are exclusive in all cases where a libel might be filed under it." p. 327. These statements, coupled with the fact that the judgment in the *Lustgarten* case was reversed not only as respects the Fleet Corporation but the Consolidated Navigation Co. as well, support the view adopted by the court below.

Our conclusion, however, is that that position is untenable and that the *Lustgarten* case so far as it would prevent a private operator from being sued under the circumstances of this case must be considered as no longer controlling.

There is ample support for the holding in the *Johnson* case that § 2 of the Suits in Admiralty Act was intended to provide the only available remedy against the United States or its wholly owned corporations for enforcement of maritime causes of action covered by the Act. But there is not the slightest intimation or suggestion in the history of that Act that it was designed to abolish all remedies which might exist against a private company for torts committed during its operation of government vessels under agency agreements.

Sec. 1 of the Suits in Admiralty Act provides that no vessel owned by the United States or a governmental corporation or "operated by or for the United States, or such corporation" shall be "subject to arrest or seizure by judicial process in the United States or its possessions." That section was designed to avoid the inconvenience, expense and delay resulting from the holdings in *The Florence H.*, 248 F. 1012, and *The Lake Monroe*, 250 U. S. 246, that libel *in rem* would lie against vessels owned by the United States. See S. Rep. No. 223, 66th Cong., 1st Sess.; H. Rep. No. 497, 66th Cong., 2d Sess. The wording of that section makes clear that the right to arrest or seize the vessel was taken away whether the vessel was operated by the United States or its wholly owned corporation or for either of them by a private company. To that extent the Act affects remedies which would otherwise exist on maritime causes of action arising out of operation of government vessels by private companies for the United States or its wholly owned corporations. Yet there is no indication whatsoever that it went further and took away any personal remedy which a tort claimant might have against such a private operator. While § 1 abolishes the right to arrest or seize the vessel, § 2 provides that "a libel in personam may be brought against the United States or against such corporations" in cases where "if such vessel were privately owned or operated . . . a proceeding in

admiralty could be maintained." Sec. 2, however, does not mention private operators. Nor do the Committee Reports advert to private operators, except as they may be affected by § 1. The liability of an agent for his own negligence has long been embedded in the law. *Quinn* v. *Southgate Nelson Corp.*, 121 F. 2d 190, is a recent application of that principle to a situation very close to the present one. But the principle is an ancient one and applies even to certain acts of public officers or public instrumentalities. As stated in *Sloan Shipyards Corp.* v. *Emergency Fleet Corp.*, 258 U. S. 549, 567, "An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts." In that case the Fleet Corporation was held to be amenable to suit. And that policy has been followed. For when it comes to the utilization of corporate facilities [2] in the broadening phases of federal activities in the commercial or business field, immunity from suit is not favored. *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381; *Federal Housing Administration* v. *Burr*, 309 U. S. 242. Congress adopted that policy when it made corporations wholly owned by the United States suable on maritime causes of action under § 2 of the Suits in Admiralty Act. That it had the power to grant or withhold immunity from suit on behalf of governmental corporations is plain. *Federal Land Bank* v. *Priddy*, 295 U. S. 229; *Reconstruction Finance Corp.* v. *Menihan Corp.*, 312 U. S. 81. We may also assume that it would have the power to grant immunity to private operators of government vessels for their torts. But such a basic change in one of the funda-

[2] As to the liability of public officials see generally *Dunlop* v. *Munroe*, 7 Cranch 242, 269; *Osborn* v. *Bank of United States*, 9 Wheat. 738, 842, 843; *Wilkes* v. *Dinsman*, 7 How. 89, 123; *Robertson* v. *Sichel*, 127 U. S. 507; *Spalding* v. *Vilas*, 161 U. S. 483; *Brissac* v. *Lawrence*, 2 Blatchford 121; *United States* v. *Rogde*, 214 F. 283, 290.

mentals of the law of agency should hardly be left to conjecture. The withdrawal of the right to sue the agent for his torts would result at times in a substantial dilution of the rights of claimants. Assuming that the ordinary rules of agency apply in determining whether the United States or the Maritime Commission is responsible under § 2 of the Act for torts of private operators such as respondent, there would be instances where unless the private operator was liable no one would be. The principal is not liable for every negligent act of his agent. Furthermore, if all suits to enforce maritime causes of action must be brought in such cases under § 2 of the Act the short statute of limitations of two years contained in § 5 is applicable. *Emergency Fleet Corp.* v. *Rosenberg Bros. & Co., supra.* Moreover, if, as apparently was the case here, the claimant was eligible to receive and did receive compensation under the United States Employees Compensation Act (39 Stat. 742, 5 U. S. C. § 751), he is barred from suing the United States for the tort. *Dahn* v. *Davis,* 258 U. S. 421. He may however sue "some person other than the United States"; and in case of recovery the amount is credited on the compensation payable to him. § 777. We mention these matters as illustrations of the practical impact on claimants if it were held that the Suits in Admiralty Act restricted all suits in cases like the present to libels *in personam* against the United States or its wholly owned corporations. We can only conclude that if Congress had intended to make such an inroad on the rights of claimants it would have said so in unambiguous terms. There is one bit of legislative history which it is claimed reveals such a purpose. It is a single statement made by Representative Volstead, sponsor of the bill in the House (59 Cong. Rec. 1680): "Mr. White of Maine. Would this bill apply to Shipping Board vessels that are allocated to private concerns and are being operated by private concerns? Mr. Volstead: Yes; it covers all ships owned by

the Government." The reply was accurate. The Act does cover government ships operated by private concerns. For as we have seen § 1 is applicable to that situation as well as to others and takes away the remedy of a libel *in rem*. But it is a *non sequitur* to say that because the Act takes away the remedy of libel *in rem* in all cases involving government vessels and restricts the remedies against the United States and its wholly owned corporations, it must be presumed to have abolished all right to proceed against all other parties. Congress in fashioning § 2 of the Act, like this Court in interpreting it in the *Johnson* case, was preoccupied with suits against the United States and its wholly owned corporations. Since it dealt under § 2 only with libels *in personam* against them, the only fair assumption is that it left all personal actions against others wholly unaffected.

It is contended, however, that if the judgment against respondent stands, the United States ultimately will have to pay it by reason of provisions of the contract between respondent and the Commission. It is therefore urged that the United States is the real party in interest. We do not stop to interpret the contract. Even if we assume, without deciding, that the Commission has contracted to reimburse the respondent for such expenditures, it does not affect the result in this case. The right of the private operator to recover over from the United States would be a matter of favor, not of right, in many cases. For apart from any express contract the agent's right of exoneration or indemnity has not been thought to extend to situations where his liability was based on his own fault. 4 Williston, Contracts (1936 ed.), § 1026. Hence we cannot conclude that, in all cases where a private operator of a government vessel under an agency agreement is sued, the United States would as a matter of law ultimately be liable to pay in absence of an express provision for exoneration. It is hard to believe that Congress had any such notion when

it passed the Suits in Admiralty Act. To attribute that idea to it would be to give the Act a construction which would in practical effect encourage the assumption by the United States of the obligations of private persons.[3]

Moreover, if petitioner had a cause of action against respondent, it is difficult to see how she could be deprived of it by reason of a contract between respondent and the Commission. Immunity from suit on a cause of action which the law creates cannot be so readily obtained. Cf. *Guaranty Trust & S. D. Co.* v. *Green Cove R. Co.*, 139 U. S. 137, 143. The rights of principal and agent *inter se* are not the measure of the rights of third persons against either of them for their torts. It is, of course, true that government contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertaking with the United States. *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, was a recent example. In that case the contractor in building dikes in the Missouri River for the United States had washed away a part of the plaintiff's land. We held that the contractor was not liable, saying (pp. 20–21) "that if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." But here the situation is quite different. The question is not whether the Commission had authority to delegate to respondent responsibilities for managing and operating the vessel as its agent. It is whether respondent can escape liability for a negligent exercise of that delegated power if we assume

[3] The provision in § 8 of the Suits in Admiralty Act that any final judgment "rendered in any suit herein authorized" shall be paid "by the proper accounting officers of the United States" must be taken to refer only to judgments against the United States or its wholly owned corporations since under our construction the Act does not control or affect actions *in personam* against private operators.

that by contract it will be exonerated or indemnified for any damages it must pay. As stated in *Sloan Shipyards Corp.* v. *Emergency Fleet Corp., supra,* pp. 566–567, "the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him." Furthermore, if the United States were to become the real party in interest by reason of a contract for exoneration or indemnity, a basic alteration in that concept (*Minnesota* v. *Hitchcock,* 185 U. S. 373, 387) would be made, not pursuant to a Congressional policy [4] but by reason of concessions made by contracting officers of the government. Such a change would be detrimental to the interests of private claimants, as we have said, since it would subtract from the legal remedies which the law has afforded them. Beyond that it would make the existence of a right to exoneration or indemnity a jurisdictional fact. That could hardly help but complicate and delay the enforcement of rights based on these maritime torts. At least in the absence of a clear Congressional policy to that end, we cannot go so far.

We hold that the Suits in Admiralty Act did not deprive petitioner of the right to sue respondent for dam-

[4] Cf. *Clyde-Mallory Lines* v. *The Eglantine, ante,* p. 395, in which we held that the United States by appearing in an action for libel *in rem* against a government vessel for damages suffered during its operation by the United States could invoke the two-year statute of limitations contained in § 5 of the Suits in Admiralty Act, even though the United States had sold the vessel to a private operator. In that case we were dealing with § 4 of the Act which expressly provides for such an appearance in that type of case and which states that "thereafter such cause shall proceed against the United States in accordance with the provisions of this Act." Accordingly we stated, "The conclusion is inescapable that there is no practical difference between suits against the government as owner of the vessel and against the government as the party in interest when it voluntarily appears to defend its lately sold property against tort liability."

ages for his maritime tort. Whether a cause of action against respondent has been established is, of course, a different question, as the issues involved in *Quinn* v. *Southgate Nelson Corp., supra,* indicate. The Circuit Court of Appeals did not reach that question. Accordingly we reverse the judgment and remand the cause to it.

Reversed.

DECISIONS PER CURIAM, ETC., FROM OCTOBER 5, 1942, THROUGH JANUARY 18, 1943.*

No. 140. OSMENT *v.* PITCAIRN ET AL., RECEIVERS. On petition for writ of certiorari to the Supreme Court of Missouri. October 12, 1942. *Per Curiam:* The last clause of § 4 of the 1890 amendments to Article VI of the Missouri constitution provides that "when a division [of the Supreme Court of Missouri] in which a cause is pending shall so order, the cause shall be transferred to the court for its decision." In *Scheufler* v. *Manufacturing Lumbermen's Underwriters,* decided July 7, 1942, the Supreme Court of Missouri stated that under this clause "either division, on application or its own motion and for reasons deemed sufficient though not enumerated in the section, may order a cause transferred to the court en banc." 349 Mo. 855, 857; 163 S. W. 2d 749, 750. In this case petitioner made no application to transfer the cause from Division Two, where it was heard and decided, to the court en banc. As it does not appear that petitioner has exhausted the appellate review provided by state law, the petition for certiorari must be denied for want of jurisdiction. *Gorman* v. *Washington University,* 316 U. S. 98, and cases cited. *Mr. H. G. Waltner, Jr.* for petitioner. *Messrs. Edgar Shook* and *N. S. Brown* for respondents. Reported below: 349 Mo. 137, 159 S. W. 2d 666.

No. 113. DAVIDSON TRANSFER & STORAGE CO. ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

*For decisions on applications for certiorari, see *post,* pp. 606, 624; rehearing, *post,* p. 703. For cases disposed of without consideration by the Court, *post,* p. 702.

October 12, 1942. *Per Curiam:* The judgment is affirmed. *Mr. Charles E. Cotterill* for appellants. Reported below: 42 F. Supp. 215.

No. 128. GURNEY ET AL. *v.* FERGUSON ET AL. Appeal from the Supreme Court of Oklahoma. October 12, 1942. *Per Curiam:* The appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C., § 344 (a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) of the Judicial Code as amended, 28 U. S. C., § 344 (c), certiorari is denied. *Messrs. W. F. Wilson, M. A. Ned Looney,* and *T. Austin Gavin* for appellants. Reported below: 190 Okla. 254, 122 P. 2d 1002.

No. 129. TENNESSEE OIL CO. *v.* MCCANLESS, COMMISSIONER OF FINANCE AND TAXATION. Appeal from the Supreme Court of Tennessee. October 12, 1942. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a properly presented federal question. *Fullerton* v. *Texas,* 196 U. S. 192; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114. *Mr. Cecil Sims* for appellant. *Messrs. Roy H. Beeler,* Attorney General of Tennessee, and *William F. Barry,* Solicitor General, for appellee. Reported below: 178 Tenn. 328, 162 S. W. 2d 1081.

No. 160. CHELTENHAM & ABINGTON SEWERAGE CO. *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL. Appeal from the Supreme Court of Pennsylvania; and

No. 169. PENNSYLVANIA PUBLIC UTILITY COMMISSION *v.* CHELTENHAM & ABINGTON SEWERAGE CO. On petition for writ of certiorari to the Supreme Court of Pennsylvania. October 12, 1942. *Per Curiam:* In No. 160 the appeal is dismissed, and in No. 169 the petition for writ of

certiorari is denied, for want of a final judgment. *Grays Harbor Logging Co.* v. *Coats-Fordney Co.*, 243 U. S. 251; *Wick* v. *Superior Court*, 278 U. S. 575. *Mr. George Henry Huft* for appellant in No. 160 and respondent in No. 169. *Mr. Thomas A. Foulke* for Benjamin H. Davis et al., appellees in No. 160. *Messrs. Claude T. Reno, Harry M. Showalter, Samuel Graff Miller,* and *Herbert S. Levy* for the Pennsylvania Public Utility Commission. Reported below: 344 Pa. 366, 25 A. 2d 334.

No. 174. PEAK *v.* CALIFORNIA. Appeal from the Superior Court of California. October 12, 1942. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C., § 344 (a). The petition for writ of certiorari is denied. The motion for leave to proceed further *in forma pauperis* is denied. *George Peak, pro se.*

No. 192. TOYE BROS. YELLOW CAB CO. *v.* COOPERATIVE CAB CO., INC., ET AL. Appeal from the Supreme Court of Louisiana. October 12, 1942. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a properly presented federal question. *Fullerton* v. *Texas*, 196 U. S. 192; *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114. *Mr. Eberhard Deutsch* for appellant. *Mr. Francis P. Burns* for appellees. Reported below: 199 La. 1063, 7 So. 2d 353.

No. 238. MARTIN *v.* CITY OF STRUTHERS. Appeal from the Supreme Court of Ohio. October 12, 1942. *Per Curiam:* The appeal is dismissed on the ground that the record does not show that the federal question presented was properly preserved on appeal to the Court of Appeals

of Ohio. *Hiawassee River Power Co.* v. *Carolina-Tennessee Co.*, 252 U. S. 341, 343–44. *Messrs. Hayden C. Covington* and *Victor F. Schmidt* for appellant. Reported below: 139 Ohio St. 372, 40 N. E. 2d 154.

No. 244. MONKS *v.* LEE ET AL. Appeal from the District Court of Appeal, 4th Appellate District, of California. October 12, 1942. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed on the ground that it does not appear from the record that the appeal was applied for within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C., § 350. *Messrs. L. R. Kirby, Herbert S. Avery,* and *John Coker* for appellant. *Mr. William P. Cary* for appellees. Reported below: 48 Cal. App. 2d 603, 120 P. 2d 167.

No. 258. CLARK ET AL. *v.* DOYLE, EXCISE ADMINISTRATOR, ET AL. Appeal from the Supreme Court of Indiana. October 12, 1942. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. (1) *Gorin* v. *United States,* 312 U. S. 19, 27; (2) *Eberle* v. *Michigan,* 232 U. S. 700, 706. *Messrs. Lloyd D. Claycombe* and *Albert Stump* for appellants. *Mr. Urban C. Stover,* Deputy Attorney General of Indiana, for appellees. Reported below: 41 N. E. 2d 949.

No. 280. GENERAL MOTORS ACCEPTANCE CORPORATION ET AL. *v.* HULBERT, COUNTY ASSESSOR OF CANADIAN COUNTY. Appeal from the Supreme Court of Oklahoma. October 12, 1942. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Columbus Southern Railway Co.* v. *Wright,* 151 U. S. 470, 478–83; *General American Tank Car Corp.* v. *Day,* 270 U. S. 367,

372. The CHIEF JUSTICE took no part in the consideration or decision of this case. *Mr. D. I. Johnston* for appellants. *Messrs. Mac Q. Williamson,* Attorney General of Oklahoma, and *Randell S. Cobb* for appellee. Reported below: 190 Okla. 578, 125 P. 2d 975.

No. 317. MORRIS PLAN INDUSTRIAL BANK *v.* GRAVES ET AL., CONSTITUTING THE STATE TAX COMMISSION. Appeal from the Supreme Court of New York. October 12, 1942. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *First National Bank* v. *Louisiana Tax Commission,* 289 U. S. 60, 62–64. The CHIEF JUSTICE took no part in the consideration or decision of this case. *Mr. R. Randolph Hicks* for appellant. *Messrs. John J. Bennett, Jr.,* Attorney General of New York, and *Wendell P. Brown,* Assistant Attorney General, for appellees. Reported below: 261 App. Div. 1018, 26 N. Y. S. 2d 854; 288 N. Y. 567, 42 N. E. 2d 22.

No. 359. C. I. T. CORPORATION ET AL. *v.* STONE, CHAIRMAN, STATE TAX COMMISSION, ET AL.;

No. 360. UNIVERSAL CREDIT CO. ET AL. *v.* STONE, STATE TAX COMMISSION, ET AL.; and

No. 361. YELLOW MANUFACTURING ACCEPTANCE CORP. ET AL. *v.* STONE, CHAIRMAN, STATE TAX COMMISSION, ET AL. Appeals from the Supreme Court of Mississippi. October 12, 1942. *Per Curiam:* The motions to affirm are granted and the judgments are affirmed. *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435, 443–445; *Bristol* v. *Washington County,* 177 U. S. 133; *Savings & Loan Society* v. *Multnomah County,* 169 U. S. 421; *Curry* v. *McCanless,* 307 U. S. 357, 365–68. *Messrs. William H. Watkins* and *P. H. Eager, Jr.* for appellants. *Mr. John Thomas Smith*

was with them on the brief in No. 361. *Messrs. Greek L. Rice,* Attorney General of Mississippi, and *J. H. Sumrall* for appellees. Reported below: 193 Miss. 338, 344, 354; 7 So. 2d 811, 820.

No. —, Original. Ex parte Elmer E. Davis. October 12, 1942. *Per Curiam:* It appears that petitioner has an application for a writ of error coram nobis pending in the Circuit Court of Vigo County, Indiana. He alleges that that court has not taken any action upon his application. It does not appear that petitioner has exhausted his remedies in the state courts to obtain a determination, which would be a reviewable judgment. The motion for leave to file a petition for writ of habeas corpus is therefore denied without prejudice.

No. —, Original. Ex parte John Botwinski;
No. —, Original. Ex parte Joe Cephus Gray;
No. —, Original. Ex parte Joseph Bematre;
No. —, Original. Ex parte Charles E. Phillips;
No. —, Original. Ex parte Alfred Maurice;
No. —, Original. Ex parte Donald Flowers; and
No. —, Original. Ex parte Albert Smith. October 12, 1942. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. Ex parte James R. Allen. October 12, 1942. Application denied.

No. 1. Carter Oil Co. *v.* Welker et al. Certiorari, 311 U. S. 633, to the Circuit Court of Appeals for the Seventh Circuit. October 19, 1942. *Per Curiam:* The judgment is reversed, per stipulation, on the authority of *Tallman v. Eastern Illinois & Peoria R. Co.,* 379 Ill. 441, 41 N. E. 2d

537, and *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538. *Messrs. L. G. Owen, Henry I. Green,* and *Harold F. Lindley* for petitioner. *Messrs. William M. Acton, Paul J. Wimsey,* and *Lawrence T. Allen* for respondents. Reported below: 112 F. 2d 299.

No. 259. REEVES, COMMISSIONER OF REVENUE OF KENTUCKY, *v.* WILLIAMSON, TRUSTEE. Appeal from, and petition for writ of certiorari to, the Circuit Court of Appeals for the Sixth Circuit. October 19, 1942. *Per Curiam:* The appeal is dismissed for the want of jurisdiction. § 240 (b), Judicial Code, as amended, 28 U. S. C., § 347 (b); *Memphis Gas Co.* v. *Beeler,* 315 U. S. 649, 650–51. The petition for writ of certiorari is denied. *Messrs. M. B. Holifield* and *H. Appleton Federa* for appellant. *Mr. Ben Williamson* for appellee. Reported below: 127 F. 2d 657.

No. —. HOLWIG *v.* HIATT;
No. —. HUMES *v.* BLAIR, JUDGE;
No. —. EX PARTE FRANK S. FOWLER; and
No. —. EX PARTE THOMAS M. WOFFORD. October 19, 1942. Applications denied.

No. —. FLYNN *v.* HUDSPETH, WARDEN. October 19, 1942. The motion for review is denied.

No. —. EX PARTE PEDRO E. SANCHEZ TAPIA. October 19, 1942. The application for allowance of an appeal is denied.

No. —, Original. EX PARTE JOHN O. SPAULDING. October 19, 1942. The motion for leave to file petition for

writ of habeas corpus is denied without prejudice to an application to the appropriate District Court.

No. —, Original. Ex parte Marvin Davis. October 19, 1942. The motions for leave to file a petition for writ of certiorari and a petition for writ of habeas corpus are denied.

