AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

College of St. Elizabeth
CONVENT STATION, N. J.

Santa Maria Hall

345.4
Un 3
v.324
Library No.
30852

DISCARDED
APR 19 2006
CSE

UNITED STATES REPORTS

VOLUME 324

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1944

FROM JANUARY 29, 1945 (CONCLUDED) TO AND INCLUDING (IN PART)
APRIL 23, 1945



UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1946

For sale by the Superintendent of Documents, U. S. Government Printing Office
Washington 25, D. C. - Price $2.75 (Buckram)

345.4
Un 3
v. 324

Erratum.—322 U. S. 551, line 10, "confined" should be "confided".

30852

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.
ROBERT H. JACKSON, Associate Justice.
WILEY RUTLEDGE, Associate Justice.

RETIRED

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

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

---

*On Monday, March 26, 1945, the Chief Justice announced the death, on March 22, 1945, at San Diego, Calif., of John Hessin Clarke, of Ohio, a former Associate Justice of this Court. Appointed by President Wilson, Mr. Justice Clarke took his seat October 9, 1916, and resigned as of September 18, 1922.

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, FRANK MURPHY, Associate Justice.

For the Eighth Circuit, WILEY RUTLEDGE, Associate Justice.

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

For the Tenth Circuit, WILEY RUTLEDGE, Associate Justice.

For the District of Columbia, HARLAN F. STONE, Chief Justice.

March 1, 1943.

(For the next previous allotment, see 314 U. S. p. IV.)

TABLE OF CASES REPORTED

	Page
Acme Poultry Corp. *v.* United States	860
Adams, Cantrell *v*	821
Adams *v.* City Bank Farmers Trust Co	865
Adirondack Transit Lines *v.* United States	824
Adkison *v.* Ragen	884
A. E. Staley Mfg. Co., Trade Comm'n *v*	746
A. H. Phillips, Inc. *v.* Walling	490
Akins *v.* Texas	836
Alabama, Burns *v*	843, 887
Alabama Great Southern R. Co., Davis *v*	846
Alderson, Charleston Savings Assn. *v*	182, 888
Allison *v.* Pennsylvania	849
Alma Motor Co. *v.* Timken-Detroit Axle Co	832
American Tobacco Co. *v.* United States	836
American Trucking Assns. *v.* Hancock Lines	774
Amrine, Bissell *v*	875
Anchor Mills Co., Green *v*	880
Anderson *v.* Louisiana	868
Anderson *v.* Tway	861
Andrews *v.* Robertson	874
Andrews *v.* United States	49
Anglin & Stevenson, United States *v*	844
Aronson *v.* New York	845
Arsenal Building Corp. *v.* Greenberg	697
Atlantic Co. *v.* Broughton	883
Atlantic Co., Broughton *v*	883
Atlantic Co. *v.* Carthan	883
Atlantic Co., Carthan *v*	883
Automotive Maintenance Co., Precision Co. *v*	806
Badenhausen *v.* Baetjer	882
Baetjer, Badenhausen *v*	882

Page
Baker, *Ex parte* 822
Baker *v.* Ragen 855, 863
Bank of Nova Scotia, Sampayo *v.* 859, 891
Bar Association, Mitchell *v.* 845
Barland *v.* Illinois 883
Barlow *v.* Utah 829, 891
Barnes Co. *v.* International Harvester Co 850
Barnesville Farmers Elevator Co., Holt *v.* 858
Barr *v.* United States 83
Barry *v.* Reading Co 867, 891
Bartell *v.* Illinois 842, 890
Bartelt *v.* Thompson 828
Barthel *v.* Stamm 878
Barton, Fraser *v.* 849
Batson *v.* Squier 874
Beach, United States *v.* 193
Beard, Glenn *v.* 889
Belcher *v.* Louisville & Nashville R. Co 117
Benefit Association of Ry. Employees, Miner *v.* . 840, 886
Benitez Sampayo *v.* Bank of Nova Scotia 859, 891
Benitez Sampayo *v.* United States 859, 891
Bennett, Pullett *v.* 851
Benton *v.* St. Louis-San Francisco R. Co 843
Berger *v.* United States 848
Berkshire, Molloy & Co. *v.* 886
Bernards *v.* Johnson 826
Beuttas, United States *v.* 768
Bingham *v.* Commissioner 835
Bissell *v.* Amrine 875
Blacker, Thatcher *v.* 848
Bloomenthal *v.* Ragen 863
Board of Governors, Mitchell *v.* 845
Board of Health, Johnson *v.* 822
Bollenbach *v.* United States 837
Boston & Maine Railroad, Negro *v.* 862
Boundary County *v.* Woldson 843
Bowen *v.* Johnston 876

Page
Bowles, Cudmore *v*. 841
Bowles, Pfeiffer Brewing Co. *v*. 865
Bowles, Safeway Stores *v*. 847
Bowles *v*. Seminole Rock & Sand Co. 835
Bowles, Speten *v*. 877
Bowles *v*. United States. 830
Brand Investment Co., United States *v*. 850
Braner *v*. Illinois. 875
Brim, Wall *v*. 857
Brooklyn Savings Bank *v*. O'Neil. 697
Brooks *v*. Ragen. 876
Brooks *v*. United States. 878
Brotherhood of Transit Employees *v*. Madden. 825
Broughton *v*. Atlantic Co. 883
Broughton, Atlantic Co. *v*. 883
Brown, *Ex parte*. 825, 826
Brown Forman Distillers Corp., United States *v*. . . 293
Bulldog Electric Products Co. *v*. Electric Co. . . . 857, 888
Burgess, *Ex parte*. 823
Burgess, *Ex parte*. 823
Burns *v*. Alabama. 843, 887
Butler, *Ex parte*. 825
B–W Construction Co., United States *v*. 768
Byra *v*. New Jersey. 884
Caldwell Sugars, Inc. *v*. Commissioner. 851, 888
California, Coyle *v*. 863
California, Talbott *v*. 845
California Alkali Export Assn. *v*. United States. . . . 834
California Shipbuilding Corp. *v*. Industrial Comm'n. 843
Calloway *v*. Hart. 866
Callus, 10 East 40th St. Building *v*. 833
Canadian Aviator *v*. United States. 215
Canadian River Gas Co. *v*. Power Comm'n. 581, 831
Cantrell *v*. Adams. 821
Carnahan *v*. Nierstheimer. 846
Carter *v*. Johnston. 874
Carter *v*. Kubler. 877
Carthan *v*. Atlantic Co. 883