No. —, Original. Ex parte George E. Phillips;
No. —, Original. Ex parte Frank Contardi;
No. —, Original. Ex parte Frank Blaszak;
No. —, Original. Ex parte James Dobry;
No. —, Original. Ex parte Ray J. Knowlton;
No. —, Original. Ex parte George D. Templeton;
No. —, Original. Ex parte James E. Jackson;
No. —, Original. Ex parte Joseph Brown;
No. —, Original. Ex parte Glenn Wilkerson; and
No. —, Original. Ex parte Thomas Jordan. October 19, 1942. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —, Original. Ex parte David H. Johnson. October 19, 1942. The motion for leave to file a bill of complaint is denied.

No. —, Original. Ex parte Fred Benioff Co. October 19, 1942. The motion for leave to file petition for writ of mandamus is denied without prejudice to an application to the Circuit Court of Appeals.

No. 12, October Term, 1940. United States *v.* Appalachian Electric Power Co. October 19, 1942. The petition for construction of the mandate is denied.

No. 310. LACY *v.* UNITED STATES. October 22, 1942. Application for stay denied.

No. 9. UNITED STATES *v.* CONSUMERS PAPER CO. Certiorari, 315 U. S. 792, to the Court of Claims. Argued October 16, 1942. Decided October 26, 1942. *Per Curiam:* The judgment is affirmed by an equally divided Court. *Mr. Paul A. Freund* argued the cause, and *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Melvin H. Siegel, Oscar H. Davis,* and *H. G. Ingraham* were on the brief, for the United States. *Mr. Fred B. Rhodes* for respondent. Reported below: 94 Ct. Cls. 713.

No. 406. SOUTHEASTERN GREYHOUND LINES ET AL. *v.* MCCANLESS, COMMISSIONER OF FINANCE AND TAXATION, ET AL. Appeal from the Supreme Court of Tennessee. October 26, 1942. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. (1) *Maurer* v. *Hamilton,* 309 U. S. 598; (2) *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583, 598–600. *Mr. Charles C. Trabue, Jr.* for appellants. *Mr. W. F. Barry, Jr.* for appellees. Reported below: 178 Tenn. 614, 162 S. W. 2d 370.

No. 423. ROYAL CADILLAC SERVICE, INC. ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Southern District of New York. November 9, 1942. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed, it appearing that the only substantial question raised by the appeal—whether under § 206 (a) of the Interstate Commerce Act, 49 U. S. C., § 306 (a), appellants may lawfully

continue operation until the determination by the Commission of their application for a certificate of public convenience and necessity—has become moot because of the denial of such application by the Interstate Commerce Commission on September 16, 1942. *Mr. George H. Rosen* for appellants. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for the United States et al.; *Mr. Henry P. Goldstein* for the Mountain Transit Corporation; and *Mr. James F. X. O'Brien* for the Hudson Transit Lines,—appellees.

No. 491. COLEMAN *v.* CALIFORNIA. Appeal from the Supreme Court of California. November 9, 1942. *Per Curiam:* The motion for leave to proceed *in forma pauperis* is granted. The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Troche* v. *California,* 280 U. S. 524. *John Lawrence Coleman, pro se.* Reported below: 20 Cal. 2d 399, 126 P. 2d 349.

No. 426. FLOYD *v.* DU BOIS SOAP CO. On petition for writ of certiorari to the Supreme Court of Ohio. November 9, 1942. *Per Curiam:* The motion for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari is granted and the judgment is reversed on the authority of *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, and *Warren-Bradshaw Drilling Co.* v. *Hall, ante,* p. 88. *Mr. Charles A. Williams* for petitioner. *Mr. Alfred T. Geisler* for respondent. Reported below: 139 Ohio St. 520, 41 N. E. 2d 393.

No. —, Original. EX PARTE WILLIAM IRA JENKINS. November 9, 1942. The motion for leave to file petition for writ of habeas corpus is denied.

No. —. UNITED STATES *v.* TERRELL. November 9, 1942. The motion by defendant to set aside judgment is denied.

No. —. EX PARTE JAMES RULONG. November 9, 1942. The application for appeal is denied.

No. —. IN THE MATTER OF JOE TENNER. November 9, 1942. The orders of stay entered herein October 27, 1941, December 8, 1941, December 15, 1941, and December 22, 1941, are vacated.

No. 250. CARLOTA BENITEZ DE SEIX ET AL. *v.* ROS MARIA ANCIANI ET AL. November 9, 1942. The "Petition to the Court" filed herein September 9, 1942, is denied without prejudice to an application to the District Court. *Carlota Benitez de Seix* and *J. Octavio Seix, pro se.* Reported below: 127 F. 2d 121.

No. 134. BECKMAN ET AL. *v.* MALL ET AL. Appeal from the District Court of the United States for the District of Kansas. November 16, 1942. *Per Curiam:* The decree is affirmed on the authority of *Wickard* v. *Filburn, ante,* p. 111, without consideration of the grounds relied upon by the court below for dismissing the bill. *Mr. William Lemke* for appellants. Reported below: 48 F. Supp. 853.

No. —, Original. EX PARTE FRED STEFFLER. November 16, 1942. The motion for leave to file petition for writ of mandamus is denied.

No. —, Original. EX PARTE EUGENE WEIL. November 16, 1942. The motion for leave to file petition for

writ of habeas corpus is denied as moot, it appearing that the petitioner is no longer in respondent's custody. The rule to show cause is therefore discharged.

No. 75. North Chicago et al. *v.* The Maccabees, a Corporation, et al.; and

No. 96. The Maccabees, a Corporation, *v.* North Chicago et al. On petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit. November 23, 1942. *Per Curiam:* The motion to withdraw the petition for certiorari in No. 96 is granted and the petition is dismissed. The motion of The Maccabees to withdraw all papers previously filed on their behalf in No. 75 is granted. All motions made by Arvid B. Tanner on his own behalf are denied. The motion to substitute counsel is granted and the appearance of Arvid B. Tanner is ordered withdrawn. *Messrs. Lionel A. Mincer* and *Frank T. O'Brien* for petitioners in No. 75 and respondents in No. 96. *Messrs. Edward J. Jeffries, Jr.* and *David A. Hersh* for respondents in No. 75 and petitioner in No. 96. Reported below: 125 F. 2d 330.

No. —. Levy *v.* Sturgeon. November 23, 1942 Application for appeal denied.

No. —. Humes *v.* Leavenworth County Local Selective Service Board, No. 1. November 23, 1942. Application for injunction denied.

No. —, Original. Ex parte Robert E. Peyton. November 23, 1942. The motion for leave to file petition for writ of mandamus is denied.

No. —, Original. Ex parte Wilfred Hill Castleman. November 23, 1942. The motion for leave to file petition for writ of mandamus is denied.

No. —, Original. Ex parte Cecil Wright. November 23, 1942. The motion for leave to proceed *in forma pauperis* is granted. The motion for leave to file petition for writ of certiorari to the District Court of the United States for the Eastern District of Illinois is denied.

No. 510. Donovan *v.* Turner et al., Copartners. Appeal from the District Court of Appeal, 2d Appellate District, of California. December 7, 1942. *Per Curiam:* The appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C., § 344 (a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) of the Judicial Code as amended, 28 U. S. C., § 344 (c), certiorari is denied. *Mr. L. E. Dadmun* for appellant. *Messrs. Virgil T. Seaberry* and *Vernon Bettin* for appellees. Reported below: 52 Cal. App. 2d 236, 126 P. 2d 187.

No. 492. Williams et al. *v.* Miller et al. Appeal from the District Court of the United States for the Northern District of California. December 7, 1942. *Per Curiam:* The decree dismissing the bill of complaint is affirmed on the ground that the bill does not allege facts which would warrant the granting of equitable relief by a federal court to restrain enforcement of the state statute. *Spielman Motor Co.* v. *Dodge,* 295 U. S. 89; *Beal* v. *Missouri Pacific R. Co.,* 312 U. S. 45; *Watson* v. *Buck,* 313 U. S. 387, 400–01. *Mr. John L. McNab* for appellants. *Messrs. Earl Warren,* Attorney General of California, and

Lucas E. Kilkenny, Deputy Attorney General, for appellees. Reported below: 48 F. Supp. 277.

Nos. 446 and 447. WILLIAMS ET AL. *v.* DELAWARE & HUDSON RAILROAD CORP. ET AL. On petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit. December 7, 1942. *Per Curiam:* The petition for writs of certiorari is granted. In view of the death of the referee appointed by the National Mediation Board, the judgments are vacated, without consideration of the merits, and the causes remanded to the District Court for such further proceedings as may be appropriate. *Mr. Leo J. Hassenauer* for petitioners. *Messrs. Joseph Rosch, Conrad H. Poppenhusen,* and *Anan Raymond* for the Delaware & Hudson Railroad Corp.; and *Messrs. Kenneth F. Burgess* and *Douglas F. Smith* for E. W. Fowler et al.,— respondents. Reported below: 129 F. 2d 11.

No. —, Original. EX PARTE ETHEL PITT DONNELL. December 7, 1942. The motion for leave to file petition for writ of habeas corpus is denied.

No. —, Original. EX PARTE THOMAS MERRYL WOFFORD. December 7, 1942. The motion for leave to file petition for writ of mandamus is denied.

No. 537. RODDENBERRY *v.* FLORIDA. Appeal from the Supreme Court of Florida. December 14, 1942. *Per Curiam:* The motion for leave to proceed *in forma pauperis* is granted. The appeal is dismissed for the want of a substantial federal question. *Mr. W. D. Bell* for appellant. Reported below: 11 So. 2d 582.

No. —. Ex parte Henry E. Terrell. December 14, 1942. The motion to set aside judgment is denied.

No. —, Original. Ex parte Cecil Wright. December 14, 1942. The motion for leave to file petition for writ of habeas corpus is denied.

No. —, Original. Ex parte Karl Kive Greenfield. December 14, 1942. The motion for leave to file petition for writ of mandamus is denied.

No. —, Original. Ex parte Orville Chester Garrison. December 14, 1942. The motion for leave to file petition for writ of certiorari is denied.

No. 76. Miller *v.* United States. December 14, 1942. It is ordered that the opinion filed December 7, 1942, be amended as follows:

Page 3, line 4, insert a period after the word "transcribed" and strike out the balance of line 4 and all of lines 5, 6, 7, and 8, beginning with the word "that" and ending with the word "Exceptions."

Page 5, line 3. After "4. As we have said" strike out the balance of line 3, and all of lines 4, 5, 6, 7, 8, as well as the first six words on line 9, beginning with the words "a stenographer" and ending with the word "addition."

Page 5, last paragraph, 6th line from bottom of page. Strike out sentence beginning with the word "We" and ending with the word "foreclosed." On the same page, 4th line from bottom, strike out the words "so" and "rule" and insert between the words "to" and "in" the follow-

ing: "hold that the petitioner is foreclosed from obtaining a bill."

Opinion reported as amended, *ante*, p. 192.

No. 85. FISHER, RECEIVER, *v.* WHITON, EXECUTRIX, ET AL. December 14, 1942. It is ordered that the opinion of the Court in No. 85, *Fisher* v. *Whiton*, filed December 7, 1942, be amended by inserting after the word "eliminated" in footnote 5 on page 2 of the slip opinion the following phrase: "where there has been compliance with the provisions of the statute,".

Opinion reported as amended, *ante*, p. 217.

No. 49. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* R. DOUGLAS STUART; and

No. 48. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* JOHN STUART. December 14, 1942. It is ordered that the last paragraph on page 3 of the opinion of November 16, 1942, be struck out. It reads as follows:

"In answer to the taxpayers' petitions for the redetermination of the deficiencies, the Commissioner asserted the increase was required by the provisions of Sections 22, 166, and 167 of the Revenue Act of 1934, 48 Stat. 680. So far as pertinent these are set out in the footnote below."

In lieu thereof insert the following:

"In answer to the taxpayer's petition in No. 49 for the redetermination of the deficiencies, the Commissioner asserted the increase was required by the provisions of Sections 22, 166, and 167 of the Revenue Act of 1934, 48 Stat. 680. Section 22 was not raised by the Commissioner in his answer to the petition in No. 48. But the applicability of that section was raised by the Commissioner as appellee before the Circuit Court of Appeals (*Helvering* v. *Gowran*, 302 U. S. 238, 245). The contention in the Court

of Appeals rested on the facts stipulated in the Board of Tax Appeals. On the rejection of that ground in the court below the Commissioner was entitled to raise the question, as he did, in his petition for certiorari and rely on Section 22 in this Court. *Helvering* v. *Gowran, ibid.,* 246; cf. *Hormel* v. *Helvering,* 312 U. S. 552. So far as pertinent the sections are set out in the footnote below.*"

It is further ordered that the first sentence of the last paragraph on page 8 be struck out. It reads as follows:

"The Commissioner, however, has pressed continually since this litigation started for taxation under 22 (a), see footnote page 3, on the ground that the trust incomes are chargeable to the donors under the rule of *Helvering* v. *Clifford,* 309 U. S. 331."

In lieu thereof insert the following:

"The Commissioner, however, raised in the Court of Appeals and has pressed here the liability of the donors for taxation under 22 (a), see footnote page 3, on the ground that the trust incomes are chargeable to the donors under the rule of *Helvering* v. *Clifford,* 309 U. S. 331."

The petitions for rehearing are denied.

Opinion reported as amended, *ante,* p. 154.

No. 477. TEGTMEYER *v.* TEGTMEYER ET AL. December 14, 1942. The application for a stay is denied.

No. —, Original. EX PARTE JOHN MOSHER. December 21, 1942. The motion for leave to file petition for writ of habeas corpus is denied.

No. —, Original. EX PARTE H. L. MEYERS. December 21, 1942. The motion for leave to file petition for writ of certiorari is denied.

No. —. WATERMAN *v.* INTERBOROUGH RAPID TRANSIT CO. January 4, 1943. Application denied.

No. —, Original. EX PARTE R. H. HUGHES; and

No. —, Original. EX PARTE F. M. WINDSOR. January 4, 1943. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —, Original. EX PARTE LESLIE WILLIAMS ET AL. January 4, 1943. *Per Curiam:* It does not appear that petitioners have exhausted their remedies under state law, especially in view of their failure to file an original application for habeas corpus in the Supreme Court of Nebraska as is permissible under state law (Nebraska Compiled Statutes, 1929, § 27–204; *In re White,* 33 Neb. 812, 814, 51 N. W. 287), nor does it appear that the question presented here has been considered on the merits by the Supreme Court of Nebraska in any prior proceeding. The motion for leave to file a petition for writ of habeas corpus is therefore denied without prejudice. *Leslie Williams* and *Joe Bennett, pro se.*

No. —, Original. EX PARTE ARMIN ELLERBRAKE; and

No. —, Original. EX PARTE WILLIAM W. BOEHMAN. January 4, 1943. The motions for leave to file petitions for writs of mandamus are denied.

No. —, Original. EX PARTE TAYLOR SEALS. January 11, 1943. Application denied.

No. 2, October Term, 1941. BERNARDS ET AL. *v.* JOHNSON ET AL. January 11, 1943. Motion to recall mandate denied.

No. —. LOGUE ET AL. *v.* SOUTH CAROLINA. January 14, 1943. Application for stay denied.

No. 564. ALMER RAILWAY EQUIPMENT CO. ET AL. *v.* COMMISSIONER OF TAXATION. Appeal from the Supreme Court of Minnesota. January 18, 1943. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. (1) *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62, 66, 67; (2) *General American Tank Car Corp.* v. *Day*, 270 U. S. 367, 373; *Madden* v. *Kentucky*, 309 U. S. 83, 87–90. *Mr. Leon S. Hirsh* for appellants. *Mr. J. A. A. Burnquist*, Attorney General of Minnesota, for appellee. Reported below: 213 Minn. 62, 5 N. W. 2d 637.

No. 601. HOLLEY *v.* LAWRENCE, WARDEN. Appeal from the Supreme Court of Georgia. January 18, 1943. *Per Curiam:* The motion for leave to file the jurisdictional statement is granted. The motion for leave to proceed *in forma pauperis* is also granted. The appeal is dismissed on the authority of *Holley* v. *Lawrence, ante*, p. 518. *Mr. Benjamin E. Pierce* for appellant. Reported below: 194 Ga. 529, 22 S. E. 2d 154.

No. —, Original. EX PARTE DORSEY EDMONDSON; and No. —, Original. EX PARTE ELLERT L. MCGRATH. January 18, 1943. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 79. ADAMS, WARDEN, ET AL. *v.* UNITED STATES EX REL. MCCANN. January 18, 1943. The petition for rehearing is denied. The opinion is amended so that the

last paragraph reads as follows: "The order of the Circuit Court of Appeals must therefore be set aside and the cause remanded to that court for such further proceedings, not inconsistent with this opinion, as may be appropriate." The judgment is amended accordingly.

Opinion reported as amended, *ante,* p. 269.

DECISIONS GRANTING CERTIORARI THROUGH JANUARY 18, 1943.

Nos. 1–7. UNITED STATES EX REL. QUIRIN ET AL. *v.* COX, PROVOST MARSHAL. See *ante,* p. 18, n.

No. 284. OVERSTREET ET AL. *v.* NORTH SHORE CORPORATION. October 12, 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. *Mr. Lucien H. Boggs* for petitioners. *Messrs. Roswell P. C. May, Livingston Platt,* and *W. Gregory Smith* for respondent. Reported below: 128 F. 2d 450.

Nos. 325 and 326. JEROME *v.* UNITED STATES. October 12, 1942. On petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit. The motion for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari in No. 325 is also granted. The Court directs that the expense of printing the record be paid by the United States, pursuant to 28 U. S. C., § 832. In No. 326, the petition for writ of certiorari is denied. *Jerome Parker Jerome, pro se. Solicitor General Fahy* and *Assistant Attorney General Berge* for the United States. Reported below: 130 F. 2d 514.

No. 80. CHOCTAW NATION OF INDIANS *v.* UNITED STATES ET AL. October 12, 1942. Petition for writ of certiorari to the Court of Claims granted. *Mr. William G. Stigler* for petitioner. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Mr. Vernon L. Wilkinson* for the United States; *Mr. Melvin Cornish* for the Chickasaw Nation,—respondents. Reported below: 95 Ct. Cls. 192.

No. 93. MARSHALL, DEPUTY COMMISSIONER, ET AL. *v.* PLETZ. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. E. K. Oppenheimer* for petitioners. *Messrs. Ben Anderson* and *Wm. P. Lord* for respondent. Reported below: 127 F. 2d 104.

No. 142. ENDICOTT JOHNSON CORP. ET AL. *v.* PERKINS, SECRETARY OF LABOR. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Howard A. Swartwood, William H. Pritchard,* and *John C. Bruton* for petitioners. *Solicitor General Fahy* for respondent. Reported below: 128 F. 2d 208.

No. 156. DETROIT BANK, FORMERLY DETROIT SAVINGS BANK, *v.* UNITED STATES; and

No. 214. MICHIGAN ET AL. *v.* UNITED STATES. October 12, 1942. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Ferris D. Stone* and *Cleveland Thurber* for petitioner in No. 156. *Messrs. Herbert J. Rushton,* Attorney General of Michigan, *James H. Lee,* and *Samuel Brezner* for petitioners in No. 214. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J.*

Louis Monarch, Oscar Cox, Archibald Cox, and *Morton K. Rothschild* for the United States. Reported below: 127 F. 2d 64.

No. 171. UNITED STATES *v.* OKLAHOMA GAS & ELECTRIC CO. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Solicitor General Fahy* for the United States. *Messrs. R. M. Rainey* and *Streeter B. Flynn* for respondent. Reported below: 127 F. 2d 349.

No. 172. WRAGG *v.* FEDERAL LAND BANK OF NEW ORLEANS. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Walter J. Knabe* and *Jack Crenshaw* for petitioner. *Mr. Thomas Harvey Hedgepeth* for respondent. Reported below: 125 F. 2d 1003.

No. 183. PENDERGAST *v.* UNITED STATES;

No. 186. O'MALLEY *v.* UNITED STATES; and

No. 187. MCCORMACK *v.* UNITED STATES. October 12, 1942. Petitions for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. John G. Madden* and *James P. Aylward* for petitioners in Nos. 183 and 186. *Mr. James E. Carroll* for petitioner in No. 187. *Mr. William S. Hogsett* for the United States. Reported below: 128 F. 2d 676.

No. 234. ALBIN *v.* COWING PRESSURE RELIEVING JOINT CO. ET AL. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Lewis E. Pennish* for petitioner. *Mr. Charles Aaron* for respondents.

No. 246. CORYELL ET AL. *v.* PHIPPS ET AL. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. T. Catesby Jones* and *Leonard J. Matteson* for petitioners. *Messrs. Chauncey I. Clark* and *Eugene Underwood* for respondents. Reported below: 128 F. 2d 702.

No. 254. SECURITIES AND EXCHANGE COMMISSION *v.* CHENERY CORPORATION ET AL. October 12, 1942. Petition for writ of certiorari to the U. S. Court of Appeals for the District of Columbia granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Solicitor General Fahy* and *Mr. Chester T. Lane* for petitioner. *Mr. Spencer Gordon* for respondents. Reported below: 128 F. 2d 303.

No. 265. CLYDE-MALLORY LINES *v.* THE EGLANTINE ET AL. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Chauncey I. Clark* and *Eugene Underwood* for petitioner. *Solicitor General Fahy* for respondents. Reported below: 127 F. 2d 569.