Page
Carthan, Atlantic Co. *v*. 883
Catlin *v*. United States 229
Catovolo *v*. Hibbs 828
Central Dispensary & Hospital *v*. Labor Board 847
Central National Bank Co., Herget *v*. 4
Central States Electric Co. *v*. Muscatine 138
Chapman *v*. Hunter 856, 891
Chapman, Potomac Chemical Co. *v*. 881
Charleston Federal Savings Assn. *v*. Alderson . . . 182, 888
Chase National Bank *v*. Dixon, Irmaos & Cia 850
Chatwin *v*. United States 835
Chicago, B. & Q. R. Co., Howard *v*. 879
Chicago, B. & Q. R. Co., Illinois Comm'n *v*. 824
Choate *v*. Commissioner 1
Christensen *v*. United States 835
Chronister, Robertson *v*. 883
C. I. O. *v*. McAdory 832
City Bank Farmers Trust Co., Adams *v*. 865
City of. See name of city.
Cleveland *v*. United States 835
Coe, Companhia Antarctica Paulista *v*. 880
Coe, Minnesota Mining & Mfg. Co. *v*. 887, 889
Coe, Special Equipment Co. *v*. 370
Cohen *v*. United States 885
Cole Co. *v*. United States 822, 887
Colorado Interstate Gas Co. *v*. Power Comm'n . . 581, 831
Colorado-Wyoming Gas Co. *v*. Power Comm'n 626
Commissioner, Caldwell Sugars *v*. 851, 888
Commissioner, Choate *v*. 1
Commissioner *v*. Court Holding Co 331
Commissioner *v*. Disston 832
Commissioner *v*. Field 113
Commissioner, Fondren *v*. 18
Commissioner, Franklin Peanut Co. *v*. 867
Commissioner, Friedmann *v*. 865
Commissioner, Goldwasser *v*. 890
Commissioner, Greenan *v*. 848

Page
Commissioner, Guaranty Trust Co. *v*. 393
Commissioner, Hay *v*. 863, 891
Commissioner, Kroger *v*. 866
Commissioner, Mallinckrodt *v*. 871
Commissioner, Meurer Steel Barrel Co. *v*. 860
Commissioner, National Memorial Park *v*. 858
Commissioner, Putnam *v*. 393
Commissioner, Roberts *v*. 841
Commissioner, Slack Bros. *v*. 852, 889
Commissioner *v*. Smith. 177, 695, 830, 889
Commissioner, Superior Coal Co. *v*. 864
Commissioner, Taylor *v*. 871
Commissioner, Trust of Bingham *v*. 835
Commissioner, Webre Steib Co. *v*. 164
Commissioner *v*. Wemyss. 303
Commissioner *v*. Wheeler. 542
Commodore Park, United States *v*. 386
Compagna *v*. United States. 867
Companhia Antarctica Paulista *v*. Coe. 880
Condenser Corp. *v*. Micamold Radio Corp. 861
Congress of Industrial Organizations *v*. McAdory. . . 832
Connecticut Light & Power Co. *v*. Power Comm'n. . . 515
Copperweld Steel Co. *v*. Industrial Comm'n. 780
Cordts *v*. Ragen. 846
Corning Glass Works *v*. United States. 570
Corn Products Refining Co. *v* Trade Comm'n. 726
Cotton State Fertilizer Co. *v*. Hurt. 844
Court Holding Co., Commissioner *v*. 331
Coyle *v*. California. 863
Crapo *v*. Johnston. 886
Crews, Garber *v*. 200
Crist *v*. Ragen. 851
Cudmore *v*. Bowles. 841
Darger *v*. United States. 835
Daulley *v*. Ragen. 884
Davenport *v*. United States. 881
Davis *v*. Alabama Great Southern R. Co. 846
Davis *v*. Johnston. 828

Page
Deal, Robinson *v*. 850
De Beers Consolidated Mines *v*. United States. 839
Des Rosiers *v*. Ford Motor Co. 857
Dickey *v*. Raisin Proration Zone. 869
Disney Productions *v*. Labor Board. 877
Disston, Commissioner *v*. 832
District Court, Wilson *v*. 886
Dixon, Irmaos & Cia., Chase Bank *v*. 850
Dize *v*. Maddrix. 697
Dockstader *v*. United States. 835
Dr. William H. Hay Foundation *v*. Sanatorium. 877
Dolan *v*. Meyer. 867
Dollert *v*. Pratt-Hewit Oil Corp. 853, 889
Doss *v*. Lindsley. 829, 863
Dow Chemical Co. *v*. Halliburton Co. 320
Dow Chemical Co., Halliburton Co. *v*. 320
Drake *v*. United States. 862
Driscoll *v*. Howard-Vaughan Co. 853
Drummond *v*. United States. 316
Duel, State Farm Ins. Co. *v*. 154, 887
Duncan *v*. Kahanamoku. 833
Duncombe *v*. Martinson. 829
Du Pont de Nemours & Co. *v*. Wright. 873
E. I. du Pont de Nemours & Co. *v*. Wright. 873
Eldridge *v*. Keith. 851
Emerald Coal & Coke Co., Kennedy *v*. 872
Estate of. See name of estate.
Euler *v*. Illinois. 851
Evans *v*. Nierstheimer. 859, 889
Evatt, Hooven & Allison Co. *v*. 652
Evatt, Ohio *ex rel.* Foster *v*. 878
Ex parte. See name of party.
Fahs, Merrill *v*. 308, 888
Farmers Bank & Trust Co., Ledbetter *v*. 886
Farrington, Hays *v*. 885
Federal Land Bank, Putnam *v*. 826, 882
Federal Land Bank, Wragg *v*. 872

Page
Federal Petroleum Board, Genecov *v*. 865
Federal Power Comm'n, Canadian River Co. *v*. . 581, 831
Federal Power Comm'n, Colorado Gas Co. *v*. . . . 581, 831
Federal Power Comm'n, Colorado-Wyoming Co. *v*. . 626
Federal Power Comm'n, Connecticut Co. *v*. 515
Federal Power Comm'n, Panhandle Co. *v*. 635
Federal Trade Comm'n, Corn Products Co. *v*. 726
Federal Trade Comm'n, Segal Lock Co. *v*. 885
Federal Trade Comm'n *v*. Staley Mfg. Co. 746
Fidelity-Philadelphia Trust Co. *v*. Rothensies. 108
Field, Commissioner *v*. 113
Fife *v*. Ragen. 851
Finn *v*. Meighan. 834
Fitzgerald *v*. Sanford. 869
Fitzgerald Construction Co. *v*. Pedersen. 720
Fitzpatrick *v*. Nierstheimer. 842
Fleish *v*. Johnston. 840
Fleming, Illinois Commerce Comm'n *v*. 823
Florida, Kinsey *v*. 846
Florida, Pearce *v*. 851
Florida *ex rel*. Watson, Hill *v*. 832
Fondren *v*. Commissioner. 18
Ford Motor Co., Des Rosiers *v*. 857
Ford Motor Co. *v*. Pennsylvania. 827, 890
Fort Tryon Gardens, Metrik *v*. 866
Foster *v*. Evatt. 878
Foxall *v*. Ragen. 851
Frankfort Distilleries, United States *v*. 293
Franklin *v*. New York City. 847
Franklin Life Ins. Co. *v*. Heitchew. 865
Franklin Peanut Co. *v*. Commissioner. 867
Fraser *v*. Barton. 849
Fraser *v*. United States. 842
Frazier, *Ex parte*. 823
Frederick *v*. United States. 861
Friedmann *v*. Commissioner. 865
Gaines, *Ex parte*. 831

Page
Gallagher *v.* Ragen 868
Gapinski *v.* Nierstheimer 846
Garber *v.* Crews 200
Gemsco, Inc. *v.* Walling 244
Genecov *v.* Federal Petroleum Board 865
General Electric Co. *v.* Jewel Lamp Co 838
General Insurance Co., Pathfinder Co. *v.* 844
General Motors Corp., Horton *v.* 844
Georgia *v.* Pennsylvania R. Co 439, 890
Georgia, White *v.* 864
Giese *v.* United States 885
Glenn *v.* Beard 889
Globe Indemnity Co. *v.* United States 852
Golden *v.* Missouri 874
Goldstone *v.* United States 833
Goldwasser *v.* Commissioner 890
Gordon *v.* Illinois 851
Graham *v.* Squier 845
Graham, Steinberg *v.* 823
Great Lakes Transit Corp. *v.* Marceau 872
Green *v.* Anchor Mills Co 880
Greenan *v.* Commissioner 848
Greenberg, Arsenal Building Corp. *v.* 697
Group of Institutional Investors, Park *v.* 857
Guaranty Trust Co. *v.* Commissioner 393
Guiseppi *v.* Walling 244
Gurney, Price *v.* 100, 825, 886
Haines *v.* Nierstheimer 842
Hall *v.* United States 871
Halliburton Oil Well Co. *v.* Dow Co 320
Halliburton Oil Well Co., Dow Co. *v.* 320
Hammersmith *v.* New York 875
Hammond, Harris *v.* 859
Hancock Truck Lines, Common Carriers Conference *v.* 774
Hancock Truck Lines, United States *v.* 774
Hanley *v.* Ragen 851

Page
Hardware Mutual Casualty Co., Wendlinger *v*..... 882
Harnischfeger Corp., Walling *v*..... 837
Harris *v.* Hammond..... 859
Harris, Thompson *v*..... 845
Hart, Calloway *v*..... 866
Hartford-Empire Co. *v.* United States..... 570, 888
Hastings *v.* Haystone Securities Corp..... 860
Hawk *v.* Olson..... 839
Hawke, *Ex parte*..... 878
Hay *v.* Commissioner..... 863, 891
Hay Foundation *v.* Safety Harbor Sanatorium..... 877
Hays *v.* Farrington..... 885
Haystone Securities Corp., Hastings *v*..... 860
Hazel-Atlas Glass Co. *v.* United States..... 570
Heitchew, Franklin Life Ins. Co. *v*..... 865
Herb *v.* Pitcairn..... 117
Herget *v.* Central National Bank Co..... 4
Hesley *v.* Ragen..... 842
Hibbs, Catovolo *v*..... 828
Higbee Co., Young *v*..... 204
Hill *v.* Florida *ex rel.* Watson..... 832
Hines *v.* Louisville & Nashville R. Co..... 858
Hinman, Wilson *v*..... 822, 886, 889
Hiram Walker, Inc., United States *v*..... 293
Hoffman, Republic of Mexico *v*..... 30
Holland *v.* Illinois..... 829, 854
Holt *v.* Barnesville Farmers Elevator Co..... 858
Hooven & Allison Co. *v.* Evatt..... 652
Horni Signal Mfg. Corp. *v.* Katz..... 882
Horton *v.* General Motors Corp..... 844
House *v.* Mayo..... 42, 886
Howard *v.* Chicago, B. & Q. R. Co..... 879
Howard-Vaughan Co., Driscoll *v*..... 853
Howe *v.* United States..... 841, 886
Hunter, Chapman *v*..... 856, 891
Hunter, Mosher *v*..... 888
Hurt, Cotton State Fertilizer Co. *v*..... 844

Page
Illinois, Barland *v*. 883
Illinois, Bartell *v*. 842, 890
Illinois, Braner *v*. 875
Illinois, Euler *v*. 851
Illinois, Gordon *v*. 851
Illinois, Holland *v*. 829, 854
Illinois, Locke *v*. 875
Illinois, Whited *v*. 842
Illinois Central R. Co., Illinois Comm'n *v*. 823
Illinois Commerce Comm'n *v*. Chicago, B. & Q. R. Co. 824
Illinois Commerce Comm'n *v*. Fleming. 823
Illinois Commerce Comm'n *v*. Illinois Central R. Co. 823
Illinois Commerce Comm'n *v*. Scandrett. 824
Illinois Commerce Comm'n *v*. Sprague. 824
Illinois *ex rel.* Railway Employees, Miner *v*. . . . 840, 886
Illinois *ex rel.* Rensing *v*. Nierstheimer. 825
Illinois State Supreme Court, Piskorz *v*. 883
Industrial Accident Comm'n, Shipbuilding Corp. *v*. . 843
Industrial Commission, Copperweld Steel Co. *v*. . . . 780
Institutional Investors, Park *v*. 857
International Harvester Co., Barnes Co. *v*. 850
International Union *v*. Wisconsin Board. 884
In the Matter of. See name of party.
Jack Cole Co. *v*. United States. 822, 887
Jackson, U. S. *ex rel.* Rogalski *v*. 873
Jefferson County *v*. T. V. A. 871, 891
Jessop *v*. United States. 835
Jewel Incandescent Lamp Co., Electric Co. *v*. 838
J. F. Fitzgerald Construction Co. *v*. Pedersen. 720
John Barnes Co. *v*. Harvester Co. 850
Johnson, Bernards *v*. 826
Johnson *v*. Board of Health. 822
Johnson *v*. Ragen. 859
Johnson *v*. United States. 852
Johnston, Bowen *v*. 876
Johnston, Carter *v*. 874

Page
Johnston, Crapo *v*. 886
Johnston, Davis *v*. 828
Johnston, Fleish *v*. 840
Johnston, Mahoney *v*. 853
Johnston, Michener *v*. 874
Johnston, O'Keith *v*. 873
Jones *v*. Stewart. 845
Jones *v*. Whittle. 829
Kahanamoku, Duncan *v*. 833
Katz, Horni Signal Corp. *v*. 882
Kaufman *v*. United States. 867
Keeton *v*. Thompson. 838
Keith, Eldridge *v*. 851
Kelby, Manhattan Co. *v*. 866
Kelly *v*. Swygert. 830
Kelly *v*. United States. 855, 888
Kennedy *v*. Emerald Coal & Coke Co. 872
King *v*. United States. 854
King County *v*. Washington Chocolate Co. 880
Kinsey *v*. Florida. 846
Kirsch *v*. Ragen. 846
Klein *v*. Moser. 879
Korematsu *v*. United States. 885
Kramer *v*. United States. 878
Kroger *v*. Commissioner. 866
Kubler, Carter *v*. 877
Kuczynski *v*. O'Brien. 888
Labor Board, Central Dispensary & Hospital *v*. 847
Labor Board *v*. Le Tourneau Co. 793
Labor Board, May Stores Co. *v*. 838
Labor Board, Ohio Public Service Co. *v*. 857
Labor Board, Onan *v*. 843
Labor Board, Point Breeze Assn. *v*. 870
Labor Board, Regal Knitwear Co. *v*. 9
Labor Board, Republic Aviation Corp. *v*. 793
Labor Board, Wallace Corp. *v*. 885
Labor Board, Walt Disney Productions *v*. 877