No. 268. HARRIS, ADMINISTRATOR, *v.* ZION'S SAVINGS BANK & TRUST CO. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Messrs. J. D. Skeen* and *E. J. Skeen* for petitioner. *Mr. Hadlond P. Thomas* for respondent. Reported below: 127 F. 2d 1012.

No. 269. BRADY, ADMINISTRATRIX, *v.* ROOSEVELT STEAMSHIP CO., INC. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second

Circuit granted. *Mr. Simone N. Gazan* for petitioner. *Messrs. Raymond Parmer* and *Vernon Sims Jones* for respondent. Reported below: 128 F. 2d 169.

No. 273. JOHNSON *v.* UNITED STATES. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Benjamin M. Golder* and *William A. Gray* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Ellis N. Slack,* and *Joseph W. Burns* for the United States. Reported below: 129 F. 2d 954.

No. 278. SPIES *v.* UNITED STATES. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. David V. Cahill* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Morton K. Rothschild* for the United States. Reported below: 128 F. 2d 743.

No. 296. TILLER, EXECUTOR, *v.* ATLANTIC COAST LINE RAILROAD CO. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. J. Vaughan Gary* for petitioner. *Messrs. Thomas W. Davis* and *Collins Denny, Jr.* for respondent. Reported below: 128 F. 2d 420.

No. 299. JERSEY CENTRAL POWER & LIGHT CO. *v.* FEDERAL POWER COMMISSION; and

No. 329. NEW JERSEY POWER & LIGHT CO. *v.* FEDERAL POWER COMMISSION. October 12, 1942. Petitions

for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Reynier J. Wortendyke, Jr.* for petitioner in No. 299. *Mr. Allen E. Throop* for petitioner in No. 329. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Ellis Lyons, Richard S. Salant, Charles V. Shannon,* and *Lambert McAllister* for the Federal Power Commission. *Mr. Francis A. Pallotti,* Attorney General of Connecticut, filed a memorandum in support of the petition. *Messrs. John E. Benton* and *Frank B. Warren* filed a brief on behalf of the National Association of Railroad and Utilities Commissioners, as *amicus curiae,* in support of the petition. Reported below: 129 F. 2d 183.

No. 300. PALMER ET AL., TRUSTEES, *v.* HOFFMAN. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Edward R. Brumley* for petitioners. *Messrs. William Paul Allen* and *Benjamin Diamond* for respondent. Reported below: 129 F. 2d 976.

No. 320. O'DONNELL *v.* GREAT LAKES DREDGE & DOCK CO. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Walter F. Dodd* for petitioner. *Mr. Ezra L. O'Isa* for respondent. Reported below: 127 F. 2d 901.

No. 327. FRED FISHER MUSIC CO., INC. ET AL. *v.* M. WITMARK & SONS. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Arthur Garfield Hays* for petitioners. *Mr. Robert W. Perkins* for respondent. Reported below: 125 F. 2d 949.

No. 332. LEISHMAN *v.* ASSOCIATED WHOLESALE ELECTRIC CO. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. John Flam* for petitioner. *Messrs. Marston Allen, Theodore Greve,* and *Leonard S. Lyon* for respondent. Reported below: 128 F. 2d 204.

No. 103. HARRISON, COLLECTOR OF INTERNAL REVENUE, *v.* NORTHERN TRUST CO. ET AL. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Fahy* for petitioner. *Messrs. Alexander F. Reichmann* and *Myron D. Davis* for respondents. Reported below: 125 F. 2d 893.

No. 124. LILLY *v.* GRAND TRUNK WESTERN RAILROAD CO. October 12, 1942. Petition for writ of certiorari to the Appellate Court, First District, of Illinois granted. *Mr. Samuel Cohen* for petitioner. *Messrs. H. Victor Spike, Silas H. Strawn,* and *Harold A. Smith* for respondent. Reported below: 312 Ill. App. 73, 37 N. E. 2d 888.

No. 303. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* AMERICAN DENTAL CO. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Fahy* for petitioner. *Messrs. John E. Hughes* and *James A. O'Callaghan* for respondent. Reported below: 128 F. 2d 254.

No. 184. KIESELBACH ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third

Circuit granted limited to the first question presented by the petition. *Mr. Harry Friedman* for petitioners. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Miss Helen R. Carloss* and *Messrs. Arthur A. Armstrong* and *Archibald Cox* for respondent. Reported below: 127 F. 2d 359.

No. 201. AMERICAN MEDICAL ASSOCIATION *v.* UNITED STATES; and

No. 202. MEDICAL SOCIETY OF THE DISTRICT OF COLUMBIA *v.* UNITED STATES. October 12, 1942. Petition for writs of certiorari to the United States Court of Appeals for the District of Columbia granted limited to the first three questions presented by the petition. *Messrs. Edward M. Burke, William E. Leahy, Seth W. Richardson,* and *Charles S. Baker* for petitioners. *Assistant Attorney General Arnold* and *Messrs. Oscar Cox, John Henry Lewin,* and *Grant W. Kelleher* for the United States. Reported below: 130 F. 2d 233.

No. 173. UNITED STATES EX REL. MARCUS ET AL. *v.* HESS ET AL. On petition for writ of certiorari to the Circuit Court for Appeals for the Third Circuit; and

No. 236. UNITED STATES EX REL. OSTRAGER ET AL. *v.* NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. October 12, 1942. Petitions for writs of certiorari granted. In these cases the Solicitor General is requested to file a brief and, if he so desires, to participate in the oral argument. *Messrs. Homer Cummings* and *Charles J. Margiotti* for petitioners in No. 173. *Mr. Burnett Wolfson* for petitioners in No. 236. *Mr. William H. Eckert* for respondents in No. 173. Reported below: 127 F. 2d 233, 649.

No. 319. FIDELITY ASSURANCE ASSOCIATION, A CORPORATION, ET AL. *v.* SIMS, AUDITOR OF THE STATE OF WEST VIRGINIA, ET AL. October 12, 1942. The motion to consider the petition for certiorari upon the appendices to the briefs filed in the Circuit Court of Appeals is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit is also granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Messrs. James R. Fleming, Homer A. Holt,* and *T. C. Townsend* for petitioners. *Solicitor General Fahy* and *Messrs. John F. Davis, Homer Kripke,* and *Justin N. Reinhardt* for the Securities & Exchange Commission; *Mr. Ira J. Partlow,* Assistant Attorney General of West Virginia, for Edgar B. Sims, Auditor, et al.; *Messrs James Ward Rector,* Deputy Attorney General of Wisconsin, and *Rickard H. Lauritzen,* Assistant Attorney General, for the Banking Commission of Wisconsin; *Mr. Carl J. Stephens* for Chas. R. Fischer, Commissioner of Insurance of Iowa; *Mr. H. Vernon Eney* for John B. Gontrum, Insurance Commissioner of Maryland; and *Mr. Weldon B. White* for L. H. Brooks, Trustee, et al.,—respondents. Briefs of *amici curiae* were filed by *Mr. Orlin F. Goudy* on behalf of Victor Salkeld et al. in support of the petition; and by *Messrs. George F. Barrett,* Attorney General of Illinois, *George N. Beamer,* Attorney General of Indiana, *Thomas J. Herbert,* Attorney General of Ohio, and *J. W. Jones,* Assistant Attorney General of Kentucky, in opposition to the petition. Reported below: 129 F. 2d 442.

No. 321. CREEK NATION *v.* UNITED STATES; and

No. 322. SEMINOLE NATION *v.* UNITED STATES. October 19, 1942. Petition for writs of certiorari to the Court of Claims granted. *Messrs. Paul M. Niebell, C. Maurice Weidemeyer,* and *W. W. Pryor* for petitioners.

Solicitor General Fahy, Assistant Attorney General Littell, and *Mr. Vernon L. Wilkinson* for the United States.

No. 336. WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, *v.* JACKSONVILLE PAPER CO. October 19, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Fahy* and *Mr. Warner W. Gardner* for petitioner. *Messrs. Charles Cook Howell* and *Louis Kurz* for respondent. Reported below: 128 F. 2d 395.

No. 366. UNITED STATES *v.* BROOKS-CALLAWAY COMPANY. October 19, 1942. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Fahy* for the United States. *Messrs. George R. Shields, Herman J. Galloway, John W. Gaskins,* and *Fred W. Shields* for respondent.

No. 72. NEW YORK EX REL. WHITMAN *v.* WILSON, WARDEN. October 19, 1942. The motion for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari to the Supreme Court of New York is also granted. *R. Gordon Whitman, pro se. Messrs. John J. Bennett, Jr.,* Attorney General of New York, and *Henry Epstein,* Solicitor General, for respondent. Reported below: 263 App. Div. 924, 32 N. Y. S. 2d 1023.

Nos. 387 and 388. RECONSTRUCTION FINANCE CORPORATION *v.* BANKERS TRUST CO., TRUSTEE. October 26, 1942. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Fahy* for petitioner. *Mr. Jesse E. Waid* for respond-

ent. *Solicitor General Fahy* and *Mr. Daniel K. Knowlton* filed a memorandum on behalf of the Interstate Commerce Commission, as *amicus curiae,* in support of the petition. Reported below: 129 F. 2d 122.

No. 473. In re William V. Bradley. October 26, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted and an order is entered admitting the petitioner to bail. *Mr. Thomas D. McBride* for petitioner. *Assistant Solicitor General Cox* and *Mr. Archibald Cox* for the United States.

No. 426. Floyd *v.* Du Bois Soap Co. *See ante,* p. 596.

No. 11, Original. Wells *v.* United States. On motion for leave to file petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. November 9, 1942. The motion for leave to proceed *in forma pauperis* is granted. The motion for leave to file petition for writ of certiorari is granted and the petition for writ of certiorari is also granted. The Court directs that the expense of printing the record be paid by the United States, pursuant to 28 U. S. C., § 832. *Selvie Winfield Wells, pro se.*

No. 422. Mandeville, Trustee, et al. *v.* Canterbury. November 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Miss Corinne L. Rice* for petitioners. *Mr. Lloyd C. Whitman* for respondent. Reported below: 130 F. 2d 208.

No. 424. Federal Security Administrator *v.* Quaker Oats Co. November 9, 1942. Petition for writ of

certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Fahy* for petitioner. *Messrs. George I. Haight* and *William D. McKenzie* for respondent. Reported below: 129 F. 2d 76.

No. 452. CORN EXCHANGE NATIONAL BANK & TRUST CO. ET AL. *v.* KLAUDER, TRUSTEE. November 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Thomas P. Mikell, Allen S. Olmsted, 2d, Maurice Bower Saul,* and *Charles J. Biddle* for petitioners. Reported below: 129 F. 2d 894.

No. 429. SMITH *v.* SHAUGHNESSY, COLLECTOR OF INTERNAL REVENUE. November 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. George R. Fearon* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Benjamin M. Brodsky* for respondent. Reported below: 128 F. 2d 742.

No. 436. DE ZON *v.* AMERICAN PRESIDENT LINES, LTD. November 9, 1942. The motion to proceed on typewritten papers is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit is also granted. *Mr. Herbert Resner* for petitioner. *Messrs. Edward F. Treadwell* and *Reginald S. Laughlin* for respondent. Reported below: 129 F. 2d 404.

No. 453. MARSHALL FIELD & CO. *v.* NATIONAL LABOR RELATIONS BOARD. November 16, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Preston B. Kavanagh*

and *Ralph E. Bowers* for petitioner. *Solicitor General Fahy* and *Messrs. Richard S. Salant, Robert B. Watts, Ernest A. Gross,* and *Morris P. Glushien* for respondent. Reported below: 129 F. 2d 169.

No. 460. NATIONAL LABOR RELATIONS BOARD *v.* SOUTHERN BELL TELEPHONE & TELEGRAPH CO.; and

No. 461. NATIONAL LABOR RELATIONS BOARD *v.* SOUTHERN ASSOCIATION OF BELL TELEPHONE EMPLOYEES. November 16, 1942. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Fahy* and *Mr. Robert B. Watts* for petitioner. *Mr. Marion Smith* for respondent in No. 460; and *Messrs. Frank A. Hooper, Jr.* and *James A. Branch* for respondent in No. 461. Reported below: 129 F. 2d 410.

No. 458. VIERECK *v.* UNITED STATES. November 16, 1942. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted except with respect to the first question presented by the petition. *Mr. O. R. McGuire* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost, Andrew F. Oehmann,* and *W. Marvin Smith* for the United States. Reported below: 130 F. 2d 945.

No. 449. MARICOPA COUNTY ET AL. *v.* VALLEY NATIONAL BANK. November 16, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Leslie C. Hardy, J. Mercer Johnson,* and *Gerald Jones* for petitioners. *Messrs. Charles L. Rawlins, J. L. Gust,* and *William C. Fitts* for respondent. Reported below: 130 F. 2d 356.

No. 467. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* GRIFFITHS. November 23, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Fahy* for petitioner. *Messrs. Will R. Gregg* and *Allin H. Pierce* for respondent. Reported below: 129 F. 2d 321.

Nos. 446 and 447. WILLIAMS ET AL. *v.* DELAWARE & HUDSON RAILROAD CORP. ET AL. See *ante*, p. 600.

No. 488. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* CHICAGO STOCK YARDS CO. December 7, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Solicitor General Fahy* for petitioner. *Mr. George Wharton Pepper* for respondent. Reported below: 129 F. 2d 937.

No. 490. CLEARFIELD TRUST CO. ET AL. *v.* UNITED STATES. December 7, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Roswell D. Pine, Jr.* for petitioners. *Solicitor General Fahy* for the United States. Reported below: 130 F. 2d 93.

No. 497. ANDERSON, RECEIVER, *v.* ABBOTT, ADMINISTRATRIX, ET AL. December 7, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Robert S. Marx, Frank E. Wood, Edward M. Brown,* and *Harry Kasfir* for petitioner. *Messrs. William W. Crawford, Richard P. Dietzman, Allen P. Dodd, James W. Stites, Henry E. McElwain, Edward P. Humphrey,* and *Lafon Allen* for respondents. *Mr. John F. Anderson* filed a brief on behalf of Preston Delano,

Comptroller of the Currency, as *amicus curiae*, in support of the petition. Reported below: 127 F. 2d 696.

No. 499. ROBINETTE *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE; and

No. 500. PAUMGARTEN *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. December 7, 1942. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Henry A. Mulcahy* and *Guilford S. Jameson* for petitioners. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *L. W. Post* for respondent. Reported below: 129 F. 2d 832.

No. 525. SHARPE *v.* BUCHANAN. See *ante*, p. 238.

No. 369. MARCONI WIRELESS TELEGRAPH CO. *v.* UNITED STATES; and

No. 373. UNITED STATES *v.* MARCONI WIRELESS TELEGRAPH CO. December 14, 1942. Petitions for writs of certiorari to the Court of Claims granted. *Messrs. Abel E. Blackmar, Jr.* and *Richard A. Ford* for the Marconi Wireless Telegraph Co. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Clifton V. Edwards* for the United States.

No. 518. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* SABINE TRANSPORTATION CO., INC. December 14, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Fahy* for petitioner. *Mr. Charles I. Francis* for respondent. Reported below: 128 F. 2d 945.

No. 495. BURFORD ET AL. *v.* SUN OIL CO. ET AL. December 14, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Gerald C. Mann,* Attorney General of Texas, *Ed Roy Simmons,* Assistant Attorney General, and *James P. Hart* for petitioners. *Mr. J. B. Robertson* for respondents. Reported below: 130 F. 2d 10.

No. 528. HASTINGS ET AL. *v.* SELBY OIL & GAS CO. ET AL. December 14, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Gerald C. Mann,* Attorney General of Texas, *E. R. Simmons* and *James D. Smullen,* Assistant Attorneys General, and *W. Edward Lee* for petitioners. *Mr. Dan Moody* for respondents. Reported below: 128 F. 2d 334.

No. 540. MYERS, TRUSTEE, *v.* MATLEY. January 4, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Harlan L. Heward* for petitioner. *Mr. William M. Kearney* for respondent. Reported below: 130 F. 2d 775.

No. 551. EMIL, TRUSTEE IN BANKRUPTCY, *v.* HANLEY, RECEIVER. January 4, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. David Haar* for petitioner. *Mr. John P. McGrath* for respondent. Reported below: 130 F. 2d 369.

No. 582. WATERMAN STEAMSHIP CORP. *v.* JONES. January 4, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Joseph W. Henderson* and *George M. Brodhead,*

Jr. for petitioner. *Mr. Abraham E. Freedman* for respondent. Reported below: 130 F. 2d 797.

No. 454. AGUILAR *v.* STANDARD OIL CO. OF NEW JERSEY. January 4, 1943. The order denying certiorari, *post*, p. 681, is vacated and the petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is granted. *Mr. George J. Engelman* for petitioner. *Mr. Vernon S. Jones* for respondent. Reported below: 130 F. 2d 154.

No. 553. GALLOWAY *v.* UNITED STATES. January 4, 1943. The motion for leave to proceed on typewritten papers is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit is also granted. *Mr. Warren E. Miller* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Lester P. Schoene, Wilbur C. Pickett,* and *Keith L. Seegmiller* for the United States. Reported below: 130 F. 2d 467.

No. 557. NATIONAL LABOR RELATIONS BOARD *v.* GOODYEAR TIRE & RUBBER CO. ET AL. January 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Fahy* and *Mr. Robert B. Watts* for petitioner. *Messrs. O. R. Hood* and *Forney Johnston* for respondents. Reported below: 129 F. 2d 661.

No. 556. BOARD OF COUNTY COMMISSIONERS ET AL. *v.* SEBER ET AL. January 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Messrs. Mac Q. Williamson,* Attorney General of Oklahoma, and *Houston E. Hill,* Assistant At-

torney General, for petitioners. *Mr. Leonard O. Lytle* for respondents. Reported below: 130 F. 2d 663.

No. 569. TOT *v.* UNITED STATES. January 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted limited to the 4th and 5th questions stated in the Government's memorandum. *Mr. Frederic M. P. Pearse* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Robert S. Erdahl* and *Valentine Brookes* for the United States. Reported below: 131 F. 2d 261.

No. 496. SUN OIL CO. ET AL. *v.* BURFORD ET AL. January 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Dan Moody, Wyman S. Gideon,* and *J. B. Robertson* for petitioners. *Messrs. Gerald C. Mann,* Attorney General of Texas, *Ed Roy Simmons, James D. Smullen,* Assistant Attorneys General, and *James P. Hart* for respondents. Reported below: 130 F. 2d 10.

No. 580. OWENS, EXECUTRIX, *v.* UNION PACIFIC RAILROAD CO. January 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Frank C. Hanley* for petitioner. *Mr. Roy F. Shields* for respondent. Reported below: 129 F. 2d 1013.

No. 581. SOUTHLAND GASOLINE CO. *v.* BAYLEY ET AL. January 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Claude H. Rosenstein* for petitioner. Reported below: 131 F. 2d 412.

No. 585. FEDERAL COMMUNICATIONS COMMISSION *v.* NATIONAL BROADCASTING CO., INC. ET AL. January 18, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Solicitor General Fahy* for petitioner. *Messrs. Philip J. Hennessey, Jr., Karl A. Smith,* and *A. L. Ashby* for respondents. Reported below: 132 F. 2d 545.

DECISIONS DENYING CERTIORARI, FROM OCTOBER 5, 1942, THROUGH JANUARY 18, 1943.

No. 140. OSMENT *v.* PITCAIRN ET AL., RECEIVERS. See *ante,* p. 587.

No. 128. GURNEY ET AL. *v.* FERGUSON ET AL. See *ante,* p. 588.

No. 169. PENNSYLVANIA PUBLIC UTILITY COMM'N *v.* CHELTENHAM & ABINGTON SEWERAGE CO. See *ante,* p. 588.

No. 174. PEAK *v.* CALIFORNIA. See *ante,* p. 589.

No. 326. JEROME *v.* UNITED STATES. See *ante,* p. 606.

No. 115. CARLOTA BENITEZ SAMPAYO *v.* BANK OF NOVA SCOTIA. October 12, 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 First Circuit is denied. The CHIEF JUSTICE took no part in the consideration or decision of these applications. *Carlota Benitez Sampayo, pro se. Mr. Henri Brown* for respondent.

No. 221. GANTZ *v.* UNITED STATES. October 12, 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 Eighth Circuit is denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications. *Mr. Leonidas C. Dyer* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 127 F. 2d 498.

No. 311. WOOD *v.* INDIANA. October 12, 1942. The motion for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari to the Circuit Court of Randolph County, Indiana, is denied for the reason that it does not appear from the papers submitted that petitioner has exhausted state remedies by appealing to the highest court of the state the judgment sought to be reviewed. *Forest G. Wood, pro se.*

No. 323. NEW YORK EX REL. PRISAMENT *v.* BROPHY, WARDEN. October 12, 1942. The motion for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari to the County Court of Cayuga County, New York, is denied. The application for certiorari to the District Court of the United States for the Middle District of Georgia is also denied. *Martin Prisament, pro se.*

No. 125. COATES *v.* BRADY, WARDEN. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Court of Appeals of Maryland denied. *Wilbur Coates, pro se.* Reported below: 180 Md. 502, 25 A. 2d 676.

No. 139. YANIS *v.* SMITH, WARDEN. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *John Yanis, pro se.*

No. 149. WILCOXON *v.* MOUNT, SHERIFF (SUCCESSOR TO J. C. ALDREDGE, SHERIFF). October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Supreme Court of Georgia denied. *Mr. William S. Shelfer* for petitioner. *Mr. John A. Boykin* for respondent. Reported below: 193 Ga. 661. 19 S. E. 2d 499.