Page
Labor Board, Western Electric Co. *v.* 870
Lack *v.* Western Loan & Building Co 877
Ledbetter *v.* Farmers Bank & Trust Co 886
Lesser *v.* New York 875
Le Tourneau Co., Labor Board *v.* 793
Lewis, *Ex parte* 825
Liggett & Myers Tobacco Co. *v.* United States 836
Lindsley, Doss *v.* 829, 863
Locke *v.* Illinois 875
Loew *v.* United States 840
Long Island Lighting Co., Securities Comm'n *v.* 837
Louisiana, Anderson *v.* 868
Louisville & Nashville R. Co., Belcher *v.* 117
Louisville & Nashville R. Co., Hines *v.* 858
Lutz *v.* Ragen 760
Lyerla *v.* Nierstheimer 846
Lynch Corp. *v.* United States 570
Mackreth *v.* Williams 855, 889
Madden, Transit Employees *v.* 825
Maddrix, Dize *v.* 697
Maggio *v.* Zeitz 841
Mahoney *v.* Johnston 853
Malinski *v.* New York 401
Mallinckrodt *v.* Commissioner 871
Mancuso *v.* Ragen 856, 888
Manhattan Co. *v.* Kelby 866
Marceau, Great Lakes Transit Corp. *v.* 872
Maretzo *v.* Walling 244
Maritote *v.* United States 867
Market Street R. Co. *v.* Railroad Comm'n 548, 890
Marsh *v.* Nierstheimer 883
Martine, *Ex parte* 822
Martino *v.* Michigan Window Cleaning Co 849
Martinson, Duncombe *v.* 829
May Department Stores Co. *v.* Labor Board 838
Mayo, House *v.* 42, 886
McAdory, C. I. O. *v.* 832

Page
McBride, *Ex parte*..... 831
McClendon, *Ex parte*..... 831
McConnell, *Ex parte*..... 828, 831
McCoy *v.* Pescor..... 868
McKesson & Robbins, United States *v*..... 293
McLean *v.* Texas..... 870
McMahan, *Ex parte*..... 828
McMullen *v.* Squier..... 842
Mechanical Ice Tray Co. *v.* General Motors Corp.... 844
Meighan, Finn *v*..... 834
Merrill *v.* Fahs..... 308, 888
Metrik *v.* Fort Tryon Gardens..... 866
Meurer Steel Barrel Co. *v.* Commissioner..... 860
Mexico *v.* Hoffman..... 30
Meyer, Dolan *v*..... 867
Meyers *v.* Ragen..... 869
Micamold Radio Corp., Condenser Corp. *v*..... 861
Michael, In the Matter of..... 837
Michener *v.* Johnston..... 874
Michigan, Woodson *v*..... 853
Michigan Window Cleaning Co., Martino *v*..... 849
Miller, *Ex parte*..... 825
Millman *v.* Ragen..... 842
Miner *v.* Illinois *ex rel.* Railway Employees..... 840, 886
Minnesota Mining & Mfg. Co. *v.* Coe..... 887, 889
Minntole, *Ex parte*..... 831
Mississippi, Simmons *v*..... 821
Mississippi Board of Health, Johnson *v*..... 822
Missouri, Golden *v*..... 874
Mitchell *v.* United States..... 887
Mitchell *v.* Washington State Bar Assn..... 845
Molloy & Co. *v.* Berkshire..... 886
Montgomery Ward & Co., United States *v*..... 858, 888
Moore *v.* Moore..... 849
Moore, Moore *v*..... 849
Morrill *v.* Waern Building Corp..... 871
Morris *v.* Ragen..... 856

637582°—46——2

Page
Morris Plan Industrial Bank *v.* Raphiel..... 879
Morton *v.* United States..... 875
Moser, Klein *v*..... 879
Mosher *v.* Hunter..... 888
Mosher *v.* Wayland..... 862
Moskovitz, *Ex parte*..... 886
Muscatine, Central States Electric Co. *v*..... 138
Muschany *v.* United States..... 49
National Aluminate Corp. *v.* Permutit Co..... 864
National Distillers Products Corp., U. S. *v*..... 293
National Labor Relations Board. See Labor Board.
National Memorial Park *v.* Commissioner..... 858
National War Labor Board, U. S. Gypsum Co. *v*.. 856, 890
Negro *v.* Boston & Maine Railroad..... 862
New Jersey, Byra *v*..... 884
New York, Aronson *v*..... 845
New York, Hammersmith *v*..... 875
New York, Lesser *v*..... 875
New York, Malinski *v*..... 401
New York, Petersen *v*..... 876, 891
New York City, Franklin *v*..... 847
Nierstheimer, Carnahan *v*..... 846
Nierstheimer, Evans *v*..... 859, 889
Nierstheimer, Fitzpatrick *v*..... 842
Nierstheimer, Gapinski *v*..... 846
Nierstheimer, Haines *v*..... 842
Nierstheimer, Illinois *ex rel.* Rensing *v*..... 825
Nierstheimer, Lyerla *v*..... 846
Nierstheimer, Marsh *v*..... 883
Nierstheimer, O'Neill *v*..... 885
Nierstheimer, Sires *v*..... 883
Nierstheimer, Van Dyke *v*..... 846
North Carolina, Weinstein *v*..... 849
Northwestern Bands of Shoshones *v.* United States..... 335, 890
Nuveen, Okeechobee County *v*..... 881
O'Brien, Kuczynski *v*..... 888

Page
Ohio, Tompsett *v*. 869
Ohio *ex rel.* Foster *v.* Evatt. 878
Ohio Public Service Co. *v.* Labor Board. 857
Oil Workers Union *v.* Texoma Gas Co. 872
Okeechobee County *v.* Nuveen. 881
O'Keith *v.* Johnston. 873
Okin, Securities & Exchange Comm'n *v*. 835
Olson, Hawk *v*. 839
Olson, Rice *v*. 786
Onan *v.* Labor Board. 843
O'Neil, Brooklyn Savings Bank *v*. 697
O'Neill *v.* Nierstheimer. 885
Orangeburg *v.* Southern R. Co. 860
Oriolo *v.* United States. 824
Otis & Co. *v.* Securities & Exchange Comm'n. 887
Overholser, Wrobel *v*. 854
Owens-Illinois Glass Co. *v.* United States. 570
Pacific Gas & Electric Co. *v.* Securities Comm'n. . 826, 890
Paddy *v.* United States. 855
Pan American Airways, Wyman *v*. 882
Panhandle Eastern Pipe Line Co. *v.* Comm'n. 635
Park *v.* Group of Investors. 857
Pathfinder Petroleum Co. *v.* General Ins. Co. 844
Pearce *v.* Florida. 851
Pedersen, Fitzgerald Construction Co. *v*. 720
Pennsylvania, Allison *v*. 849
Pennsylvania, Ford Motor Co. *v*. 827, 890
Pennsylvania, Quaker Oats Co. *v*. 827, 890
Pennsylvania R. Co., Georgia *v*. 439, 890
Peplowski, *Ex parte*. 830, 890
Permutit Co., National Aluminate Corp. *v*. 864
Perry *v.* United States. 855
Pescor, McCoy *v*. 868
Petersen *v.* New York. 876, 891
Petty *v.* United States. 835
Pfeiffer Brewing Co. *v.* Bowles. 865
Phillips *v.* Ragen. 851