No. 150. MILLER *v.* UNITED STATES. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *William Roy Miller, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 128 F. 2d 519.

No. 151. SANDERS ET AL. *v.* UNITED STATES. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. James J. Laughlin* for petitioners. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. H. G. Ingraham* and *Robert S. Erdahl* for the United States. Reported below: 127 F. 2d 647.

No. 155. FATONE *v.* UNITED STATES. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of

Appeals for the Second Circuit denied. *Mr. Herbert E. Rosenberg* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 128 F. 2d 260.

No. 158. HOWELL *v.* AMRINE, WARDEN, ET AL. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Supreme Court of Kansas denied. *James E. Howell, pro se.* Reported below: 155 Kan. 185, 123 P. 2d 954.

No. 164. WRIGHT *v.* UNION CENTRAL LIFE INSURANCE CO. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Morton S. Hawkins* for petitioner. *Messrs. Arthur S. Lytton* and *Virgil D. Parish* for respondent. Reported below: 126 F. 2d 92.

No. 165. BULLOCK *v.* RIVES, SUPERINTENDENT. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. William J. O'Mahony* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost, Andrew F. Oehmann,* and *W. Marvin Smith* for respondent. Reported below: 130 F. 2d 411.

No. 166. BROWN ET AL. *v.* JOHNSTON, WARDEN. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied.

Royce R. Brown and *Tom C. Moffitt, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for respondent. Reported below: 126 F. 2d 727.

No. 168. LEVINE *v.* HUDSPETH, WARDEN. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Milton J. Levine, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for respondent. Reported below: 127 F. 2d 982.

No. 188. NIVENS *v.* HUDSPETH, WARDEN. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Claud Nivens, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for respondent. Reported below: 128 F. 2d 15.

No. 197. WILLIAMS ET AL. *v.* O'GRADY, WARDEN. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Supreme Court of Nebraska denied. *Leslie Williams* and *Joe Bennett, pro se. Mr. Walter R. Johnson,* Attorney General of Nebraska, for respondent.

No. 204. COUNTEE *v.* UNITED STATES. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Edward H. S. Martin* for petitioner. *Solicitor General Fahy,*

Assistant Attorney General Shea, and *Messrs. Lester P. Schoene, Wilbur C. Pickett,* and *Keith L. Seegmiller* for the United States. Reported below: 127 F. 2d 761.

No. 205. JOHNSTON *v.* MARSHALL, DEPUTY COMMISSIONER, ET AL. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Ben Anderson* for petitioner. Reported below: 128 F. 2d 13.

No. 208. VILES *v.* UNITED STATES. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Court of Claims denied. *Edmond L. Viles, pro se. Solicitor General Fahy* and *Assistant Attorney General Shea* for the United States. Reported below: 95 Ct. Cls. 591.

No. 209. BUXTON *v.* AMRINE, WARDEN. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Herbert Buxton, pro se.* Reported below: 155 Kan. 440, 125 P. 2d 381.

No. 215. MOORE *v.* UNITED STATES. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James F. Kemp* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 128 F. 2d 887.

No. 225. HUDSON *v.* YOUELL, SUPERINTENDENT. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. M. J. Fulton* for petitioner. Reported below: 179 Va. 442, 19 S. E. 2d 705.

No. 226. WATERMAN *v.* SOMERVELL ET AL. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Corinne C. Waterman, pro se. Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Paul A. Sweeney* and *W. Marvin Smith* for respondents.

No. 237. NEAL *v.* NEW YORK. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Supreme Court of New York denied. *Howard Neal, pro se.*

No. 242. ANDERSON *v.* DOWD, WARDEN. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Supreme Court of Indiana denied. *Mr. Oscar B. Thiel* for petitioner. *Mr. Joseph W. Hutchinson,* Deputy Attorney General of Indiana, for respondent. Reported below: 40 N. E. 2d 658.

No. 247. GARRISON ET AL. *v.* AMRINE, WARDEN, ET AL. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Cecil T. Garrison* and *James Perkins, pro se.* Reported below: 155 Kan. 509, 126 P. 2d 228.

No. 255. QUICK *v.* MISSISSIPPI. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Supreme Court of Mississippi denied. *S. V. Quick, pro se.* Reported below: 7 So. 2d 887.

No. 257. WEATHERS *v.* KANSAS ET AL. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Wilbert Weathers, pro se.* Reported below: 155 Kan. 434, 125 P. 2d 373.

No. 272. GILMORE *v.* UNITED STATES. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Dewey Gilmore, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 129 F. 2d 199.

No. 283. WEINER ET AL. *v.* PENNSYLVANIA. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Superior Court of Pennsylvania denied. *Mr. Philip Dorfman* for petitioners. *Messrs. Carl B. Shelley* and *E. LeRoy Keen* for respondent. Reported below: 148 Pa. Super. 577, 25 A. 2d 844.

No. 289. DERR *v.* DERR. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Superior Court of Pennsylvania denied. *Mr. Hayden C. Covington* for petitioner. Reported below: 148 Pa. Super. 511, 25 A. 2d 769.

No. 295. SCHRAMM *v.* BRADY, WARDEN. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Charles E. Schramm, pro se.* Reported below: 129 F. 2d 108.

No. 298. SHOTKIN ET UX. *v.* BOARD OF PENSIONS OF THE PRESBYTERIAN CHURCH OF THE UNITED STATES. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Bernard M. Shotkin, pro se.* Reported below: 343 Pa. 650, 23 A. 2d 419.

No. 307. PICKING ET AL. *v.* STATE OF NEW YORK. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Court of Appeals of New York denied. *Ida M. Picking, pro se.* Reported below: 288 N. Y. 644, 42 N. E. 2d 741.

No. 313. ADAMS ET AL. *v.* UNITED STATES. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James F. Kemp* for petitioners. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 128 F. 2d 820.

No. 316. BROWN *v.* CAPITAL TRANSIT CO. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Isadore H. Halpern* for petitioner. *Messrs. S. R.*

Bowen, H. W. Kelly, and *R. E. Lee Goff* for respondent. Reported below: 127 F. 2d 329.

No. 324. SMITH *v.* LAWRENCE, WARDEN. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. M. A. Grace* for petitioner. *R. H. Lawrence, pro se.* Reported below: 128 F. 2d 822.

No. 338. LOUISIANA EX REL. PIERRE *v.* JONES, GOVERNOR. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Mr. Maurice R. Woulfe* for petitioner. Reported below: 200 La. 808, 9 So. 2d 42.

No. 342. ADDISON *v.* ADDISON. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Superior Court of Pennsylvania denied. *Mr. H. Eugene Gardner* for petitioner. *William Marlborough Addison, pro se.* Reported below: 147 Pa. Super. 267, 24 A. 2d 45.

No. 352. LEIMER *v.* COOK, JUDGE. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Jackson County, Missouri, denied. *Walter A. Leimer, pro se.*

No. 381. VILES *v.* SYMES ET AL. October 12, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Edmund L. Viles, pro*

se. Mr. Jean S. Breitenstein for respondents. Reported below: 129 F. 2d 828.

No. 104. HAMLET ICE CO., INC. *v.* FLEMING, ADMINISTRATOR. October 12, 1942. L. Metcalfe Walling, present Administrator of the Wage and Hour Division, U. S. Department of Labor, substituted as the party respondent herein in the place and stead of Philip B. Fleming, resigned. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. J. L. Emanuel, O. L. Henry,* and *L. R. Varser* for petitioner. *Solicitor General Fahy* and *Messrs. Robert L. Stern, Warner W. Gardner, Mortimer B. Wolf* for respondent. Reported below: 127 F. 2d 165.

No. 130. KHARAITI RAM SAMRAS *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit; and

No. 267. CARLETON SCREW PRODUCTS CO. *v.* FLEMING, ADMINISTRATOR. On petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. October 12, 1942. The petitions for writs of certiorari in these cases are denied for the reason that applications therefor were not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C., § 350. *Mr. D. B. Spagnoli* for petitioner in No. 130. *Mr. Josiah E. Brill* for petitioner in No. 267. *Solicitor General Fahy* for respondent in No. 130, and *Mr. Warner W. Gardner* was with him on the brief for respondent in No. 267. Reported below: No. 130, 125 F. 2d 879; No. 267, 126 F. 2d 537.

No. 138. BOCZ *v.* HUDSON MOTOR CAR CO. ET AL. October 12, 1942. Petition for writ of certiorari to the

Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE ROBERTS and MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Alexander C. Bocz, pro se. Mr. Henry E. Bodman* for Hupp Motor Car Corp., and *Mr. Wilbur M. Brucker* for the Packard Motor Car Co.,—respondents. Reported below: 126 F. 2d 465.

No. 203. CLAIMANTS FOR BENEFITS UNDER THE MICHIGAN UNEMPLOYMENT COMPENSATION ACT *v.* CHRYSLER CORPORATION ET AL. October 12, 1942. Petition for writ of certiorari to the Supreme Court of Michigan denied. MR. JUSTICE ROBERTS and MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Mr. Lee Pressman* for petitioners. *Messrs. Harry C. Bulkley, John G. Garlinghouse,* and *Nicholas Kelley* for respondents. Reported below: 301 Mich. 351, 3 N. W. 2d 302.

No. 270. EACHO, TRUSTEE, *v.* STONE, TRUSTEE, ET AL. October 12, 1942. The motion to consider the petition for writ of certiorari upon appendices to the brief in the Circuit Court of Appeals is granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. R. Hugh Rudd* for petitioner. *Mr. Nathan Bilder* for respondents. Reported below: 128 F. 2d 16.

No. 328. ESTATE OF FISKE *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE REED took no part in the consideration or decision of this application. *Mr John A. Reed* for petitioner. *Solicitor General Fahy, As-*

sistant Attorney General Clark, and *Messrs. Sewall Key, J. Louis Monarch,* and *Newton K. Fox* for respondent. Reported below: 128 F. 2d 487.

No. 367. Neal *v.* Lykes Bros. Ripley Steamship Co., Inc. October 12, 1942. The motion to proceed on the typewritten record is granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Alex. W. Swords* for petitioner. *Mr. Walter Carroll* for respondent. Reported below: 127 F. 2d 879.

No. 88. Nebo Oil Co., a Trust, *v.* Helvering, Commissioner of Internal Revenue. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. George M. Green* and *T. Murray Robinson* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Benjamin M. Brodsky* for respondent. Reported below: 126 F. 2d 148.

No. 90. Roden Coal Co., Inc. *v.* United States. October 12, 1942. Petition for writ of certiorari to the Court of Claims denied. *Mr. John Jay McKelvey* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 95 Ct. Cls. 219.

No. 91. Order of United Commercial Travelers of America *v.* Wigginton. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Richard T. Rector* for petitioner. *Mr. Richard R. McGinnis* for respondent. Reported below: 126 F. 2d 659.

No. 92. HUMPHREYS *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles P. R. Macaulay* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Earl C. Crouter* for respondent. Reported below: 125 F. 2d 340.

No. 95. PIUMA *v.* UNITED STATES. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Louis J. Canepa* for petitioner. *Solicitor General Fahy, Assistant Attorney General Arnold,* and *Mr. Charles H. Weston* for the United States. Reported below: 126 F. 2d 601.

No. 98. BARCO, EXECUTRIX, ET AL. *v.* PENN MUTUAL LIFE INSURANCE CO. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. O. D. Batchelor* and *Henry K. Gibson* for petitioners. *Mr. Crate D. Bowen* for respondent. Reported below: 126 F. 2d 56.

No. 99. NEW YORK EX REL. COGAN *v.* MANN. October 12, 1942. Petition for writ of certiorari to the Court of Appeals of New York denied. *Mr. Carl E. Ring* for petitioner. *Mr. Leo C. Fennelly* for respondent. Reported below: 287 N. Y. 779, 40 N. E. 2d 646.

No. 100. MIFFLINBURG BODY CO. *v.* MIFFLINBURG BANK & TRUST CO. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Harry S. Knight* for petitioner. *Mr. Gilbert Nurick* for respondent. Reported below: 127 F. 2d 59.

No. 101. W. W. CLYDE & Co. *v.* DYESS. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Arthur E. Moreton* for petitioner. Reported below: 126 F. 2d 719.

No. 102. MIRSKY *v.* CONLEW, INC. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Horace G. Marks* and *David Haar* for petitioner. *Messrs. Leonard G. Bisco* and *Henry Landau* for respondent. Reported below: 124 F. 2d 1017.

No. 105. DUQUESNE CLUB *v.* BELL, FORMER ACTING COLLECTOR OF INTERNAL REVENUE; and

No. 106. DUQUESNE CLUB *v.* DRISCOLL, COLLECTOR OF INTERNAL REVENUE. October 12, 1942. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. George B. Furman, Paul Armitage,* and *Edward Holloway* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Carlton Fox* for respondents. Reported below: 127 F. 2d 363.

No. 107. EVANS *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. James S. Y. Ivins* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *L. W. Post* for respondent. Reported below: 126 F. 2d 270.

No. 108. MOREHEAD *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certi-

orari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. James S. Y. Ivins* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *L. W. Post* for respondent. Reported below: 126 F. 2d 270.

No. 109. SWASTIKA OIL & GAS CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Harry C. Kinne* and *Michael J. Sporrer* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *J. Louis Monarch,* and *Miss Louise Foster* for respondent. Reported below: 123 F. 2d 382.

No. 110. RICHARDSON, TRUSTEE, ET AL. *v.* BLUE GRASS MINING CO. ET AL. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Bailey P. Wootton* and *H. C. Faulkner* for petitioners. *Mr. Simeon S. Willis* for respondents. Reported below: 127 F. 2d 291.

No. 111. MAY DEPARTMENT STORES CO. *v.* REYNOLDS. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Richard S. Bull* for petitioner. *Mr. Jesse W. Barrett* for respondent. Reported below: 127 F. 2d 396.

No. 112. CHESTER C. FOSGATE CO. *v.* UNITED STATES. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles O. Andrews, Jr.* for petitioner. *Solicitor*

General Fahy, Assistant Attorney General Clark, and *Messrs. Sewall Key, J. Louis Monarch, Bernard Chertcoff,* and *Archibald Cox* for the United States. Reported below: 125 F. 2d 775.

No. 114. McCarthy, doing business as Hercules Supply Co., et al. *v.* Wynne et al. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. John M. Miley* for petitioners. *Mr. Rayburn L. Foster* for respondents. Reported below: 126 F. 2d 620.

No. 116. Nieschlag & Co., Inc. *v.* Atlantic Mutual Insurance Co. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Harold T. Edwards* and *Charles A. Ellis* for petitioner. *Messrs. J. M. Richardson Lyeth* and *Mark W. Maclay* for respondent. Reported below: 126 F. 2d 834.

No. 117. Summers et al. *v.* Purcell et al. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Collins Denny, Jr.* for petitioners. *Messrs. J. Morgan Stevens, Walter McElreath, J. T. Jaynes,* and *Orville A. Park* for respondents. Reported below: 126 F. 2d 390.

No. 118. Helvering, Commissioner of Internal Revenue, *v.* Estate of Davies et al. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Solicitor General Fahy* for petitioner. *Mr. John L. Davies, Sr.* for respondents. Reported below: 126 F. 2d 294.

No. 119. ADVANCE TRANSPORTATION CO. *v.* MILLER ET AL. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Joseph H. Hinshaw* and *Oswell G. Treadway* for petitioner. *Mr. Lloyd D. Heth* for respondents. Reported below: 126 F. 2d 442.

No. 120. BEN BIMBERG & CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Prew Savoy* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Joseph M. Jones* for respondent. Reported below: 126 F. 2d 412.

No. 121. KNOST *v.* MACMILLAN. October 12, 1942. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Leslie C. Garnett* and *Samuel F. Beach* for petitioner. *Mrs. Mabel Walker Willebrandt* and *Mr. John J. Sirica* for respondent. Reported below: 126 F. 2d 235.

No. 123. DANIEL *v.* UNITED STATES. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. E. H. Gamble* for petitioner. *Solicitor General Fahy* and *Assistant Attorney General Berge* for the United States. Reported below: 127 F. 2d 1.

No. 126. MUSHER FOUNDATION, INC. *v.* ALBA TRADING CO., INC. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second

Circuit denied. *Mr. Harry Price* for petitioner. *Mr. Joseph Joffe* for respondent. Reported below: 127 F. 2d 9.

No. 127. UNITED CONSTRUCTION CO. *v.* MILAM ET AL. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Charles Bushnell Fullerton* and *Harold V. Snyder* for petitioner. Reported below: 124 F. 2d 670.

No. 131. KITTREDGE *v.* STEVENS ET AL. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Scott F. Kittredge, pro se. Mr. Edwin A. Howes* for respondents. Reported below: 126 F. 2d 263.

No. 133. CORY *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Peter V. D. Voorhees* and *Samuel B. Stewart, Jr.* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Warren F. Wattles* for respondent. Reported below: 126 F. 2d 689.

No. 135. SECOND CAREY TRUST *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Geo. E. H. Goodner* and *Miss Helen Goodner* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Warren F. Wattles* for respondent. Reported below: 126 F. 2d 526.

No. 136. HARE TRUST *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Geo. E. H. Goodner* and *Miss Helen Goodner* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Warren F. Wattles* for respondent. Reported below: 126 F. 2d 530.

No. 137. ABRAHAM ET AL., TRUSTEES, *v.* HIDALGO COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT No. 1 ET AL. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. D. F. Strickland* and *Camden R. McAtee* for petitioners. *Messrs. W. B. Lewis* and *Cecil A. Morgan* for respondents. Reported below: 125 F. 2d 829.

No. 141. HIGHWAY CONSTRUCTION CO., INC. *v.* MIAMI. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. William H. Boyd, James E. Calkins,* and *Robert H. Anderson* for petitioner. *Messrs. J. W. Watson, Jr.* and *Sidney S. Hoehl* for respondent. Reported below: 126 F. 2d 777.

Nos. 143 and 144. MADDIX ET AL. *v.* SAULSBERRY. October 12, 1942. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *F. M. Maddix, Malinda Maddix, W. T. Saulsberry,* and *George A. Saulsberry, pro se. Mr. H. R. Dysard* for respondent. Reported below: 125 F. 2d 430.

No. 145. SEWELL ET AL. *v.* J. E. CROSBIE, INC., ET AL. October 12, 1942. Petition for writ of certiorari to the

Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Wallace Townsend* for petitioners. Reported below: 127 F. 2d 599.

No. 146. R. E. CRUMMER & Co. *v.* WARE ET AL. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Robert J. Pleus* for petitioner. Reported below: 128 F. 2d 114.

No. 147. OLDS ET AL. *v.* TOWN OF BELLEAIR. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Giles J. Patterson* for petitioners. *Mr. O. K. Reaves* for respondent. Reported below: 127 F. 2d 838.

No. 148. MILLER ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD CO. ET AL. October 12, 1942. Petition for writ of certiorari to the Supreme Court of Indiana denied. *Mr. Theodore Lockyear* for petitioners. *Mr. William L. Craig* for respondents. Reported below: 219 Ind. 389, 38 N. E. 2d 239.

No. 152. TERHUNE ET AL., EXECUTORS, *v.* WELCH, COLLECTOR. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Clement R. Lamson* for petitioners. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Bernard Chertcoff* for respondent. *Messrs. Hugh Satterlee* and *Wm. R. Green, Jr.* filed a brief, as *amici curiae,* in support of the petition. Reported below: 126 F. 2d 695.

No. 153. LUCKENBACH STEAMSHIP CO., INC. *v.* SOCIETA ANONIMA PARTECIPAZIONI INDUSTRIALI COMMER-

CIALI ET AL. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Lyman Henry* and *Frederick W. Dorr* for petitioner. *Messrs. S. Hasket Derby* and *Joseph C. Sharp* for the Hawaii Liquor Company et al.; and *Mr. W. F. Williamson* for the Societa Anonima Partecipazioni Industriali Commerciali et al.,—respondents. Reported below: 127 F. 2d 86.

No. 154. KEYSTONE FREIGHT LINES, INC. *v.* LEE WAY MOTOR FREIGHT, INC. ET AL. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. John B. Dudley* and *Duke Duvall* for petitioner. Reported below: 126 F. 2d 931.

No. 157. PHIPPS *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. David A. Reed* and *Norman D. Keller* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Joseph M. Jones* for respondent. Reported below: 127 F. 2d 214.

No. 159. MASON *v.* MERCED IRRIGATION DISTRICT. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. George T. Davis* and *Peter tum Suden* for petitioner. *Mr. Stephen W. Downey* for respondent. Reported below: 126 F. 2d 920.

Nos. 161 and 162. ESTATE OF LEVIS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writs of certiorari to the Circuit Court of Appeals

for the Second Circuit denied. *Mr. Ralph Royall* for petitioners. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Joseph M. Jones* for respondent. Reported below: 127 F. 2d 796.

No. 170. McGrew *v.* Simmons et al. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Samuel G. Wagner* and *Dorothea M. Wagner* for petitioner. *Mr. W. Denning Stewart* for respondents. Reported below: 126 F. 2d 676.

No. 177. Wenger *v.* Commissioner of Internal Revenue. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Henry B. Graves* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *F. E. Youngman* for respondent. Reported below: 127 F. 2d 523.

No. 180. Southwestern Greyhound Lines, Inc. *v.* Buchanan. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Virgil T. Seaberry* and *Robert G. Payne* for petitioner. *Messrs. Thomas L. Blanton, John Matthews Blanton,* and *William W. Blanton* for respondent. Reported below: 126 F. 2d 179.