Page
Phillips, Inc. *v.* Walling 490
Pierce *v.* United States 873
Piskorz *v.* Illinois Supreme Court 883
Pitcairn, Herb *v.* 117
Point Breeze Employees Assn. *v.* Labor Board 870
Potomac Chemical Co. *v.* Chapman 881
Potts *v.* Potts 868
Potts, Potts *v.* 868
Potts *v.* Rabb 870
Povich *v.* Sanford 854
Pratt-Hewit Oil Corp., Dollert *v.* 853, 889
Precision Instrument Co. *v.* Automotive Co 806
President & Directors of Manhattan Co. *v.* Kelby ... 866
Price *v.* Gurney 100, 825, 886
Proctor *v.* United States 862
Pullett *v.* Bennett 851
Putnam *v.* Commissioner 393
Putnam *v.* Federal Land Bank 826, 882
Quaker Oats Co. *v.* Pennsylvania 827, 890
Rabb, U. S. *ex rel.* Potts *v.* 870
Ragen, Adkison *v.* 884
Ragen, Baker *v.* 855, 863
Ragen, Bloomenthal *v.* 863
Ragen, Brooks *v.* 876
Ragen, Cordts *v.* 846
Ragen, Crist *v.* 851
Ragen, Daulley *v.* 884
Ragen, Fife *v.* 851
Ragen, Foxall *v.* 851
Ragen, Gallagher *v.* 868
Ragen, Hanley *v.* 851
Ragen, Hesley *v.* 842
Ragen, Johnson *v.* 859
Ragen, Kirsch *v.* 846
Ragen, Lutz *v.* 760
Ragen, Mancuso *v.* 856, 888
Ragen, Meyers *v.* 869

Page
Ragen, Millman *v*. 842
Ragen, Morris *v*. 856
Ragen, Phillips *v*. 851
Ragen, Resco *v*. 883
Ragen, Rooney *v*. 851
Ragen, Scott *v*. 856
Ragen, Watkins *v*. 863
Ragen, Wescott *v*. 842
Ragen, Westrup *v*. 863
Ragen, White *v*. 760
Ragen, Wright *v*. 851
Railroad Commission, Market Street R. Co. *v*. . . . 548, 890
Railway Employees, Miner *v*. 840, 886
Raisin Proration Zone, Dickey *v*. 869
Rambo *v*. United States. 848
Raphiel, Morris Plan Bank *v*. 879
Reading Co., Barry *v*. 867, 891
Regal Knitwear Co. *v*. Labor Board. 9
Regular Common Carriers Conference *v*. Hancock Lines 774
Rensing *v*. Nierstheimer. 825
Republic Aviation Corp. *v*. Labor Board. 793
Republic of Mexico *v*. Hoffman. 30
Resco *v*. Ragen. 883
Reynolds Tobacco Co. *v*. United States. 836, 891
Riccia *v*. Welch. 854
Rice *v*. Olson. 786
Richardson *v*. Richardson. 864
Richardson, Richardson *v*. 864
Richetsky, *Ex parte*. 828
R. J. Reynolds Tobacco Co. *v*. United States. . . . 836, 891
Roberts *v*. Commissioner. 841
Robertson, Andrews *v*. 874
Robertson *v*. Chronister. 883
Robinson *v*. Deal. 850
Robinson *v*. United States. 282, 880
Rockton & Rion Railroad *v*. Walling. 880

Page
Rogalski *v.* Jackson 873
Roodenko *v.* United States 860, 891
Rooney *v.* Ragen 851
Root Refining Co., Universal Oil Co. *v.* 839
Rothensies, Fidelity-Philadelphia Co. *v.* 108
Ruthven, *Ex parte* 830
Ryan *v.* Thompson 821
Safety Harbor Sanatorium, Hay Foundation *v.* 877
Safeway Stores *v.* Bowles 847
St. John *v.* Stubblefield 869
St. Louis-San Francisco R. Co., Benton *v.* 843
Sampayo *v.* Bank of Nova Scotia 859, 891
Sampayo *v.* United States 859, 891
Sanford, Fitzgerald *v.* 869
Sanford, Povich *v.* 854
Sanford, Stumpf *v.* 876
Santa Inez Co. *v.* United States 879
Scandrett, Illinois Commerce Comm'n *v.* 824
Schenley Distillers Corp., United States *v.* 293
Schwab, *Ex parte* 825, 891
Scott *v.* Ragen 856
Seagram-Distillers Corp., United States *v.* 293
Securities & Exchange Comm'n *v.* Long Island Co. 837
Securities & Exchange Comm'n *v.* Okin 835
Securities & Exchange Comm'n, Otis & Co. *v.* 887
Securities & Exchange Comm'n, Pacific Gas Co. *v.* .. 826, 890
Segal Lock & Hardware Co. *v.* Trade Comm'n 885
Seminole Rock & Sand Co., Bowles *v.* 835
Shoshone Indians *v.* United States 335, 890
Simmons *v.* Mississippi 821
Sires *v.* Nierstheimer 883
Slack Bros. *v.* Commissioner 852, 889
Smith, *Ex parte* 831
Smith, Commissioner *v.* 177, 695, 830, 889
Societe Internationale Forestiere *v.* United States .. 839
Southern R. Co., Orangeburg *v.* 860

Page
Special Equipment Co. *v.* Coe 370
Speegle, United States *v* 293
Speten *v.* Bowles 877
Sprague, Illinois Commerce Comm'n *v* 824
Spurlock *v.* Steer 868
Squier, Batson *v* 874
Squier, Graham *v* 845
Squier, McMullen *v* 842
Staley Mfg. Co., Trade Comm'n *v* 746
Stamm, Barthel *v* 878
State Farm Mutual Ins. Co. *v.* Duel 154, 887
State National Bank *v.* Tittle 881
Steer, Spurlock *v* 868
Steer, White *v* 833
Steinberg *v.* Graham 823
Stephenson, *Ex parte* 822
Stewart, Jones *v* 845
Stockton *v.* Texas 829
Stone, Viator *v* 880
Stubblefield, St. John *v* 869
Stubbs *v.* United States 835
Stumpf *v.* Sanford 876
Superior Coal Co. *v.* Commissioner 864
Sutton, *Ex parte* 822
Swygert, Kelly *v* 830
Talbott *v.* California 845
Taylor *v.* Commissioner 871
10 East 40th Street Building *v.* Callus 833
Tennessee Valley Authority, Jefferson Co. *v* ... 871, 891
Texas, Akins *v* 836
Texas, McLean *v* 870
Texas, Stockton *v* 829
Texas Mexican R. Co., Thompson *v* 838
Texoma Natural Gas Co., Oil Workers Union *v* 872
Thatcher *v.* Blacker 848
Thatcher Manufacturing Co. *v.* United States 570
Thomas, *Ex parte* 823

Page
Thomas J. Molloy & Co. *v.* Berkshire 886
Thompson *v.* Harris 845
Thompson, Keeton *v.* 838
Thompson, Ryan *v.* 821
Thompson *v.* Texas Mexican R. Co. 838
Thompson *v.* United States 861
Thompson, Wisconsin *ex rel.* Bartelt *v.* 828
Tilghman *v.* United States 870
Timken-Detroit Axle Co., Alma Motor Co. *v.* 832
Tittle, State National Bank *v.* 881
Tompsett *v.* Ohio 869
Transit Employees *v.* Madden 825
Tree *v.* United States 852
Trust Under the Will of Bingham *v.* Comm'r 835
Tway, Anderson *v.* 861
Two Acres of Land, United States *v.* 833, 884
Union of Transit Employees *v.* Madden 825
United Automobile Workers *v.* Wisconsin Board 884
United States, Acme Poultry Corp. *v.* 860
United States, Adirondack Transit Lines *v.* 824
United States, American Tobacco Co. *v.* 836
United States, Andrews *v.* 49
United States *v.* Anglin & Stevenson 844
United States, Barr *v.* 83
United States *v.* Beach 193
United States, Benitez Sampayo *v.* 859, 891
United States, Berger *v.* 848
United States *v.* Beuttas 768
United States, Bollenbach *v.* 837
United States, Bowles *v.* 830
United States *v.* Brand Investment Co. 850
United States, Brooks *v.* 878
United States *v.* Brown Forman Corp. 293
United States, California Alkali Assn. *v.* 834
United States, Canadian Aviator *v.* 215
United States, Catlin *v.* 229
United States, Chatwin *v.* 835

Page
United States, Christensen *v*. 835
United States, Cleveland *v*. 835
United States, Cohen *v*. 885
United States, Cole Co. *v*. 887
United States *v*. Commodore Park. 386
United States, Compagna *v*. 867
United States, Corning Glass Works *v*. 570
United States, Darger *v*. 835
United States, Davenport *v*. 881
United States, De Beers Mines *v*. 839
United States, Dockstader *v*. 835
United States, Drake *v*. 862
United States, Drummond *v*. 316
United States *v*. Frankfort Distilleries. 293
United States, Fraser *v*. 842
United States, Frederick *v*. 861
United States, Giese *v*. 885
United States, Globe Indemnity Co. *v*. 852
United States, Goldstone *v*. 833
United States, Hall *v*. 871
United States *v*. Hancock Truck Lines. 774
United States, Hartford-Empire Co. *v*. 570, 888
United States, Hazel-Atlas Glass Co. *v*. 570
United States *v*. Hiram Walker, Inc. 293
United States, Howe *v*. 841, 886
United States, Jack Cole Co. *v*. 822
United States, Jessop *v*. 835
United States, Johnson *v*. 852
United States, Kaufman *v*. 867
United States, Kelly *v*. 855, 888
United States, King *v*. 854
United States, Korematsu *v*. 885
United States, Kramer *v*. 878
United States, Liggett & Myers Co. *v*. 836
United States, Loew *v*. 840
United States, Lynch Corp. *v*. 570
United States, Maritote *v*. 867

Page
United States *v.* McKesson & Robbins..... 293
United States, Mitchell *v*..... 887
United States *v.* Montgomery Ward & Co..... 858, 888
United States, Morton *v*..... 875
United States, Muschany *v*..... 49
United States *v.* National Distillers Corp..... 293
United States, Northwestern Bands of Indians *v*. 335, 890
United States, Oriolo *v*..... 824
United States, Owens-Illinois Glass Co. *v*..... 570
United States, Paddy *v*..... 855
United States, Perry *v*..... 855
United States, Petty *v*..... 835
United States, Pierce *v*..... 873
United States, Proctor *v*..... 862
United States, Rambo *v*..... 848
United States, Reynolds Tobacco Co. *v*..... 836, 891
United States, Robinson *v*..... 282, 889
United States, Roodenko *v*..... 860, 891
United States, Sampayo *v*..... 859, 891
United States, Santa Inez Co. *v*..... 879
United States *v.* Schenley Distillers Corp..... 293
United States *v.* Seagram Distillers Corp..... 293
United States, Shoshone Indians *v*..... 335, 890
United States, Societe Internationale *v*..... 839
United States *v.* Speegle..... 293
United States, Stubbs *v*..... 835
United States, Thatcher Mfg. Co. *v*..... 570
United States, Thompson *v*..... 861
United States, Tilghman *v*..... 870
United States, Tree *v*..... 852
United States *v.* Two Acres of Land..... 833, 884
United States, U. S. Alkali Export Assn. *v*..... 834
United States, Velazquez *v*..... 889
United States, Vinson *v*..... 830
United States, Waldon *v*..... 847, 889
United States, Watkins *v*..... 826
United States, Williams *v*..... 876

Page
United States *v.* Willow River Power Co..... 499
United States, Womble *v*..... 830
United States, Zitting *v*..... 835
U. S. Alkali Export Assn. *v.* United States..... 834
U. S. *ex rel.* Potts *v.* Rabb..... 870
U. S. *ex rel.* Rogalski *v.* Jackson..... 873
United States Gypsum Co. *v.* War Labor Board.. 856, 890
Universal Oil Products Co., *Ex parte*..... 826, 887
Universal Oil Products Co. *v.* Root Rfg. Co..... 839
Utah, Barlow *v*..... 829, 891
Van Dyke *v.* Nierstheimer..... 846
Van Orden, *Ex parte*..... 828
Velazquez *v.* United States..... 889
Viator *v.* Stone..... 880
Vinson *v.* United States..... 830
Wabash R. Co., Herb *v*..... 117
Waern Building Corp., Morrill *v*..... 871
Waldon *v.* United States..... 847, 889
Wall *v.* Brim..... 857
Wallace Corp. *v.* Labor Board..... 885
Walling, Gemsco *v*..... 244
Walling, Guiseppi *v*..... 244
Walling *v.* Harnischfeger Corp..... 837
Walling, Maretzo *v*..... 244
Walling, Phillips, Inc. *v*..... 490
Walling, Rockton & Rion Railroad *v*..... 880
Walling *v.* Youngerman-Reynolds Co..... 837
Walt Disney Productions *v.* Labor Board..... 877
War Labor Board, U. S. Gypsum Co. *v*..... 856, 890
Washington Chocolate Co., King County *v*..... 880
Washington State Bar Assn., Mitchell *v*..... 845
Watkins *v.* Ragen..... 863
Watkins *v.* United States..... 826
Watson, Hill *v*..... 832
Wayland, Mosher *v*..... 862
Webre Steib Co. *v.* Commissioner..... 164
Weinstein *v.* North Carolina..... 849

Page
Welch, Riccia *v.* 854
Wemyss, Commissioner *v.* 303
Wendlinger *v.* Hardware Mutual Co. 882
Wescott *v.* Ragen 842
Western Electric Co. *v.* Labor Board 870
Western Loan & Building Co., Lack *v.* 877
Westinghouse Electric Co., Bulldog Co. *v.* 857, 888
Westrup *v.* Ragen 863
W. F. & John Barnes Co. *v.* Harvester Co. 850
Wheeler, Commissioner *v.* 542
White *v.* Georgia 864
White *v.* Ragen 760
White *v.* Steer 833
Whited *v.* Illinois 842
Whittle, Jones *v.* 829
Wilhoit, *Ex parte* 826
Williams, Mackreth *v.* 855, 889
Williams *v.* United States 876
Willow River Power Co., United States *v.* 499
Wilson *v.* District Court 886
Wilson *v.* Hinman 822, 886, 889
Wisconsin Employment Board, United Auto. Workers *v.* 884
Wisconsin *ex rel.* Bartelt *v.* Thompson 828
Woldson, Boundary County *v.* 843
Womble *v.* United States 830
Woodson *v.* Michigan 853
Wragg *v.* Federal Land Bank 872
Wright, Du Pont Co. *v.* 873
Wright *v.* Ragen 851
Wrobel *v.* Overholser 854
Wyman *v.* Pan American Airways 882
Young *v.* Higbee Co. 204
Youngerman-Reynolds Hardwood Co., Walling *v.* ... 837
Zeitz, Maggio *v.* 841
Zitting *v.* United States 835