No. 181. Roth *v.* Local No. 1460 of Retail Clerks Union et al. October 12, 1942. Petition for writ of certiorari to the Supreme Court of Indiana denied. *Mr. Jay E. Darlington* for petitioner. *Messrs. William H. Faust* and *William H. Faust, Jr.,* and *Mrs. Irene Faust*

for respondents. Reported below: 219 Ind. 642, 39 N. E. 2d 775.

No. 182. O'BRYAN BROTHERS *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Cecil Sims* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Earl C. Crouter* and *Miss Helen R. Carloss* for respondent. Reported below: 127 F. 2d 645.

No. 185. MILLER, INDUSTRIAL COMMISSIONER, *v.* WESTERN PERISHABLE CARLOAD RECEIVERS ASSOCIATION OF NEW YORK, INC. October 12, 1942. Petition for writ of certiorari to the Supreme Court of New York, Appellate Division, denied. *Messrs. John J. Bennett, Jr.,* Attorney General of New York, *Henry Epstein,* Solicitor General, *William Gerard Ryan* and *Francis R. Curran,* Assistant Attorneys General, for petitioner. *Mr. John L. McMaster* for respondent.

No. 189. BARLOW, TRUSTEE, *v.* BUDGE, CLAIMANT. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William M. Giller* for petitioner. *Mr. Preston B. Kavanagh* for respondent. Reported below: 127 F. 2d 440.

No. 190. EDMUND WRIGHT GINSBERG CORPORATION *v.* SWETNAM, TRUSTEE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Duane R. Dills* and *Jack J. Levinson* for petitioner. *Messrs. Maurice L. Shaine* and *William V. Ford* for respondent. Reported below: 128 F. 2d 1.

No. 191. HARAWAY *v.* ARKANSAS. October 12, 1942. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Mr. Scipio A. Jones* for petitioner. *Mr. John P. Streepey,* Assistant Attorney General of Arkansas, for respondent. Reported below: 203 Ark. 912, 159 S. W. 2d 733.

No. 193. PHILLIPS BUTTORFF MANUFACTURING CO. *v.* JOHNSON. October 12, 1942. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *Mr. Cecil Sims* for petitioner. *Mr. James C. Havron* for respondent. *Solicitor General Fahy* and *Messrs. Warner W. Gardner* and *Mortimer B. Wolf* filed a brief on behalf of the Administrator of the Wage and Hour Division, U. S. Department of Labor, as *amicus curiae,* in opposition to the petition. Reported below: 178 Tenn. 559, 160 S. W. 2d 893.

No. 194. MATEUS *v.* UNITED STATES. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Morris Lavine* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 127 F. 2d 683.

No. 195. AMERICAN LIBERTY OIL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John Barre King* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Joseph M. Jones,* and *Archibald Cox,* and *Miss Helen R. Carloss* for respondent. Reported below: 127 F. 2d 262.

No. 196. ROBINSON *v.* BATON ROUGE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. P. G. Borron* for petitioner. Reported below: 127 F. 2d 693.

No. 198. SCHALLER *v.* PHILADELPHIA. October 12, 1942. Petition for writ of certiorari to the Superior Court of Pennsylvania denied. *Mr. Michael Francis Doyle* for petitioner. *Messrs. Ernest Lowengrund* and *Abraham Wernick* for respondent. Reported below: 148 Pa. Super. 276, 25 A. 2d 406.

No. 200. STONE ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Lewis F. Jacobson* and *David Silbert* for petitioners. *Assistant Solicitor General Cox* and *Messrs. Robert B. Watts, Ernest A. Gross,* and *Morris P. Glushien* for respondent. Reported below: 125 F. 2d 752.

No. 206. Series "A" TRUST *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the U. S. Court of Appeals for the District of Columbia denied. *Mr. Geo. E. H. Goodner* and *Miss Helen Goodner* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Warren F. Wattles* and *Miss Helen R. Carloss* for respondent. Reported below: 126 F. 2d 530.

No. 207. LEHIGH VALLEY RAILROAD CO. ET AL. *v.* DOOLEY. October 12, 1942. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Messrs. Edward A. Markley, Frank L. Mulholland, Clar-*

ence M. Mulholland, and *Willard H. McEwen* for petitioners. *Mr. Walter L. McDermott* for respondent. Reported below: 131 N. J. Eq. 468, 25 A. 2d 893.

No. 210. Rapid Roller Co. *v.* National Labor Relations Board. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Homer Cummings* and *Charles LeRoy Brown* for petitioner. *Assistant Solicitor General Cox* and *Messrs. Robert B. Watts* and *Ernest A. Gross* for respondent. Reported below: 126 F. 2d 452.

Nos. 211 and 212. Eastern Building Corporation *v.* United States. October 12, 1942. Petition for writs of certiorari to the Court of Claims denied. *Messrs. Homer Cummings* and *Raymond E. Hackett* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for the United States. Reported below: No. 211, 96 Ct. Cls. 399, and No. 212, 96 Ct. Cls. 438.

No. 216. A. W. Stickle & Co. *v.* Interstate Commerce Commission. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. John B. Dudley* and *Duke Duvall* for petitioner. *Messrs. Daniel W. Knowlton* and *Francis A. Silver* for respondent. Reported below: 128 F. 2d 155.

No. 217. Ohio ex rel. Lien, Superintendent of Banks, *v.* Metropolitan Life Insurance Co. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Thomas J. Herbert,* Attorney General of Ohio, and *George*

R. Effler for petitioner. *Mr. Frank Ewing* for respondent. Reported below: 127 F. 2d 297.

No. 219. PICARD, ADMINISTRATOR, ET AL. *v.* UNITED AIRCRAFT CORP. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. George I. Haight* and *M. K. Hobbs* for petitioners. *Messrs. Drury W. Cooper* and *C. Blake Townsend* for respondent. Reported below: 128 F. 2d 632.

No. 220. TRINITY CORPORATION *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Robert Ash* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Samuel H. Levy, Newton K. Fox,* and *Archibald Cox* for respondent. Reported below: 127 F. 2d 604.

No. 222. ROSE *v.* UNITED STATES. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Edward M. Box* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Ellis N. Slack* for the United States. Reported below: 128 F. 2d 622.

No. 223. PANDOLFO *v.* UNITED STATES. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Mr. James M. Hervey* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney Gen-*

eral Berge, and *Mr. Oscar A. Provost* for the United States. Reported below: 128 F. 2d 917.

No. 224. WIGGINS *v.* KENNARD. October 12, 1942. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Daniel N. Kirby* and *Harry W. Kroeger* for petitioner. *Mr. Paul Bakewell, Jr.* for respondent. Reported below: 349 Mo. 283, 160 S. W. 2d 706.

No. 227. GREAT SOUTHERN TRUCKING CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Thomas C. Guthrie* and *E. T. McIlvaine* for petitioner. *Solicitor General Fahy* and *Messrs. Valentine Brookes, Robert B. Watts, Ernest A. Gross,* and *Ralph Winkler* for respondent. Reported below: 127 F. 2d 180.

No. 228. SCHRAM, RECEIVER, *v.* COYNE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Robert S. Marx, Frank E. Wood,* and *George P. Barse* for petitioner. *Mr. Harry C. Bulkley* for respondent. Reported below: 127 F. 2d 205.

No. 229. ALABAMA POWER CO. *v.* FEDERAL POWER COMMISSION. October 12, 1942. Petition for writ of certiorari to the U. S. Court of Appeals for the District of Columbia denied. *Messrs. H. C. Kilpatrick, P. W. Turner, Walter Bouldin,* and *William M. Moloney* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Richard J. Connor* and *Charles V. Shannon* for respondent. Reported below: 128 F. 2d 280.

No. 230. ESTATE OF ANDERSON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Marshall P. Madison, Francis R. Kirkham,* and *Sigvald Nielson* for petitioners. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Harry Marselli* for respondent. Reported below: 126 F. 2d 46.

No. 231. HAWAIIAN GAS PRODUCTS, LTD. *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Robbins Battell Anderson* and *Lee P. Warren* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Joseph M. Jones* for respondent. Reported below: 126 F. 2d 4.

No. 232. KELLEY ET AL. *v.* EVERGLADES DRAINAGE DISTRICT. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Miller Walton* for petitioners. *Messrs. John D. McCall* and *M. Lewis Hall* for respondent. Reported below: 127 F. 2d 808.

No. 233. WASHER, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Eugene L. Garey* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Arnold Raum,* and *L. W. Post* for respondent. Reported below: 127 F. 2d 446.

No. 239. RHEINSTROM, EXECUTOR, *v.* CONNOR, COLLECTOR OF INTERNAL REVENUE; and

No. 240. FIRST NATIONAL BANK, TRUSTEE, *v.* CONNOR, COLLECTOR OF INTERNAL REVENUE. October 12, 1942. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Jerome Goldman, Thomas C. Lavery,* and *A. Julius Freiberg* for petitioners. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Samuel H. Levy,* and *Paul S. McMahon* for respondent. Reported below: 125 F. 2d 790.

No. 241. KANSAS CITY LIFE INSURANCE CO. *v.* PARFET, ADMINISTRATOR. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Morrison Shafroth, W. W. Grant, Henry W. Toll,* and *Charles H. Haines, Jr.* for petitioner. *Mr. A. D. Quaintance* for respondent. Reported below: 128 F. 2d 361.

No. 243. GENERAL RADIO CO. *v.* ALLEN B. DUMONT LABORATORIES, INC. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Dean S. Edmonds, R. Morton Adams,* and *George E. Faithfull* for petitioner. *Messrs. Samuel E. Darby, Jr.* and *Floyd H. Crews* for respondent. Reported below: 129 F. 2d 608.

No. 249. OUERBACKER *v.* HENDERSON COUNTY. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Henry E. McElwain, Jr.* for petitioner. *Mr. Kester Walton* for respondent. Reported below: 126 F. 2d 309.

No. 251. KATZ UNDERWEAR CO. *v.* UNITED STATES. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Prew Savoy* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *J. Louis Monarch* for the United States. Reported below: 127 F. 2d 965.

No. 252. NATIONAL PROTECTIVE INSURANCE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James P. Aylward* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Edward H. Horton,* and *Harry Marselli* for respondent. Reported below: 128 F. 2d 948.

No. 253. WILLIAMS *v.* UNITED STATES. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Joseph A. Padway* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Alvin J. Rockwell* and *Miss Helen R. Carloss* for the United States. Reported below: 126 F. 2d 129.

No. 256. WILGARD REALTY CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry S. Fraser* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Harry Marselli* and *Miss Helen R. Carloss* for respondent. Reported below: 127 F. 2d 514.

No. 260. MUMFORDE *v.* UNITED STATES. October 12, 1942. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. George E. C. Hays* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 130 F. 2d 411.

No. 261. CAIN *v.* HUTSON ET AL. October 12, 1942. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Rossa F. Downing* for petitioner. *Mr. James J. Hayden* for respondents. Reported below: 127 F. 2d 19.

Nos. 262, 263, and 264. STROBEL STEEL CONSTRUCTION CO. *v.* STATE HIGHWAY COMMISSIONER. October 12, 1942. Petition for writs of certiorari to the Court of Errors and Appeals of New Jersey denied. *Messrs. Lionel P. Kristeller* and *Saul J. Zucker* for petitioner. *Mr. Joseph Lanigan* for respondent. Reported below: 128 N. J. L. 379, 25 A. 2d 903.

No. 266. RESEARCH LABORATORIES, INC. *v.* UNITED STATES. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Alexander G. Barry* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 126 F. 2d 42.

No. 271. ROGGE ET AL., COPARTNERS, ET AL. *v.* UNITED STATES. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Morgan J. Doyle* for petitioners. *Solicitor*

General Fahy, Assistant Attorney General Littell, and *Mr. Vernon L. Wilkinson* for the United States. Reported below: 128 F. 2d 800.

No. 274. MARSHALL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Thomas C. Lavery* for petitioners. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Joseph M. Jones* for respondent. Reported below: 128 F. 2d 741.

No. 276. GONZALES ET AL. *v.* CALIFORNIA. October 12, 1942. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. Leo R. Friedman* for petitioners. *Mr. Earl Warren,* Attorney General of California, for respondent. Reported below: 20 Cal. 2d 165, 124 P. 2d 44.

No. 277. PETRELLI *v.* UNITED STATES. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Bryan Purteet* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 129 F. 2d 101.

No. 279. DUBUQUE FIRE & MARINE INSURANCE CO. *v.* REYNOLDS CO., INC. ET AL. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Hugh Q. Buck* for petitioner. Reported below: 128 F. 2d 665.

No. 282. MASON ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of cer-

tiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Victor C. Swearingen* for petitioners. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, A. F. Prescott, S. Dee Hanson,* and *Robert L. Stern* for respondent. Reported below: 125 F. 2d 540.

No. 285. PERRY *v.* BAUMANN ET AL. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Reuben G. Hunt* for petitioner. Reported below: 128 F. 2d 727.

No. 287. HIGGINS *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Lawrence E. Green* and *George E. Ray* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Morton K. Rothschild* for respondent. Reported below: 129 F. 2d 237.

No. 290. BUCKLEY *v.* DISTRICT OF COLUMBIA. October 12, 1942. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *M. Edward Buckley, Jr., pro se. Messrs. Richmond B. Keech* and *Vernon E. West* for respondent. Reported below: 128 F. 2d 17.

No. 291. MCSWEENEY, ADMINISTRATRIX, *v.* PRUDENTIAL INSURANCE CO. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Douglas McKay* for petitioner. *Mr. Robert McC. Figg, Jr.* for respondent. Reported below: 128 F. 2d 660.

No. 292. NEHER *v.* HARWOOD, POSTMASTER. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Walter H. Maloney* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for respondent. Reported below: 128 F. 2d 846.

No. 293. LEBANON STEEL FOUNDRY *v.* NATIONAL LABOR RELATIONS BOARD. October 12, 1942. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. H. Rank Bickel, Jr.* and *H. P. McFadden* for petitioner. *Solicitor General Fahy* and *Messrs. Robert B. Watts, Ernest A. Gross,* and *Morris P. Glushien* for respondent. Reported below: 130 F. 2d 404.

No. 294. WIREN *v.* SHUBERT THEATRE CORP. ET AL. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Oscar B. Wiren* for petitioner. *Mr. William Klein* for the Shubert Theatre Corporation et al.; and *Mr. Louis Phillips* for Paramount Pictures, Inc.,—respondents.

No. 297. WILLKIE *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Wendell L. Willkie* and *Harold J. Gallagher* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Joseph M. Jones* for respondent. Reported below: 127 F. 2d 953.

No. 301. THOMSON, TRUSTEE, ET AL. *v.* HICKS ET AL. October 12, 1942. Petition for writ of certiorari to the

Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. William T. Faricy, William B. Hale,* and *Otis Lowell Hastings* for petitioners. *Mr. Roy F. Hall* for respondents. Reported below: 127 F. 2d 1001.

No. 302. FABER, EXECUTRIX, ET AL. *v.* TRIUMPH EXPLOSIVES, INC. ET AL. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Spencer B. Michael, George H. Wallace,* and *Charles B. Cannon* for petitioners. *Mr. Harold F. Watson* for respondents. Reported below: 128 F. 2d 444.

No. 304. MARTIN BROTHERS BOX CO. *v.* NATIONAL LABOR RELATIONS BOARD. *October* 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Nolan Boggs* for petitioner. *Solicitor General Fahy* and *Messrs. Richard S. Salant, Robert B. Watts, Ernest A. Gross,* and *Morris P. Glushien* for respondent. Reported below: 130 F. 2d 202.

No. 305. THOMAS ET AL. *v.* EL DORADO IRRIGATION DISTRICT. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. Coburn Cook* for petitioners. *Mr. Chellis M. Carpenter* for respondent. Reported below: 126 F. 2d 922.

No. 306. MINER, SUCCESSOR TRUSTEE, *v.* RECONSTRUCTION FINANCE CORPORATION. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George Edward Leonard* for petitioner. *Solicitor General Fahy* and *Messrs. Robert L. Stern, Hans A. Klagsbrunn,* and *Wil-*

liam S. Allen for respondent. Reported below: 128 F. 2d 242.

No. 308. LOFTIN ET AL., RECEIVERS, *v.* CROWLEY'S, INC. October 12, 1942. Petition for writ of certiorari to the Supreme Court of Florida denied. *Messrs. Russell L. Frink* and *Robert H. Anderson* for petitioners. Reported below: 8 So. 2d 909.

No. 309. AKTIEBOLAGET SEPARATOR *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Benjamin A. Matthews* and *Harold Harper* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *L. W. Post* for respondent. Reported below: 128 F. 2d 739.

No. 310. LACY *v.* UNITED STATES. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Frank J. Looney* for petitioner. *Solicitor General Fahy and Assistant Attorney General Berge* for the United States. Reported below: 128 F. 2d 912.

No. 312. DE BARDELEBEN COAL CO., INC. *v.* MACOMBER, ADMINISTRATRIX. October 12, 1942. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Mr. Richard B. Montgomery* for petitioner. *Mr. Alex. W. Swords* for respondent. Reported below: 200 La. 633, 8 So. 2d 624.

No. 315. ODLAND, RECEIVER, *v.* FAIRMONT SUPPLY CO. October 12, 1942. Petition for writ of certiorari to the Circuit Court, Marion County, West Virginia, denied.

Mr. John F. Anderson and *Harriet Buckingham* and *Mr. Ernest R. Bell* for petitioner. *Messrs. Eli Whitney Debevoise* and *Robert C. Morris* for respondent.

No. 318. CONSOLIDATED DISTRIBUTORS, INC. *v.* ATLANTA. October 12, 1942. Petition for writ of certiorari to the Supreme Court of Georgia denied. *Mr. George C. Spence* for petitioner. *Mr. J. C. Murphy* for respondent. Reported below: 193 Ga. 853, 20 S. E. 2d 421.

No. 330. GOLDBLATT BROS., INC. *v.* UNITED STATES. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Nicholas J. Pritzker* and *Stanford Clinton* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Joseph M. Jones* for the United States. Reported below: 128 F. 2d 576.

No. 331. WOOD *v.* FEDERAL LAND BANK OF OMAHA ET AL. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William Lemke* for petitioner. *Messrs. J. C. Pryor* and *C. A. Sorensen* for respondents. Reported below: 129 F. 2d 89.

No. 333. THOMPSON, TRUSTEE, *v.* GALLIEN ET AL. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Fred. G. Hudson, Jr.* for petitioner. Reported below: 127 F. 2d 664.

No. 334. MINGORI ET AL. *v.* BRODERICK, COLLECTOR OF INTERNAL REVENUE. October 12, 1942. Petition for

writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Jeff A. Robertson* for petitioners. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Newton K. Fox* for respondent. Reported below: 128 F. 2d 996.

No. 335. AETNA INSURANCE CO. *v.* JEFFCOTT. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. D. Roger Englar, Leonard J. Matteson,* and *George S. Brengle* for petitioner. *Messrs. George C. Sprague* and *John Tilney Carpenter* for respondent. Reported below: 129 F. 2d 582.

No. 339. NEW ROCHELLE *v.* WESTCHESTER ELECTRIC RAILROAD CO. ET AL. October 12, 1942. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Charles S. Rhyne* for petitioner. *Mr. Alfred T. Davison* for respondents. Reported below: 262 App. Div. 961, 30 N. Y. S. 2d 495; 288 N. Y. 571, 42 N. E. 2d 23.

No. 340. DOEHLER METAL FURNITURE CO., INC. *v.* WARREN, COMPTROLLER GENERAL. October 12, 1942. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Nathan Boone Williams* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for respondent. Reported below: 129 F. 2d 43.

No. 341. PACIFIC SOUTHWEST REALTY CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. John B. Milliken,*

L. A. Luce, and *Claude I. Parker* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Morton K. Rothschild* for respondent. Reported below: 128 F. 2d 815.

No. 344. CONTINENTAL DISTILLING CORP. *v.* CONNECTICUT IMPORTING CO. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Raymond E. Hackett* for petitioner. *Messrs. Arthur Klein* and *David S. Day* for respondent. Reported below: 129 F. 2d 651.

No. 345. NATIONAL HOSPITAL SERVICE SOCIETY, INC. *v.* JORDAN, SUPERINTENDENT OF INSURANCE. October 12, 1942. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Cornelius H. Doherty* for petitioner. *Messrs. Richmond B. Keech* and *Vernon E. West* for respondent. Reported below: 128 F. 2d 460.

No. 347. KALB *v.* YELLOW MANUFACTURING ACCEPTANCE CORP. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Elmer McClain* for petitioner. *Mr. David Charness* for respondent. Reported below: 127 F. 2d 511.

No. 351. STEIN ET AL. *v.* DELANO, COMPTROLLER OF THE CURRENCY, ET AL. October 12, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Saul J. Zucker* and *Lionel P. Kristeller* for petitioners. *Mr. John F. Anderson* for respondents. Reported below: 130 F. 2d 870.

No. 356. ANDREWS, TRUSTEE IN BANKRUPTCY, *v.* METROPOLITAN JOCKEY CLUB ET AL. October 12, 1942. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. Horace M. Gray* and *Charles E. Wythe* for petitioner. *Messrs. Joseph S. Auerbach, Martin A. Schenck,* and *Harold C. McCollom* for respondents. Reported below: 262 App. Div. 861, 29 N. Y. S. 2d 149; 288 N. Y. 673, 43 N. E. 2d 75.

No. 259. REEVES, COMMISSIONER OF REVENUE, *v.* WILLIAMSON, TRUSTEE. See *ante,* p. 593.

No. 362. MOSES *v.* HUNTER, WARDEN. October 19, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Joseph E. Moses, pro se. Solicitor General Fahy* and *Assistant Attorney General Berge* for respondent. Reported below: 129 F. 2d 279.