TABLE OF CASES

Cited in Opinions

Page

Abernathy, Ex parte, 320 U. S. 219 49
A. C. Conn Co. v. Little Suamico Lumber Co., 74 Wis. 652 513
Adams v. New York, 192 U. S. 585 422
Adams v. Russell, 229 U. S. 353 126
Adams Express Co. v. Ohio, 165 U. S. 194 190
Addison v. Holly Hill Fruit Products, 322 U. S. 607 13
Adkins v. Children's Hospital, 261 U. S. 525 713
Alabama v. Arizona, 291 U. S. 286 445
Alaska Packers Assn. v. Industrial Accident Comm'n, 294 U. S. 532 160
Alemite Mfg. Corp. v. Staff, 42 F. 2d 832 13
Allesandro v. Smith Co., 136 F. 2d 75 493
Altoona Theatres v. Tri-Ergon Corp., 294 U. S. 477 377
Aluminum Colors, Inc. v. Empire Plating Co., 5 F. Supp. 687 12
American Insurance Co. v. Canter, 1 Pet. 511 682
American National Bank v. Crews, 191 Okla. 53 200
American Steel & Wire Co. v. Speed, 192 U. S. 500 666, 681, 683
American Telephone & Telegraph Co. v. United States, 299 U. S. 232 608
American United Insurance Co. v. Avon Park, 311 U. S. 138 214
Ames v. Kansas, 111 U. S. 449 464

Page

Amick v. Mortgage Security Corp., 30 F. 2d 359 210
Anderson v. United States, 318 U. S. 350 411, 423, 430
Angers v. Sabatinelli, 235 Wis. 422 163
Angers v. Sabatinelli, 239 Wis. 364 163
Ann Arbor R. Co. v. United States, 281 U. S. 658 479
Annette, The, [1919] P. 105 37
Anniston Mfg. Co. v. Davis, 301 U. S. 337 166, 173, 175
Apex Hosiery Co. v. Leader, 310 U. S. 469 298
Apfelbacher v. State, 167 Wis. 233 513
Arantzazu Mendi, The [1939] A. C. 256 37
Arizona v. California, 283 U. S. 423 392, 393
Arizona v. California, 298 U. S. 558 445, 487
Arizona Grocery Co. v. Atchison, T. & S. F. R. Co., 284 U. S. 370 151, 456, 459
Arkansas Gas Co. v. Department of Public Utilities, 304 U. S. 61 620
Arkansas Louisiana Gas Co. v. Texarkana, 96 F. 2d 179 587
Armour & Co. v. Alton R. Co., 312 U. S. 195 483
Armour & Co. v. Wantock, 323 U. S. 126 249
Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U. S. 315 258
Arnold Grocery Co. v. Shackelford, 140 Ga. 585 6
Arrow Stevedore Co. v. Pillsbury, 88 F. 2d 446 712

Page

Arsenal Building Corp. v. Greenberg, 324 U. S. 697 724
Ashcraft v. Tennessee, 322 U. S. 143 161, 404, 405, 411, 412, 431
Assiniboine Indian Tribe v. United States, 77 Ct. Cls. 347 349
Athanasaw v. United States, 227 U. S. 326 194
Atlantic Co. v. Broughton, 146 F. 2d 480 708
Atlantic Coast Line R. Co. v. Powe, 283 U. S. 401 48
Atlas Bank v. Nahant Bank, 23 Pick. (Mass.) 480 209
Attualita, The, 238 F. 909 38
Avery v. Alabama, 308 U. S. 444 764
Avery v. Commissioner, 292 U. S. 210 396, 398
Bailey v. Alabama, 219 U. S. 219 169
Bailey v. Glover, 21 Wall. 342 6
Baker v. Druesedow, 263 U. S. 137 191
Baldwin v. Seelig, 294 U. S. 511 666, 669, 688
Baltimore National Bank v. State Tax Comm'n, 296 U. S. 538 185
Baltimore & Ohio R. Co. v. Pitcairn Coal Co., 215 U. S. 481 452
Baltimore & Ohio S. W. R. Co. v. Voigt, 176 U. S. 498 67
Balzac v. Porto Rico, 258 U. S. 298 672, 673, 674, 684, 686
Banks v. Ogden, 2 Wall. 57 5
Barker v. Harvey, 181 U. S. 481 352, 353
Barnstable, The, 181 U. S. 464 224
Barringer & Co. v. United States, 319 U. S. 1 479
Barrington v. Missouri, 205 U. S. 483 412
Bates v. Clark, 95 U. S. 204 340
Bates v. United States, 323 U. S. 15 196, 380

Page

Beattie v. Gedney, 99 N. J. Eq. 207 396
Beaumont, S. L. & W. R. Co. v. United States, 282 U. S. 74 479
Beaver Cotton Mills, In re, 275 F. 498 107
Beaverton, The, 273 F. 539 38
Bedford v. United States, 192 U. S. 217 510
Beecher v. Wetherby, 95 U. S. 517 339
Bein v. Heath, 6 How. 228 814
Belcher v. Louisville & Nashville R. Co., 384 Ill. 281 134
Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232 190, 191
Berea College v. Kentucky, 211 U. S. 45 125
Berizzi Bros. Co. v. The Pesaro, 271 U. S. 562 35, 38, 39, 40
Bethlehem Steel Co. v. Labor Board, 120 F. 2d 641 11
Betts v. Brady, 316 U. S. 455 46, 764, 768
Birbalas v. Cuneo Printing Industries, 140 F. 2d 826 708
Bird v. United States, 187 U. S. 118 258
Blair v. Commissioner, 300 U. S. 5 162
Board of Commissioners v. United States, 308 U. S. 343 715
Boeing Airplane Co. v. Labor Board, 140 F. 2d 423 796
Boese v. King, 108 U. S. 379 210
Bond v. St. Louis-San Francisco R. Co., 315 Mo. 987 170
Bongiorno v. Ragen, 54 F. Supp. 973 762
Booth Fisheries Corp. v. Case, 182 Wash. 392 670
Boske v. Comingore, 177 U. S. 459 94, 97, 547
Bowden v. Johnson, 107 U. S. 251 203
Bowen v. Delaware, L. & W. R. Co., 153 N. Y. 476 6
Bowen v. Johnston, 306 U. S. 19 791, 792
Bowling v. United States, 233 U. S. 528 317