No. 368. BELL *v.* UNITED STATES. October 19, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Robert Vivion Bell, pro se. Solicitor General Fahy* for the United States. Reported below: 129 F. 2d 290.

No. 382. MCDONALD ET AL. *v.* HUDSPETH, WARDEN. October 19, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Walter McDonald* and *Otto Barnowski, pro se. Solicitor General Fahy* and *Assistant Attorney General Berge* for respondent. Reported below: 129 F. 2d 196.

No. 384. MAHAFFEY *v.* HUDSPETH, WARDEN. October 19, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Clarence E. Mahaffey, pro se. Solicitor General Fahy* and *Assistant Attorney General Berge* for respondent. Reported below: 128 F. 2d 940.

No. 314. LAKESIDE IRRIGATION CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. October 19, 1942. The motion to defer consideration of the petition for writ of certiorari is denied. The petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit is also denied. *Mr. Camden R. McAtee* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Samuel H. Levy* for respondent. Reported below: 128 F. 2d 418.

No. 364. BUNN *v.* ATLANTA. October 19, 1942. Petition for writ of certiorari to the Court of Appeals of Georgia denied on the ground that it does not appear from the record that application therefor was made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C., § 350. *Mr. Hal Lindsay* for petitioner. *Messrs. J. C. Murphy* and *Frank A. Hooper, Jr.* for respondent. Reported below: 67 Ga. App. 147, 19 S. E. 2d 553.

No. 372. FOX *v.* UNITED STATES. October 19, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Mr. Abraham L. Freedman* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Robert S. Er-*

dahl, Andrew F. Oehmann, and *Archibald Cox* for the United States. Reported below: 130 F. 2d 56.

No. 122. KRAVITZ *v.* STATE OF NEW YORK. October 19, 1942. Petition for writ of certiorari to the Court of Appeals of New York denied. *Mr. Jacob W. Friedman* for petitioner. Reported below: 287 N. Y. 475, 41 N. E. 2d 61.

No. 199. CRAIN ET AL., TRUSTEES, *v.* UNITED STATES. October 19, 1942. Petition for writ of certiorari to the Court of Claims denied. *Mr. Geo. E. H. Goodner* for petitioners. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *J. Louis Monarch* for the United States. Reported below: 96 Ct. Cls. 443, 44 F. Supp. 321.

No. 337. TOKATYAN *v.* CHOPNICK. October 19, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Benjamin Pepper* for petitioner. *Mr. Benjamin Howe Conner* for respondent. Reported below: 128 F. 2d 521.

No. 343. THOMPSON *v.* GEORGIA. October 19, 1942. Petition for writ of certiorari to the Court of Appeals of Georgia denied. *Mr. Thomas Howell Scott* for petitioner. Reported below: 67 Ga. App. 240, 19 S. E. 2d 777.

No. 346. STONEWALL COTTON MILLS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. October 19, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. William H. Watkins* and *P. H. Eager, Jr.* for petitioner. *Solicitor General Fahy* and

Messrs. Richard S. Salant, Robert B. Watts, Ernest A. Gross, and *Morris P. Glushien* for respondent. Reported below: 129 F. 2d 629.

No. 348. HILLEY *v.* SPIVEY, SHERIFF. October 19, 1942. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied. *Mr. Hayden C. Covington* for petitioner. Reported below: 162 S. W. 2d 428.

No. 349. LARGENT *v.* REEVES, CITY MARSHAL. October 19, 1942. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied. *Mr. Hayden C. Covington* for petitioner. Reported below: 162 S. W. 2d 419.

No. 350. KILLAM *v.* FLORESVILLE. October 19, 1942. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied. *Mr. Hayden C. Covington* for petitioner. Reported below: 162 S. W. 2d 426.

No. 353. HILLMER, REPRESENTATIVE OF CREDITORS OF CHICAGO BANK OF COMMERCE, *v.* BENDIX. October 19, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George Edward Leonard* for petitioner. *Mr. G. A. Farabaugh* for respondent. Reported below: 127 F. 2d 759.

No. 357. INDUSTRIAL BOARD OF THE STATE OF NEW YORK *v.* NEW YORK CENTRAL RAILROAD CO. October 19, 1942. Petition for writ of certiorari to the Supreme Court, Appellate Division, of New York, denied. *Messrs. John J. Bennett, Jr.,* Attorney General of New York, and *Joseph A. McLaughlin,* Assistant Attorney General, for petitioner. *Messrs. Robert E. Whalen* and *Charles E. Nichols*

for respondent. Reported below: 263 App. Div. 461, 33 N. Y. S. 2d 531; 288 N. Y. 719, 43 N. E. 2d 97.

No. 363. BRACKIN *v.* UNITED STATES. October 19, 1942. Petition for writ of certiorari to the Court of Claims denied. *Mr. Geo. E. H. Goodner* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *J. Louis Monarch* and *Mrs. Elizabeth B. Davis* for the United States. Reported below: 96 Ct. Cls. 457, 44 F. Supp. 327.

No. 371. CALIFORNIA *v.* ANGLIM, U. S. COLLECTOR OF INTERNAL REVENUE. October 19, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Earl Warren,* Attorney General of California, *H. H. Linney,* Assistant Attorney General, *Lucas E. Kilkenny,* and *Adrian A. Kragen,* Deputy Attorneys General, for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Alvin J. Rockwell,* and *Archibald Cox* for respondent. Reported below: 129 F. 2d 455.

No. 374. UNITED ENTERPRISES, INC. *v.* DUBEY ET AL. October 19, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Theodore Lockyear* for petitioner. *Messrs. J. Tom Watson,* Attorney General of Florida, and *Joseph E. Gillen,* Assistant Attorney General, for respondents. Reported below: 128 F. 2d 843.

Nos. 375 and 376. HOWELL ET AL. *v.* CHICAGO, WILMINGTON & FRANKLIN COAL CO., INC., ET AL. October 19, 1942. Petition for writs of certiorari to the Circuit

Court of Appeals for the Seventh Circuit denied. *Messrs. W. F. Weeks, Chas. F. Potter,* and *Frank Bezoni* for petitioners. *Messrs. Fred H. Kelly* and *Thurlow G. Essington* for respondents. Reported below: 127 F. 2d 1006, 1010.

No. 377. RONNING MACHINERY CO. ET AL. *v.* CATERPILLAR TRACTOR CO. October 19, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harker H. Hittson* for petitioners. *Mr. Chas. M. Fryer* for respondent. Reported below: 129 F. 2d 70.

No. 378. PORTER ET AL *v.* COOKE ET AL., EXECUTORS, ET AL. October 19, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Luke E. Hart* and *William J. Dempsey* for petitioners. Reported below: 127 F. 2d 853.

No. 379. TITLE INSURANCE & TRUST CO. *v.* MABRY, EXECUTOR, ET AL. October 19, 1942. Petition for writ of certiorari to the District Court of Appeal, Second Appellate District, of California, denied. *Messrs. Louis W. Myers* and *Pierce Works* for petitioner. *Messrs. Gurney E. Newlin* and *Allen W. Ashburn* for Harry C. Mabry, Executor; and *Mr. William C. Mathes, pro se,*—respondents. Reported below: 51 Cal. App. 2d 245, 124 P. 2d 659.

No. 380. KAUSAL *v.* 79TH AND ESCANABA CORPORATION. October 19, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Charles Bushnell Fullerton* and *Harold V. Snyder* for petitioner. *Mr. John A. Bussian* for respondent. Reported below: 129 F. 2d 173.

No. 383. BARNHART ET AL. *v.* WESTERN MARYLAND RAILWAY CO. October 19, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Isaac Lobe Straus* for petitioners. *Messrs. Eugene S. Williams, Walter C. Capper, William Stanley,* and *William D. Donnelly* for respondent. Reported below: 128 F. 2d 709.

Nos. 389 and 390. BORD *v.* UNITED STATES. October 26, 1942. Motion for leave to proceed further *in forma pauperis* granted. Petition for writs of certiorari to the U. S. Court of Appeals for the District of Columbia denied. *Mr. John H. Burnett* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 133 F. 2d 213.

No. 407. WOOLWORTH *v.* KANSAS ET AL. October 26, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Allen B. Woolworth, pro se.* Reported below: 148 Kan. 180.

No. 393. BARRY ET AL. *v.* CHRYSLER CORPORATION ET AL. October 26, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. *Messrs. Patrick J. Lucey* and *Gerald G. Barry* for petitioners. *Mr. Frank Parker Davis* for respondents. Reported below: 128 F. 2d 618.

No. 403. PHOENIX FINANCE CORP. *v.* IOWA-WISCONSIN BRIDGE CO. October 26, 1942. Petition for writ of certi-

orari to the Supreme Court of Delaware denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Mr. James R. Morford* for petitioner. *Messrs. Fred A. Ontjes* and *Wm. C. Green* for respondent. Reported below: 41 Del. 527, 25 A. 2d 383.

No. 286. MAHOGANY ASSOCIATION, INC., ET AL. *v.* BLACK & YATES, INC., ET AL. October 26, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. William P. McCool* and *Arthur G. Logan* for petitioners. *Messrs. Harry D. Nims, Hugh M. Morris, Minturn de S. Verdi,* and *Wallace H. Martin* for respondents. Reported below: 129 F. 2d 227.

No. 365. KRUSE, ADMINISTRATRIX, ET AL. *v.* NEW ENGLAND FISH CO. OF OREGON ET AL. October 26, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. William P. Lord* and *Ben Anderson* for petitioners. *Mr. E. G. Dobrin* for respondents. Reported below: 127 F. 2d 648.

No. 370. DILL MANUFACTURING CO. *v.* GOFF ET AL. October 26, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Arthur J. Hudson* and *W. E. Williams* for petitioner. *Mr. Albert L. Ely* for respondents. Reported below: 125 F. 2d 676.

No. 386. BORUP ET AL. *v.* THE ULYSSES ET AL. October 26, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Lyman Stansky* for petitioners. *Mr. Joseph K. Inness* for respondents. Reported below: 130 F. 2d 381.

No. 391. LEVINE *v.* LEVINE. October 26, 1942. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Jesse Climenko* for petitioner. *Mr. Samuel Hoffman* for respondent. Reported below: 264 App. Div. 770, 35 N. Y. S. 2d 765; 288 N. Y. 680, 43 N. E. 2d 79.

No. 392. DAGGETT ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 26, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Northcutt Ely* for petitioners. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *J. Louis Monarch* and *Miss Louise Foster* for respondent. Reported below: 128 F. 2d 568.

No. 395. TIME, INCORPORATED, *v.* VIOBIN CORPORATION. October 26, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Frederick H. Wood* for petitioner. Reported below: 128 F. 2d 860.

No. 397. GENERAL PORCELAIN ENAMELING & MANUFACTURING CO. *v.* CERAMIC PROCESS CO. October 26, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Max W. Zabel* for petitioner. *Mr. Edmund P. Wood* for respondent. Reported below: 129 F. 2d 803.

No. 400. LINEN THREAD CO., LTD. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 26, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Prew Savoy* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis*

Monarch, and *L. W. Post* for respondent. Reported below: 128 F. 2d 166.

No. 401. PARTS MANUFACTURING CORP. *v.* LYNCH, SPECIAL AGENT, ET AL. October 26, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Irving R. Kaufman* for petitioner. *Solicitor General Fahy* and *Assistant Attorney General Berge* for respondents. Reported below: 129 F. 2d 841.

No. 402. JAMES HEDDON'S SONS *v.* MILLSITE STEEL & WIRE WORKS, INC. October 26, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Samuel W. Banning* and *Ephraim Banning* for petitioner. *Mr. L. W. Bugbee, Jr.* for respondent. Reported below: 128 F. 2d 6.

No. 404. SHULTZ ET AL., CO-EXECUTORS, *v.* MANUFACTURERS & TRADERS TRUST CO., CO-EXECUTOR, ET AL. October 26, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Ellsworth C. Alvord* for petitioners. *Messrs. Harold R. Medina, Louis L. Babcock,* and *Noel S. Symons* for Manufacturers & Traders Trust Co. et al.; and *Mr. John W. Drye, Jr.* for Thomas C. Eastman et al.,—respondents. Reported below: 128 F. 2d 889.

No. 408. PRESTON *v.* BUNKER HILL STATE BANK ET AL. October 26, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. O. B. Martin* and *Albert L. Orr* for petitioner. *Messrs. Hayes McCoy* and *R. O. Mason* for respondents. Reported below: 128 F. 2d 162.

No. 409. UNITED STATES GAUGE CO. *v.* PENN ELECTRIC SWITCH CO. October 26, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. James A. Hoffman* and *William A. Strauch* for petitioner. *Messrs. W. P. Bair* and *Will Freeman* for respondent. Reported below: 120 F. 2d 166.

No. 410. LYDIA E. PINKHAM MEDICINE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 26, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Joseph W. Worthen* and *Erland B. Cook* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *J. Louis Monarch* for respondent. Reported below: 128 F. 2d 986.

No. 411. MAY ET AL. *v.* JOHN M. PARKER CO., INC. October 26, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. J. L. Roberson* and *W. W. Venable* for petitioners. *Mr. John D. Miller* for respondent. Reported below: 128 F. 2d 1020.

No. 412. HOWELL ET AL *v.* COUCH, DOING BUSINESS AS COUCH MANUFACTURING CO. October 26, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Francis G. Boswell* for petitioners. *Mr. Charles R. Fenwick* for respondent. Reported below: 127 F. 2d 975.

No. 417. BACHMANN *v.* NEW YORK CITY TUNNEL AUTHORITY. October 26, 1942. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr.*

David Friedenberg for petitioner. *Messrs. William C. Chanler* and *Paxton Blair* for respondent. Reported below: 263 App. Div. 945, 33 N. Y. S. 2d 812; 288 N. Y. 707, 43 N. E. 2d 91.

No. 213. SOUTHERN PACIFIC CO. *v.* HAIGHT. November 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. George R. Freeman, William H. Devlin, A. I. Diepenbrock,* and *Horace B. Wulff* for petitioner. *Mr. John D. Costello* for respondent. Reported below: 126 F. 2d 900.

No. 394. NATIONAL LABOR RELATIONS BOARD *v.* EXPRESS PUBLISHING CO. November 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Solicitor General Fahy* and *Mr. Robert B. Watts* for petitioner. *Mr. Leroy G. Denman* for respondent. Reported below: 128 F. 2d 690.

No. 414. CHATTANOOGA BAKERY, INC. *v.* NATIONAL LABOR RELATIONS BOARD. November 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Cecil Sims* for petitioner. *Solicitor General Fahy* and *Messrs. Robert B. Watts, Ernest A. Gross,* and *Morris P. Glushien* for respondent. Reported below: 127 F. 2d 201.

No. 416. BELAND *v.* UNITED STATES. November 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Charles Beland, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Valentine Brookes* for the United States. Reported below: 128 F. 2d 795.

No. 419. R. SIMPSON & Co., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. November 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Gerald Donovan* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *J. Louis Monarch* for respondent. Reported below: 128 F. 2d 742.

No. 425. MANION *v.* MICHIGAN ET AL. November 9, 1942. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Eugene F. Black* for petitioner. *Mr. Herbert J. Rushton,* Attorney General of Michigan, for respondents. Reported below: 303 Mich. 1, 5 N. W. 2d 527.

No. 428. TATE, TRUSTEE IN BANKRUPTCY, ET AL. *v.* HOOVER. November 9, 1942. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Mr. Thomas M. Lewis* for petitioners. *Mr. W. L. Pace* for respondent. Reported below: 345 Pa. 19, 26 A. 2d 665.

No. 431. H. T. POINDEXTER & SONS MERCHANDISE CO. *v.* UNITED STATES. November 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Meredith M. Daubin* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *J. Louis Monarch* for the United States. Reported below: 128 F. 2d 992.

No. 432. PERSEN, ANCILLARY ADMINISTRATOR, *v.* NATIONAL CITY CO. November 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sec-

ond Circuit denied. *Mr. Wilbur W. Chambers* for petitioner. *Mr. Joseph M. Proskauer* for respondent. Reported below: 129 F. 2d 326.

No. 433. TERMINAL RAILROAD ASSOCIATION *v.* MILLER, ADMINISTRATRIX. November 9, 1942. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Carleton S. Hadley, Louis A. McKeown,* and *Arnot L. Sheppard* for petitioner. *Messrs. Mark D. Eagleton* and *Roberts P. Elam* for respondent. Reported below: 349 Mo. 944, 163 S. W. 2d 1034.

No. 434. SWEENEY *v.* PATTERSON, TRADING AS THE WASHINGTON TIMES-HERALD, ET AL. November 9, 1942. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. John O'Connor* and *William F. Cusick* for petitioner. *Messrs. R. H. Yeatman, O. Max Gardner, Edgar Turlington,* and *Morris L. Ernst* for respondents. Reported below: 128 F. 2d 457.

No. 443. INDIANA GAS & CHEMICAL CORP. *v.* KENTUCKY NATURAL GAS CORP. November 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Paul Y. Davis* and *Frank C. Dailey* for petitioner. *Messrs. Harry T. Ice* and *Merle H. Miller* for respondent. Reported below: 129 F. 2d 17.

No. 413. CALIFORNIA EX REL. MCCOLGAN *v.* BRUCE. November 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Earl Warren,* Attorney General of California, and

H. H. Linney, Assistant Attorney General, for petitioner. *Mr. George B. Thatcher* for respondent. Reported below: 129 F. 2d 421.

No. 421. JOHN J. FULTON CO. *v.* FEDERAL TRADE COMMISSION. November 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Zach Lamar Cobb* for petitioner. *Solicitor General Fahy, Assistant Attorney General Arnold,* and *Messrs. Charles H. Weston* and *W. T. Kelley* for respondent. Reported below: 130 F. 2d 85.

No. 430. COLONIAL OIL CO. *v.* AMERICAN OIL CO. November 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Claude N. Sapp* for petitioner. *Mr. Pinckney L. Cain* for respondent. Reported below: 130 F. 2d 72.

No. 442. BUCKLEY *v.* JUDSON. November 9, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Messrs. Gordon Dean, Brien McMahon,* and *Walter Gallagher* for petitioner. *Mr. Eli Whitney Debevoise* for respondent. Reported below: 130 F. 2d 174.

No. 415. EYER *v.* BRADY, WARDEN. November 9, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourt Circuit denied. *Mr. O. Bowie Duckett, Jr.* for petitioner. Reported below: 128 F. 2d 1012.

No. 448. FLETCHER *v.* MAUPIN ET AL. November 9, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Edmond C. Fletcher, pro se. Solicitor General Fahy* for respondents. Reported below: 129 F. 2d 46.

Nos. 437, 438, and 439. HALLIDAY ET AL. *v.* OHIO EX REL. SQUIRE, SUPERINTENDENT OF BANKS, ET AL. November 9, 1942. Motion for leave to proceed *in forma pauperis* granted. Petitions for writs of certiorari to the Court of Appeals of Ohio denied. *Robert W. Halliday, pro se. Mr. Edwin H. Chaney* for respondents. Reported below: 140 Ohio St. 337, 43 N. E. 2d 238.

No. 435. HUNSBERGER *v.* FISCHER ET AL. November 9, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Superior Court of Pennsylvania denied. *Mary M. Hunsberger, pro se.* Reported below: 148 Pa. Super. 481, 25 A. 2d 828.

No. 440. EARLE *v.* ILLINOIS CENTRAL RAILROAD CO. ET AL. November 9, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Court of Appeals of Tennessee denied. *Mr. William M. Hall* for petitioner. *Messrs. Marion G. Evans, Thomas A. Evans, Larry Creson, V. W. Foster, Chas. A. Helsell,* and *Clinton H. McKay* for respondents. Reported below: 25 Tenn. App. 660, 167 S. W. 2d 15.

No. 444. O'KEITH *v.* JOHNSTON, WARDEN. November 9, 1942. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Cir-

cuit Court of Appeals for the Ninth Circuit denied. *Charles O'Keith, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for respondent. Reported below: 129 F. 2d 889.

No. 451. BAKER *v.* HUNTER (SUCCESSOR TO HUDSPETH), WARDEN. November 16, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. A. G. Bush* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *Andrew F. Oehmann* for respondent. Reported below: 129 F. 2d 779.

No. 456. AIR REDUCTION CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. November 16, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harry W. Forbes* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *J. Louis Monarch* for respondent. *Messrs. Charles B. McInnis, Jacob Mertens, Jr.,* and *G. Kibby Munson* filed a brief on behalf of the Brown Shoe Co., Inc., as *amicus curiae,* in support of the petition. Reported below: 130 F. 2d 145.

No. 457. WESTINGHOUSE ELECTRIC & MANUFACTURING CO. *v.* CROSLEY CORPORATION. November 16, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Victor S. Beam* for petitioner. *Messrs. Samuel E. Darby, Jr.* and *Floyd H. Crews* for respondent. Reported below: 130 F. 2d 474.

No. 454. AGUILAR *v.* STANDARD OIL CO. OF NEW JERSEY. November 16, 1942. Petition for writ of certiorari to the

Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. *Mr. George J. Engelman* for petitioner. *Mr. Vernon S. Jones* for respondent. Reported below: 130 F. 2d 154.

No. 445. POSEY *v.* INDIANA. November 16, 1942. The motion for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari to the Criminal Court, Lake County, Indiana is denied for the reason that it does not appear from the papers submitted that petitioner has exhausted state remedies by appealing to the highest court of the state the judgment sought to be reviewed. Under the law of Indiana the permission of the trial court to appeal as a poor person, which petitioner alleges was refused, does not appear to be necessary in order to take an effective appeal (see *State ex rel. Rankin* v. *Worden*, 40 N. E. 2d 970). *Winston Posey, pro se.*

No. 6. SCHULTZ *v.* HUDSPETH, WARDEN. November 16, 1942. The motion for leave to proceed *in forma pauperis* is granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Charles Schultz, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. W. Marvin Smith* for respondent. Reported below: 123 F. 2d 729.

No. —, Original. EX PARTE CECIL WRIGHT. See *ante*, p. 599.

No. 427. BICKLEY, DOING BUSINESS AS BICKLEY'S AUTO EXPRESS, *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION. November 23, 1942. Petition for writ of certiorari to the

Superior Court of Pennsylvania denied. *Mr. H. Eugene Gardner* for petitioner. *Messrs. Claude T. Reno,* Attorney General of Pennsylvania, and *Harry M. Showalter* for respondent. Reported below: 148 Pa. Super. 399, 25 A. 2d 589.

No. 455. BRADFORD ET AL. *v.* UNITED STATES. November 23, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. T. W. Holloman* for petitioners. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Robert S. Erdahl* and *Miss Melva M. Graney* for the United States. Reported below: 130 F. 2d 630.

No. 462. KOOLISH ET AL., TRADING AS STANDARD DISTRIBUTING CO., *v.* FEDERAL TRADE COMMISSION. November 23, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Homer Cummings* and *Irvin H. Fathchild* for petitioners. *Solicitor General Fahy, Assistant Attorney General Arnold,* and *Mr. W. T. Kelley* for respondent. Reported below: 129 F. 2d 64.

No. 465. CHICAGO JUNCTION RAILROAD CO. *v.* SPRAGUE ET AL. November 23, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. George Wharton Pepper, Silas H. Strawn, Ralph M. Shaw,* and *John D. Black* for petitioner. *Messrs. Thomas L. Marshall* and *David A. Watts* for respondents. Reported below: 129 F. 2d 1.

No. 469. GENERAL AMERICAN LIFE INSURANCE CO. *v.* STEPHENS. November 23, 1942. Petition for writ of

certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John T. Gose* for petitioner. *Mr. John Stewart Ross* for respondent. Reported below: 130 F. 2d 511.

No. 510. DONOVAN *v.* TURNER ET AL., COPARTNERS. See *ante*, p. 599.

No. 89. PALOMA ESTATES, INC. *v.* SERIES C–2 TRUSTEES ET AL. December 7, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Erwin Feldman* for petitioner. *Mr. Eugene J. Morris* for the Trustees of Series C–2; and *Solicitor General Fahy* and *Messrs. Chester T. Lane, Richard S. Salant, John F. Davis, Homer Kripke, George Zolotar, Morton E. Yohalem,* and *Mortimer Weinbach* for the Securities and Exchange Commission,—respondents. Reported below: 126 F. 2d 72.

No. 470. MAYER ET AL., TRUSTEES, *v.* REINECKE, COLLECTOR OF INTERNAL REVENUE. December 7, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Isaac H. Mayer, Carl Meyer,* and *M. B. Kennedy* for petitioners. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Mr. Sewall Key* for respondent. Reported below: 130 F. 2d 350.

No. 493. SCHEUFLER, SUPERINTENDENT, *v.* CENTRAL SURETY & INSURANCE CORP. ET AL. December 7, 1942. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. William E. Byers, Paul M. Peterson, William H. Becker,* and *Lawrence Presley* for petitioner. *Mr. R. B. Caldwell* for the Central Surety & Insurance Corp.; and *Mr. James P. Aylward* for R. E.

O'Malley,—respondents. Reported below: 349 Mo. 855, 163 S. W. 2d 749.

No. 502. PHILADELPHIA COKE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. December 7, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. John E. McClure* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch, Benjamin M. Brodsky,* and *Valentine Brookes* for respondent. Reported below: 130 F. 2d 87.

No. 503. RAU CONSTRUCTION CO. *v.* PHILLIPS PETROLEUM CO. December 7, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Maurice J. O'Sullivan* for petitioner. *Messrs. H. D. Emery* and *Rayburn L. Foster* for respondent. Reported below: 130 F. 2d 499.

No. 472. CLOVER SPLINT COAL CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. December 7, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Arthur S. Dayton* and *William Wallace Booth* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Warren F. Wattles* for respondent. Reported below: 130 F. 2d 52.

No. 474. BRADLEY ET AL. *v.* WELCH, FORMER COLLECTOR. December 7, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. F. H. Nash* and *Claude R. Branch* for petitioners. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Samuel H. Levy* for respondent. Reported below: 130 F. 2d 109.

No. 489. SAMARA *v.* UNITED STATES. December 7, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Prew Savoy* and *Max Turner* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Mr. Sewall Key* and *Mrs. Maryhelen Wigle* for the United States. Reported below: 129 F. 2d 594.

No. 501. CITY OF DUBUQUE BRIDGE COMMISSION *v.* BOARD OF REVIEW FOR THE CITY OF DUBUQUE. December 7, 1942. Petition for writ of certiorari to the Supreme Court of Iowa denied. *Mr. E. Marshall Thomas* for petitioner. *Mr. Charles S. Rhyne* for respondent. Reported below: 5 N. W. 2d 334.

No. 505. PAPER CONTAINER MFG. CO. *v.* DIXIE-VORTEX CO. December 7, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Samuel E. Darby, Jr.* for petitioner. *Mr. Charles W. Hills* for respondent. Reported below: 130 F. 2d 569.

No. 508. VIM SECURITIES CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. December 7, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Llewellyn A. Luce* and *William J. Byrne* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Bernard Chertcoff* for respondent. Reported below: 130 F. 2d 106.

No. 509. VAN WORMER *v.* CHAMPION PAPER & FIBRE CO. December 7, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Walter F. Murray* for petitioner. Reported below: 129 F. 2d 428.

No. 471. SEARS, ROEBUCK & Co. *v.* HOYT ET AL. December 7, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. The CHIEF JUSTICE took no part in the consideration or decision of this application. *Messrs. Raymond G. Stanbury* and *Harry D. Parker* for petitioner. *Mr. Francis J. Gabel* for respondents. Reported below: 130 F. 2d 636.

No. 478. NEVADA CONSOLIDATED COPPER CORP. ET AL. *v.* RAILROAD RETIREMENT BOARD ET AL. December 7, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. The CHIEF JUSTICE took no part in the consideration or decision of this application. *Messrs. C. C. Parsons, H. Thomas Austern,* and *Elmer L. Brock* for petitioners. *Solicitor General Fahy* for respondents. Reported below: 129 F. 2d 358.

No. 479. UTAH COPPER CO. ET AL. *v.* RAILROAD RETIREMENT BOARD ET AL. December 7, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. The CHIEF JUSTICE took no part in the consideration or decision of this application. *Messrs. C. C. Parsons, H. Thomas Austern,* and *Elmer L. Brock* for petitioners. *Solicitor General Fahy* for respondents. Reported below: 129 F. 2d 358.

No. 476. AMERICAN INSURANCE CO. ET AL. *v.* SCHEUFLER, SUPERINTENDENT, ET AL. December 7, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE ROBERTS and MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Messrs. Wm. Marshall Bullitt, E. R. Morrison,* and *David A. Murphy* for petitioners.

Messrs. Charles L. Hensen and *Lawrence Presley* for respondents. Reported below: 129 F. 2d 143.

No. 504. EWALD *v.* MICHIGAN. December 7, 1942. Petition for writ of certiorari to the Supreme Court of Michigan denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Mr. Edward N. Barnard* for petitioner. *Mr. Herbert J. Rushton,* Attorney General of Michigan, and *Harold Helper* for respondent. Reported below: 302 Mich. 31, 4 N. W. 2d 456.

No. 512. STANDARD OIL CO. (INDIANA) *v.* COMMISSIONER OF INTERNAL REVENUE. December 7, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. *Messrs. Buell F. Jones* and *John Enrietto* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Samuel H. Levy* for respondent. Reported below: 129 F. 2d 363.

No. 532. THOMAS *v.* KANSAS. December 7, 1942. Petition for writ of certiorari to the Supreme Court of Kansas denied for the reason that application therefor was not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C., § 350. *Mr. Elisha Scott* for petitioner. Reported below: 155 Kan. 374, 125 P. 2d 375.

No. 539. ILLINOIS EX REL. PARKER *v.* O'BRIEN, SHERIFF. December 7, 1942. The application for bail is denied. The petition for writ of certiorari to the Supreme Court of Illinois is also denied. *Mr. Wm. Scott Stewart* for petitioner.

No. 561. EDWARDS *v.* UNITED STATES. December 7, 1942. The application for bail is denied. The petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit is also denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications. *Mr. Mack Taylor* for petitioner. Reported below: 131 F. 2d 198.

No. 477. TEGTMEYER *v.* TEGTMEYER ET AL. December 7, 1942. The motion for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari to the Appellate Court, First District, of Illinois, is denied. *Daisy C. Tegtmeyer, pro se. Mr. L. Duncan Lloyd* for respondents. Reported below: 314 Ill. App. 16, 40 N. E. 2d 767.

No. 513. WEBSTER, ADMINISTRATOR, *v.* CLODFELTER, TRADING AS CLODFELTER'S SERVICE STATION. December 7, 1942. The motion for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari to the United States Court of Appeals for the District of Columbia is denied. *Mr. Emory B. Smith* for petitioner. *Mr. Albert F. Beasley* for respondent. Reported below: 130 F. 2d 434.

No. 459. BUIE *v.* UNITED STATES. December 7, 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 denied for the reason that application therefor was not made within the time provided by law. Rule XI of the Criminal Appeals Rules, 292 U. S. 665–66; *United States ex rel. Coy* v. *United States,* 316 U. S. 342. *Vivian Wycliff Buie, pro se. Solicitor General Fahy* for the United States. Reported below: 127 F. 2d 367.

No. 463. RANIERI *v.* UNITED STATES. December 14, 1942. Petition for writ of certiorari to the Court of Claims denied. *Messrs. S. Wallace Dempsey* and *Bruce Fuller* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 96 Ct. Cls. 494.

No. 494. BIGELOW, RECEIVER, *v.* ANDERSON ET AL. December 14, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Burton Mason* and *Henley C. Booth* for petitioner. *Mr. John S. Field* for respondents. Reported below: 130 F. 2d 460.

No. 498. GALBAN LOBO CO., S. A. *v.* HENDERSON, PRICE ADMINISTRATOR. December 14, 1942. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Mr. Donald Marks* for petitioner. *Solicitor General Fahy* and *Messrs. Thomas I. Emerson* and *Ben W. Heineman* for respondent.

No. 515. F. A. SMITH MANUFACTURING CO., INC. *v.* SAMSON-UNITED CORPORATION. December 14, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Arthur J. Hudson* and *James T. Hoffmann* for petitioner. *Mr. W. B. Morton* for respondent. Reported below: 130 F. 2d 525.

No. 524. MILLER LAND & LIVESTOCK CO. *v.* BOGART. December 14, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. C. T. Busha, Jr.* for petitioner. *Mr. M. S. Gunn* for respondent. Reported below: 129 F. 2d 772.

No. 521. PUBLIC SERVICE CORPORATION OF NEW JERSEY *v.* SECURITIES AND EXCHANGE COMMISSION. December 14, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Messrs. Homer Cummings, William Stanley,* and *Wendell J. Wright* for petitioner. *Solicitor General Fahy* and *Messrs. John F. Davis* and *Homer Kripke* for respondent. Reported below: 29 F. 2d 899.

No. 516. EASTMAN *v.* GUARANTY TRUST CO. ET AL. December 14, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE ROBERTS and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Mr. Meyer Abrams* for petitioner. *Mr. Ralph M. Carson* for respondents. Reported below: 130 F. 2d 300.

No. 507. HOLIDAY *v.* UNITED STATES. December 14, 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 Eighth Circuit is denied. *Forrest Holiday, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* and *Miss Melva M. Graney* for the United States. Reported below: 130 F. 2d 988.

No. 167. MCBEE *v.* UNITED STATES. December 14, 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 Tenth Circuit is denied. *Stephen McBee, pro se. Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Lester P. Schoene, Wilbur C. Pickett,* and *Keith L. Seegmiller* for the United States. Reported below: 126 F. 2d 238.

No. 466. DEPARTMENT OF BANKING OF NEBRASKA, RECEIVER, *v.* PINK, SUPERINTENDENT OF INSURANCE. See *ante*, p. 264.

No. 530. SWAN CARBURETOR CO. *v.* CHRYSLER CORPORATION. December 21, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE ROBERTS and MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Messrs. F. O. Richey, B. D. Watts,* and *H. F. McNenny* for petitioner. *Mr. William J. Barnes* for respondent. Reported below: 130 F. 2d 391.

No. 475. BERRY *v.* OHIO. December 21, 1942. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mr. Parker Fulton* for petitioner. *Mr. Frank T. Cullitan* for respondent. Reported below: 140 Ohio St. 190, 42 N. E. 2d 896.

No. 506. MARKS *v.* HOFFMAN, RECEIVER. December 21, 1942. Petition for writ of certiorari to the Circuit Court of Harrison County, West Virginia, denied. *Messrs. Charles C. Scott* and *Ray L. Strother* for petitioner.

No. 522. MACDONNELL *v.* BANK OF AMERICA ET AL. December 21, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Roy Leon Daily* for petitioner. *Mr. Claude A. Hope* for respondents. Reported below: 130 F. 2d 311.

No. 527. BANKE ET AL. *v.* NOVADEL-AGENE CORPORATION. December 21, 1942. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit de-

nied. *Mr. Ralph B. Lacey* for petitioners. *Mr. Clair W. Fairbank* for respondent. Reported below: 130 F. 2d 99.

No. 531. PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES AND GRANTING ANNUITIES, EXECUTOR, ET AL. *v.* KAUFFMAN, EXECUTOR, ET AL. December 21, 1942. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. Orville C. Sanborn, Leslie J. Tompkins, George E. Reynolds,* and *Richard S. Holmes* for petitioners. *Mr. C. Horace Tuttle* for respondents. Reported below: 263 App. Div. 939, 32 N. Y. S. 2d 932; 288 N. Y. 734, 43 N. E. 2d 354.

No. 533. DISTRICT UNEMPLOYMENT COMPENSATION BOARD *v.* INTERNATIONAL REFORM FEDERATION. December 21, 1942. Petition for writ of certiorari to the U. S. Court of Appeals for the District of Columbia denied. *Messrs. Richmond B. Keech* and *Vernon E. West* for petitioner. *Mr. Robert H. McNeill* for respondent. Reported below: 131 F. 2d 337.

No. 75. NORTH CHICAGO ET AL. *v.* THE MACCABEES ET AL. January 4, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Lionel A. Mincer* and *Frank T. O'Brien* for petitioners. *Messrs. Edward J. Jeffries, Jr.* and *David A. Hersh* for respondents. Reported below: 125 F. 2d 330.

No. 526. RUTLAND RAILROAD COMPANY'S RECEIVER *v.* LAWRENCE. January 4, 1943. Petition for writ of certiorari to the Supreme Court of Vermont denied. *Mr. Edwin W. Lawrence* for petitioner. Reported below: 112 Vt. 523, 28 A. 2d 488.

No. 534. ORLANDO *v.* ILLINOIS. January 4, 1943. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Wm. Scott Stewart* for petitioner. Reported below: 380 Ill. 107, 43 N. E. 2d 677.

No. 535. PARAGON LAND CORP. *v.* DAY ET AL., TRUSTEES. January 4, 1943. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Samuel Okin* for petitioner. *Mr. Frederick A. Keck* for respondents.

No. 542. PRATT, TRUSTEE, *v.* CHEMICAL BANK & TRUST CO. ET AL. January 4, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Addison S. Pratt, pro se. Mr. Michael Halperin* for respondents. Reported below: 129 F. 2d 1016.

No. 545. KUDILE ET AL., COPARTNERS, *v.* NATIONAL LABOR RELATIONS BOARD. January 4, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Irwin Margulies* for petitioners. *Solicitor General Fahy* and *Messrs. Robert B. Watts* and *Ernest A. Gross* and *Miss Ruth Weyand* for respondent. Reported below: 130 F. 2d 615.

No. 405. GARLINGTON ET VIR *v.* WASSON. January 4, 1943. Petition for writ of certiorari to the Supreme Court of Texas denied. *Mr. M. C. Martin* for petitioners. *Mr. Clyde E. Thomas* for respondent. See 138 Tex. 651.

No. 536. BRINTON *v.* FEDERAL LAND BANK OF BERKELEY. January 4, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit

denied. *Messrs. J. D. Skeen* and *E. J. Skeen* for petitioner. *Mr. Richard W. Young* for respondent. Reported below: 129 F. 2d 740.

No. 546. BENNIE SABLOWSKY *v.* PENNSYLVANIA; and No. 547. LEONARD SABLOWSKY *v.* PENNSYLVANIA. January 4, 1943. Petition for writs of certiorari to the Superior Court of Pennsylvania denied. *Mr. Samuel G. Wagner* and *Dorothea M. Wagner* for petitioners. Reported below: 150 Pa. Super. 231, 27 A. 2d 443.

No. 464. MILLER *v.* ARROW. January 4, 1943. Petition for writ of certiorari to the Supreme Court of Ohio denied for want of a properly presented federal question. The motion to correct a diminution of the record is therefore also denied. *Anne Miller, pro se.* Reported below: 139 Ohio St. 657, 41 N. E. 2d 709.

No. 523. BANNING ET AL. *v.* UNITED STATES. January 4, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Mr. Arthur R. Seelig* for petitioners. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 130 F. 2d 330.

No. 544. BORO HALL CORP. *v.* GENERAL MOTORS CORP. ET AL. January 4, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. The CHIEF JUSTICE and MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Mr. Arthur Garfield Hays* for petitioner.

Messrs. Albert M. Levert and *John Thomas Smith* for respondents. Reported below: 130 F. 2d 196.

No. 441. BECK *v.* NEW YORK. January 4, 1943. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Court of Appeals of New York denied. *Diana Beck, pro se. Messrs. John J. Bennett, Jr.,* Attorney General of New York, and *Henry Epstein,* Solicitor General, for respondent. Reported below: 45 N. E. 2d 166.

No. 565. KERR *v.* JOHNSTON, WARDEN. January 4, 1943. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George H. Hauerken* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for respondent. Reported below: 130 F. 2d 637.

No. 538. PADGETT *v.* BENSON, WARDEN. January 4, 1943. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *William H. Padgett, pro se.*

No. 543. SEALE *v.* HUNT, WARDEN. January 4, 1943. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Court of Criminal Appeals of Oklahoma denied. *W. H. Seale, pro se.* Reported below: 129 P. 2d 862.

No. 562. ROSKOS *v.* UNITED STATES. January 4, 1943. Motion for leave to proceed *in forma pauperis* granted.

Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. John J. McCreary* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Lester P. Schoene, Wilbur C. Pickett,* and *Fendall Marbury* for the United States. Reported below: 130 F. 2d 751.

No. 541. HAWK *v.* OLSON, WARDEN. January 4, 1943. The motion for leave to proceed *in forma pauperis* is granted. The motion to strike petitioner's reply brief is denied. The petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit is denied. *Henry Hawk, pro se. Messrs. Walter R. Johnson,* Attorney General of Nebraska, and *H. Emerson Kokjer,* Assistant Attorney General, for respondent. Reported below: 130 F. 2d 910.

No. 550. WARREN TELEPHONE CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. January 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. H. H. Hoppe* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *S. Dee Hanson* for respondent. Reported below: 128 F. 2d 503.

No. 560. KLINE *v.* COMMISSIONER OF INTERNAL REVENUE. January 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. J. Warren Brock* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Joseph M. Jones* for respondent. Reported below: 130 F. 2d 742.

No. 566. LAFUENTE *v.* COUNTY OF LOS ANGELES. January 11, 1943. Petition for writ of certiorari to the Supreme Court of California denied. *Gretta Lafuente, pro se.* Reported below: 20 Cal. 2d 870, 129 P. 2d 378.

No. 567. CARWILE *v.* VIRGINIA ET AL. January 11, 1943. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. Thomas H. Stone* for petitioner. Reported below: 180 Va. XLV.

No. 568. CONSOLIDATED EXPANDED METAL CO. *v.* UNITED STATES GYPSUM CO. January 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Walter J. Blenko* and *Arthur J. Hudson* for petitioner. *Messrs. Arthur A. Olson* and *Albert H. Pendleton* for respondent. Reported below: 130 F. 2d 888.

No. 572. LAMBERT, EXECUTRIX, *v.* UNITED STATES. January 11, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. E. John Ernst, Jr.* for petitioner. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Vernon L. Wilkinson* and *Roger P. Marquis* for the United States. Reported below: 129 F. 2d 678.

No. 573. THOMSON, TRUSTEE, *v.* SEVIER, ADMINISTRATRIX. January 11, 1943. Petition for writ of certiorari to the Appellate Court, First District, of Illinois denied. *Mr. William T. Faricy* for petitioner. *Mr. John J. Yowell* for respondent. Reported below: 314 Ill. App. 382, 41 N. E. 2d 210.

No. 574. HUMES *v.* MISSOURI SUPREME COURT ET AL. January 11, 1943. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Arthur S. Humes, pro se.*

No. 250. CARLOTA BENITEZ DE SEIX ET AL. *v.* ROS MARIA ANCIANI ET AL. January 11, 1943. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Carlota Benitez de Seix* and *J. Octavio Seix, pro se.* Reported below: 127 F. 2d 121.

No. 398. KELLY *v.* JOHNSTON, WARDEN. January 11, 1943. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Harry C. Kelly, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *W. Marvin Smith* for respondent. Reported below: 128 F. 2d 793.

No. 563. CREBS *v.* AMRINE, WARDEN. January 11, 1943. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Cecil C. Crebs, pro se.* Reported below: 153 Kan. 736, 113 P. 2d 1084.

No. 281. MASON, ADMINISTRATOR, *v.* FEDERAL LAND BANK OF BERKELEY. January 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. J. D. Skeen* and *E. J. Skeen* for petitioner. Reported below: 127 F. 2d 1015.

No. 549. WEST PUBLISHING CO. *v.* SUPERIOR COURT OF CALIFORNIA. January 18, 1943. Petition for writ of certiorari to the Supreme Court of California denied. *Messrs. John W. Preston* and *Charles N. Orr* for petitioner. *Messrs. Earl Warren,* Attorney General of California, and *H. H. Linney,* Assistant Attorney General, for respondent. Reported below: 20 Cal. 2d 720, 128 P. 2d 777.

No. 571. ROCKMORE, TRUSTEE IN BANKRUPTCY, *v.* LEHMAN ET AL. January 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David Haar* for petitioner. *Mr. Louis J. Castellano* for Mathilde Lehman; and *Mr. Jacob M. Zinaman* for Joseph S. Abrams,—respondents. Reported below: 129 F. 2d 892.

No. 583. SUFFOLK SECURITIES CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. January 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. David A. Buckley, Jr., Loring M. Black,* and *Harvey L. Rabbitt* for petitioner. *Solicitor General Fahy, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Samuel H. Levy,* and *Carlton Fox* for respondent. Reported below: 128 F. 2d 743.

No. 588. MASSACHUSETTS BONDING & INSURANCE CO. *v.* WINTERS NATIONAL BANK & TRUST CO., ADMINISTRATOR. January 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Clifford R. Curtner* for petitioner. *Mr. Robert E. Cowden* for respondent. Reported below: 130 F. 2d 5.

No. 590. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY CO. *v.* MULDOWNEY, SPECIAL ADMINISTRATRIX.

January 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Warren Newcome, William T. Faricy,* and *Nelson J. Wilcox* for petitioner. *Mr. L. W. Crawhall* for respondent. Reported below: 130 F. 2d 971.

No. 592. KLEINSCHMIDT *v.* GLOBE-DEMOCRAT PUBLISHING CO. January 18, 1943. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Arthur E. Simpson* and *R. E. Kleinschmidt* for petitioner. *Messrs. Lon O. Hocker* and *Frank Y. Gladney* for respondent. Reported below: 350 Mo. 250, 165 S. W. 2d 620.

No. 598. DAVIDSON ET AL. *v.* HURDMAN ET AL. January 18, 1943. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Charles Segal* for petitioners. *Mr. Warner Pyne* for respondents.

No. 576. OKIN *v.* SECURITIES AND EXCHANGE COMMISSION. January 18, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Mr. Samuel Okin* for petitioner. *Solicitor General Fahy* and *Messrs. Richard S. Salant, John F. Davis,* and *Homer Kripke* for respondent. Reported below: 130 F. 2d 903.

No. 570. SOUTH *v.* RAILROAD RETIREMENT BOARD. January 18, 1943. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Winfield Payne Jones* for petitioner. *Solicitor General Fahy* and *Messrs. Robert L. Stern, Joseph H. Freehill,*

David B. Schreiber, and *Jacob Abramson* for respondent. Reported below: 131 F. 2d 748.

No. 575. BREWER *v.* AMRINE, WARDEN. January 18, 1943. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Floyd Brewer, pro se.* Reported below: 155 Kan. 525, 127 P. 2d 447.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, THROUGH JANUARY 18, 1943.

No. 132. WILSON & CO., INC. *v.* MCMILLAN. On petition for writ of certiorari to the Supreme Court of Minnesota. June 20, 1942. Dismissed per stipulation of counsel pursuant to Rule 35. *Mr. David L. Grannis* for petitioner.

No. 179. GATKE CORPORATION *v.* ROWE. On petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. August 6, 1942. Dismissed per stipulation of counsel pursuant to Rule 35. *Mr. Walter H. Eckert* for petitioner.

No. 58. GUY *v.* MISSOURI PACIFIC RAILROAD CO. ET AL. Certiorari, 316 U. S. 655, to the Supreme Court of Arkansas. October 5, 1942. Dismissed on motion of counsel for the petitioner. *Messrs. Jonathan H. Lookadoo* and *Wm. J. Kirby* for petitioner. *Mr. Pat Mehaffy* for respondents.

No. 519. RYAN ET AL., TRADING AS KEYSTONE TRANSFER CO., *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION. Appeal from the District Court of the United States for

the Middle District of Pennsylvania. November 9, 1942. Docketed and dismissed on motion of counsel for the appellee. *Mr. Harry M. Showalter* for appellee. Reported below: 44 F. Supp. 912.

DECISIONS GRANTING REHEARING, FROM OCTOBER 5, 1942, THROUGH JANUARY 18, 1943.

No. 459. BUIE *v.* UNITED STATES. January 11, 1943. The petition for rehearing is granted. The order heretofore entered denying certiorari, *ante*, p. 689, is vacated. The application filed with the Clerk of this Court on June 5, 1942, will be treated as a petition for certiorari. *Vivian Wycliff Buie, pro se. Solicitor General Fahy* for the United States. Reported below: 127 F. 2d 367.

DECISIONS DENYING REHEARING, THROUGH JANUARY 18, 1943.*

No. 1202, October Term, 1941. KRAMER *v.* SHEEHY, WARDEN. July 31, 1942. The petition for rehearing is denied. The order of stay heretofore entered is vacated. MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. 962, October Term, 1940. MARTIN M. GOLDMAN *v.* UNITED STATES;

No. 963, October Term, 1940. SHULMAN *v.* UNITED STATES; and

No. 980, October Term, 1940. THEODORE GOLDMAN *v.* UNITED STATES. October 12, 1942. 316 U. S. 129.

---

*See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. —, October Term, 1941. WETZEL *v.* SCHAEFER. October 12, 1942. 316 U. S. 647.

No. 772, October Term, 1941. BRILLHART, ADMINISTRATOR, *v.* EXCESS INSURANCE CO. October 12, 1942. 316 U. S. 491.

No. 914, October Term, 1941. CASEBEER *v.* HUDSPETH, WARDEN. October 12, 1942. 316 U. S. 683.

No. 1141, October Term, 1941. BERRY ET AL. *v.* BOHN ALUMINUM & BRASS CORP. ET AL. October 12, 1942. 316 U. S. 689.

No. 1157, October Term, 1941. HELTON, ADMINISTRATOR, *v.* THOMPSON, TRUSTEE. October 12, 1942. 316 U. S. 688.

No. 1167, October Term, 1941. MOODY ET AL. *v.* TOOLE COUNTY IRRIGATION DISTRICT. October 12, 1942. 316 U. S. 690.

No. 1176, October Term, 1941. MESTA *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. 316 U. S. 695.

No. 1184, October Term, 1941. OWENS *v.* COMMISSIONER OF INTERNAL REVENUE. October 12, 1942. 316 U. S. 704.

No. 1198, October Term, 1941. MASON *v.* ANDERSON-COTTONWOOD IRRIGATION DISTRICT. October 12, 1942. 316 U. S. 697.

No. 1201, October Term, 1941. ENGINEERS CLUB OF PHILADELPHIA *v.* UNITED STATES. October 12, 1942. 316 U. S. 700.

No. 1208, October Term, 1941. HASTINGS *v.* HUDSPETH, WARDEN. October 12, 1942. 316 U. S. 692.

No. 1215, October Term, 1941. PRICE *v.* NATIONAL SURETY CORP. October 12, 1942. 316 U. S. 683.

No. 1230, October Term, 1941. WEIDHAAS *v.* LOEW'S INC. ET AL. October 12, 1942. 316 U. S. 684.

No. 1232, October Term, 1941. HOWARD *v.* UNITED STATES EX REL. ALEXANDER ET AL. October 12, 1942. 316 U. S. 699.

No. 1237, October Term, 1941. CONCORD COMPANY *v.* WILLCUTS ET AL., EXECUTORS. October 12, 1942. 316 U. S. 705.

No. 1248, October Term, 1941. HODGES *v.* OCEAN ACCIDENT & GUARANTEE CORP. October 12, 1942. 316 U. S. 693.

No. 1284, October Term, 1941. BARRETT *v.* WILLIAMSON. October 12, 1942. 316 U. S. 703.

No. 903, October Term, 1941. PEYTON *v.* RAILWAY EXPRESS AGENCY, INC., ET AL. October 12, 1942. The petition for rehearing and the motion to recall the mandate and retax costs are denied. See 316 U. S. 350.

503873—43——52

No. 1197, October Term, 1941. CARLOTA BENITEZ SAMPAYO *v.* BANK OF NOVA SCOTIA. October 12, 1942. The petition for rehearing is denied. The CHIEF JUSTICE took no part in the consideration or decision of this application. 316 U. S. 702.

No. 1058, October Term, 1941. MIDLAND COOPERATIVE WHOLESALE, INC. *v.* ICKES, SECRETARY OF THE INTERIOR, ET AL. October 19, 1942. Motion for leave to file a second petition for rehearing denied. 316 U. S. 712.

No. 94. MOTHER LODE COALITION MINES CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 19, 1942.

No. 622, October Term, 1941. WALLING *v.* A. H. BELO CORPORATION. October 26, 1942. 316 U. S. 624.

No. 939, October Term, 1941. OVERNIGHT MOTOR TRANSPORTATION CO., INC. *v.* MISSEL. October 26, 1942. 316 U. S. 572.

No. —, Original. EX PARTE THOMAS JORDAN. November 9, 1942.

No. 105. DUQUESNE CLUB *v.* BELL, FORMER ACTING COLLECTOR OF INTERNAL REVENUE; and

No. 106. DUQUESNE CLUB *v.* DRISCOLL, COLLECTOR OF INTERNAL REVENUE. November 9, 1942.

No. 107. EVANS *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 108. MOREHEAD *v.* COMMISSIONER OF INTERNAL REVENUE. November 9, 1942.

No. 113. DAVIDSON TRANSFER & STORAGE CO. ET AL. *v.* UNITED STATES ET AL. November 9, 1942.

No. 116. NIESCHLAG & CO., INC. *v.* ATLANTIC MUTUAL INSURANCE CO. November 9, 1942.

No. 128. GURNEY ET AL. *v.* FERGUSON ET AL. November 9, 1942.

No. 139. YANIS *v.* SMITH, WARDEN. November 9, 1942.

No. 159. MASON *v.* MERCED IRRIGATION DISTRICT. November 9, 1942.

No. 160. CHELTENHAM & ABINGTON SEWERAGE CO. *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL. November 9, 1942.

No. 168. LEVINE *v.* HUDSPETH, WARDEN. November 9, 1942.

No. 180. SOUTHWESTERN GREYHOUND LINES, INC. *v.* BUCHANAN. November 9, 1942.

No. 188. NIVENS *v.* HUDSPETH, WARDEN. November 9, 1942.

No. 216. A. W. STICKLE & CO. *v.* INTERSTATE COMMERCE COMMISSION. November 9, 1942.

No. 239. RHEINSTROM, EXECUTOR, *v.* CONNOR, COLLECTOR OF INTERNAL REVENUE; and

No. 240. FIRST NATIONAL BANK, TRUSTEE, *v.* CONNOR, COLLECTOR OF INTERNAL REVENUE. November 9, 1942.

No. 276. GONZALES ET AL. *v.* CALIFORNIA. November 9, 1942.

No. 294. WIREN *v.* SHUBERT THEATRE CORP. ET AL. November 9, 1942.

No. 301. THOMSON, TRUSTEE, ET AL. *v.* HICKS ET AL. November 9, 1942.

No. 307. PICKING ET AL. *v.* NEW YORK. November 9, 1942.

No. 310. LACY *v.* UNITED STATES. November 9, 1942.

No. 340. DOEHLER METAL FURNITURE CO., INC. *v.* WARREN, COMPTROLLER GENERAL. November 9, 1942.

No. 361. YELLOW MANUFACTURING ACCEPTANCE CORP. ET AL. *v.* STONE, CHAIRMAN, ET AL. November 9, 1942.

No. 115. CARLOTA BENITEZ SAMPAYO *v.* BANK OF NOVA SCOTIA;

No. 280. GENERAL MOTORS ACCEPTANCE CORP. ET AL. *v.* HULBERT, COUNTY ASSESSOR; and

No. 317. MORRIS PLAN INDUSTRIAL BANK *v.* GRAVES ET AL. November 9, 1942. Petitions for rehearing denied. The CHIEF JUSTICE took no part in the consideration or decision of these applications.

No. 221. GANTZ *v.* UNITED STATES. November 9, 1942. Petition for rehearing denied. The motion to stay execution of the mandate of the Circuit Court of Appeals is also denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications.

No. 382. MCDONALD ET AL. *v.* HUDSPETH, WARDEN. November 9, 1942. Petition for rehearing denied. The "Petition for Court Order" is also denied.

No. —, Original. EX PARTE FRANK CONTARDI. November 16, 1942.

No. 137. ABRAHAM ET AL., TRUSTEES, *v.* HIDALGO COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT No. 1, ET AL. November 16, 1942.

No. 306. MINER, SUCCESSOR TRUSTEE, *v.* RECONSTRUCTION FINANCE CORPORATION. November 16, 1942.

No. 343. THOMPSON *v.* GEORGIA. November 16, 1942.

No. 347. KALB *v.* YELLOW MANUFACTURING ACCEPTANCE CORP. November 16, 1942.

No. 393. BARRY ET AL. *v.* CHRYSLER CORPORATION ET AL. November 16, 1942. Petition for rehearing denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application.

No. 65. UNITED STATES *v.* CALLAHAN WALKER CONSTRUCTION CO. November 23, 1942.

No. 378. PORTER ET AL. *v.* COOKE ET AL. November 23, 1942.

No. 404. SHULTZ ET AL., CO-EXECUTORS, *v.* MANUFACTURERS & TRADERS TRUST CO., CO-EXECUTORS, ET AL. November 23, 1942.

No. 412. HOWELL ET AL. *v.* COUCH, DOING BUSINESS AS COUCH MANUFACTURING CO. November 23, 1942.

No. 416. BELAND *v.* UNITED STATES. November 23, 1942.

No. 24. MARINE HARBOR PROPERTIES, INC. *v.* MANUFACTURERS TRUST CO., TRUSTEE, ET AL. December 7, 1942.

No. 226. WATERMAN *v.* SOMERVELL ET AL., AGENTS, ET AL. December 7, 1942.

No. 413. CALIFORNIA EX REL. MCCOLGAN, STATE FRANCHISE TAX COMMISSIONER, *v.* BRUCE. December 7, 1942.

No. 431. H. T. POINDEXTER & SONS MERCHANDISE CO. *v.* UNITED STATES. December 7, 1942.

No. 433. TERMINAL RAILROAD ASSOCIATION *v.* MILLER, ADMINISTRATRIX. December 7, 1942.

No. 435. HUNSBERGER *v.* FISCHER ET AL. December 7, 1942.

No. 444. O'KEITH *v.* JOHNSTON, WARDEN. December 7, 1942.

No. 49. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* R. DOUGLAS STUART; and

No. 48. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* JOHN STUART. See *ante*, p. 154.

Nos. 437, 438, and 439. HALLIDAY ET AL. *v.* OHIO EX REL. SQUIRE, SUPERINTENDENT OF BANKS, ET AL. December 14, 1942.

No. 451. BAKER *v.* HUNTER (SUCCESSOR TO HUDSPETH), WARDEN. December 14, 1942.

No. 462. KOOLISH ET AL., TRADING AS STANDARD DISTRIBUTING CO., *v.* FEDERAL TRADE COMMISSION. December 14, 1942.

No. 244. MONKS *v.* LEE ET AL. December 21, 1942.

No. 364. BUNN *v.* ATLANTA. December 21, 1942.

No. 561. EDWARDS *v.* UNITED STATES. December 21, 1942.

No. 381. VILES *v.* SYMES ET AL. December 21, 1942. The motion for leave to file petition for rehearing is denied.

No. —, Original. Ex parte Cecil Wright. January 4, 1943. The petition for rehearing is denied. The motion for leave to file petition for writ of certiorari is also denied.

No. 23. State Bank of Hardinsburg *v.* Brown et ux. January 4, 1943. The motion for leave to consider petition for rehearing on typewritten copies is granted. The petition for rehearing is denied.

No. 176. Hughes *v.* Wendel, County Treasurer, et al. January 4, 1943. On consideration of the suggestion of a diminution of the record and motion for a writ of certiorari in that relation, the motion for a writ of certiorari is granted. The petition for rehearing is denied.

No. 250. Carlota Benitez de Seix et al. *v.* Ros Maria Anciani et al. January 4, 1943. The petition for reconsideration of "Petition to Court" filed herein September 9th is denied.

No. 476. American Insurance Co. et al. *v.* Scheufler, Superintendent, et al. January 4, 1943. The petition for rehearing is denied. Mr. Justice Roberts and Mr. Justice Murphy took no part in the consideration or decision of this application.

No. 74. Mangus et al. *v.* Miller. January 4, 1943.

No. 234. Albin *v.* Cowing Pressure Relieving Joint Co. et al. January 4, 1943.

No. 503. RAU CONSTRUCTION CO. *v.* PHILLIPS PETROLEUM CO. January 4, 1943.

No. 505. PAPER CONTAINER MFG. CO. *v.* DIXIE-VORTEX CO. January 4, 1943.

No. 76. MILLER *v.* UNITED STATES. January 11, 1943.

No. 86. DAVIS *v.* DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON. January 11, 1943.

No. 463. RANIERI *v.* UNITED STATES. January 11, 1943.

No. 509. VAN WORMER *v.* CHAMPION PAPER & FIBRE CO. January 11, 1943.

No. 537. RODDENBERRY *v.* FLORIDA. January 11, 1943.

No. 516. EASTMAN *v.* GUARANTY TRUST CO. ET AL. January 11, 1943. Petition for rehearing denied. MR. JUSTICE ROBERTS and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 349. LARGENT *v.* REEVES, CITY MARSHAL. January 14, 1943. The motion for leave to file petition for rehearing is granted, and the petition for rehearing is denied. The application for bail is also denied.

No. 79. ADAMS, WARDEN, ET AL. *v.* UNITED STATES EX REL. MCCANN. See *ante*, p. 605.

Nos. 26 and 27. PFISTER *v.* NORTHERN ILLINOIS FINANCE CORP. ET AL. January 18, 1943.

No. 507. HOLIDAY *v.* UNITED STATES. January 18, 1943.

No. 534. ORLANDO *v.* ILLINOIS. January 18, 1943.

PREPARATION OF RULES UNDER ACT OF MAY 9, 1942.

ORDER.

Pursuant to the Act of May 9, 1942, c. 295, 56 Stat. 271, the Court will undertake the preparation of rules of practice and procedure with respect to appeals by the United States in certain cases.

To assist the Court in this undertaking, the Advisory Committee appointed by order of February 3, 1941, 312 U. S. 717 (amended by orders of May 26, 1941, 313 U. S. 602, and October 27, 1941, 314 U. S. 719), to assist the Court in the preparation of rules of pleading, practice, and procedure with respect to proceedings prior to and including verdict, or finding of guilty or not guilty, in criminal cases in district courts of the United States, is hereby authorized and directed to make such recommendations as may be deemed advisable respecting promulgation of rules of practice and procedure under the Act of May 9, 1942.

OCTOBER 26, 1942.

INDEX

I. Miscellaneous.

1. *Delegation of Power.* Delegation to Secretary of Labor of subpoena power under Walsh-Healey Act, valid. *Endicott Johnson Corp.* v. *Perkins*, 501.

2. *Admiralty Jurisdiction.* Recovery under state act for death of employee drowned in navigable river. *Davis* v. *Department of Labor and Industries*, 249.

3. *Civil Rights. Trial by Jury. War.* Congress authorized trial of offense against law of war by military commission. *Ex parte Quirin*, 1.

4. *Id.* Authority of President to order offense against law of war tried by military commission; validity of Order of July 2, 1942. *Id.*

5. *Id.* Accused persons not precluded, by proclamation of July 2, 1942 or by enemy alienage, from testing in civil courts validity of trial by military commission. *Id.*

6. *Id.* Art. III, § 2 does not extend to person charged with offense against law of war right to jury trial in civil court. *Id.*

7. *Waiver of Constitutional Right* to trial by jury and to assistance of counsel. *Adams* v. *U. S. ex rel. McCann*, 269.

8. *Bankruptcy Power.* Congress may exclude competing or conflicting proceeding in state or federal tribunals. *Marine Harbor Properties* v. *Manufacturers Trust Co.*, 78.

9. *Supremacy Clause.* Validity of § 124 of New York Decedent Estate Law requiring apportionment of federal estate tax among beneficiaries of estate. *Riggs* v. *del Drago*, 95.

10. *Id.* Priority of federal tax lien over later state tax lien. *Michigan* v. *U. S.*, 338.

11. *Federal Taxation. Uniformity.* That ultimate incidence of federal estate tax is governed by state law does not violate requirement of geographical uniformity in federal taxation. *Riggs* v. *del Drago*, 95.

II. Commerce Clause.

1. *Federal Regulation. Scope of Power.* Prices of commodities in interstate commerce, and practices affecting such prices, as subject to federal regulation. *Wickard* v. *Filburn*, 111.

503873—43——53

503873—43——54