Page

Boyd v. United States, 116 U. S. 616 422, 423
Brewster v. Gage, 280 U. S. 327 547
Brooklyn City R. Co. v. New York, 199 U. S. 48 190
Browder v. United States, 312 U. S. 335 90, 99
Brown v. Houston, 114 U. S. 622 666
Brown v. Maryland, 12 Wheat. 419 654, 655, 656, 657, 664, 665, 666, 667, 668, 669, 671, 672, 679, 683, 685, 686, 687, 688, 689, 690.
Brown v. Mississippi, 297 U. S. 278 414, 431, 438
Buchalter v. New York, 319 U. S. 427 439
Buckley v. Oceanic S. S. Co., 5 F. 2d 545 708
Burke v. Wells, 208 U. S. 14 657, 688
Burnet v. Harmel, 287 U. S. 103 395
Burnet v. Northern Trust Co., 283 U. S. 782 116
Burt v. Union Central Life Ins. Co., 187 U. S. 362 67
Butler Bros. v. McColgan, 315 U. S. 501 827
Butterworth v. Hoe, 112 U. S. 50 384
Buttz v. Northern Pacific R. Co., 119 U. S. 55 339
Cady v. Georgia, 323 U. S. 676 187
California v. Southern Pacific Co., 157 U. S. 229 463
California Drive-In Restaurant Assn. v. Clark, 22 Cal. 2d 287 267
Callaghan v. Bailey, 293 N. Y. 396 7
Campania, The, 203 F. 855 229
Campbell v. Haverhill, 155 U. S. 610 9
Campbell v. United States, 107 U. S. 407 94
Canadian Aviator, Ltd. v. United States, 142 F. 2d 709 216

Page

Canadian Aviator, Ltd. v. United States, 52 F. Supp. 211 216
Canadian River Gas Co. v. Federal Power Commission, 324 U. S. 581 626, 628, 631, 639, 649
Capital City Dairy v. Ohio, 183 U. S. 238 186
Carbice Corp. v. American Patents Corp., 283 U. S. 27 375
Carlo Poma, The, 259 F. 369 38
Carlson v. Curtiss, 234 U. S. 103 703
Carlton v. Bokee, 17 Wall. 463 383
Carpenter v. Shaw, 280 U. S. 363 362
Carter v. General American Life Ins. Co., 323 U. S. 676 185
Carter v. Virginia, 321 U. S. 131 299, 300
Case v. Los Angeles Lumber Co., 308 U. S. 106 210
Case Co. v. Labor Board, 321 U. S. 332 15
Caspian, The, 14 F. 2d 1013 228
Cedar Rapids Gas Co. v. Cedar Rapids, 223 U. S. 655 150, 601, 624
Cedar Rapids Gas Co. v. Cedar Rapids, 144 Iowa 426 150
Cement Manufacturing Assn. v. United States, 268 U. S. 588 735, 737
Central Illinois Public Service Co. v. Industrial Comm'n, 293 Ill. 62 123
Central Kentucky Natural Gas Co. v. Railroad Comm'n, 290 U. S. 264 144
Central Transfer Co. v. Terminal R. Assn., 288 U. S. 469 453, 454, 455, 482, 485
Chambers v. Baltimore & Ohio R. Co., 207 U. S. 142 120
Chambers v. Florida, 309 U. S. 227 404, 405, 428, 431, 438
Chappell v. United States, 160 U. S. 499 234

Page

Chappell v. United States, 81 F. 764 234
Charlesworth v. Hipsh, Inc., 84 F. 2d 834 7
Chase v. Calvird, 324 Mo. 429 792
Chase v. State, 93 Fla. 963 792
Chase National Bank v. Norwalk, 291 U. S. 431 13
Cherokee Nation v. United States, 270 U. S. 476 715
Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585 191
Chicago & Grand Trunk R. Co. v. Wellman, 143 U. S. 339 605
Chicago Great Western R. Co. v. Kendall, 266 U. S. 94 191
Chicago, R. I. & P. R. Co. v. Perry, 259 U. S. 548 186
Chicago, St. L. & N. O. R. Co. v. Pullman Car Co., 139 U. S. 79 67
China, The, 7 Wall. 53 224
Choctaw Nation v. United States, 318 U. S. 423 353
Cincinnati Packet Co. v. Bay, 200 U. S. 179 186
Cincinnati Soap Co. v. United States, 301 U. S. 308 674, 677, 683
Citizens National Bank v. Durr, 257 U. S. 99 185
City Bank Farmers Trust Co. v. McGowan, 323 U. S. 594 78
City Bank Farmers Trust Co. v. McGowan, 142 F. 2d 599 78
City Bank Farmers Trust Co. v. McGowan, 43 F. Supp. 790 78
City of. See name of city.
Clark's Ferry Bridge Co. v. Public Service Comm'n, 291 U. S. 227 569
Coastwise Transportation Corp. v. United States, 43 F. 2d 401 225, 229
Cochran v. Kansas, 316 U. S. 255 792
Cochrane v. Deener, 94 U. S. 780 744

Page

Coe v. Errol, 116 U. S. 517 685
Cohens v. Virginia, 6 Wheat. 264 618
Cole v. Violette, 319 U. S. 581 551
Coleman v. Miller, 307 U. S. 433 446
Colgate v. United States, 280 U. S. 43 337
Collector v. Richards, 23 Wall. 246 93
Collins v. Caldwell, 29 F. 2d 329 203
Collins v. Miller, 252 U. S. 364 233
Colorado v. Kansas, 320 U. S. 383 448
Colorado Interstate Gas Co. v. Federal Power Comm'n, 324 U. S. 581 626, 628, 631, 639
Colorado-Wyoming Gas Co. v. Federal Power Comm'n, 324 U. S. 626 639
Commercial Credit Co. v. O'Brien, 323 U. S. 665 185
Commissioner v. Bain Peanut Co., 134 F. 2d 853 165, 170
Commissioner v. Brandegee, 123 F. 2d 58 21
Commissioner v. Bristol, 121 F. 2d 129 307, 313
Commissioner v. Cohen, 121 F. 2d 348 395
Commissioner v. Field, 324 U. S. 113 112
Commissioner v. Gardner, 127 F. 2d 929 21
Commissioner v. Glos, 123 F. 2d 548 26
Commissioner v. Guaranty Trust Co., 144 F. 2d 756 395
Commissioner v. Heininger, 320 U. S. 467 307, 334
Commissioner v. Phillips' Estate, 126 F. 2d 851 21
Commissioner v. Prouty, 115 F. 2d 331 313
Commissioner v. Sansome, 60 F. 2d 931 546
Commissioner v. Scottish American Investment Co., 323 U. S. 119 307, 334

Page
Commissioner v. Taylor, 122 F. 2d 714 20, 21
Commissioner v. Wells, 132 F. 2d 405 21
Commissioner v. Wemyss, 324 U. S. 303 309, 310
Compania Espanola v. The Navemar, 303 U. S. 68 32, 34, 36
Compania Naviera Vascongado v. The Cristina, [1938] A. C. 485 40
Conant, In re, 5 Blatch. 54 5
Concordia Fire Ins. Co. v. Illinois, 292 U. S. 535 193
Conn Co. v. Little Suamico Lumber Co., 74 Wis. 652 513
Connecticut General Life Ins. Co. v. Johnson, 296 U. S. 535 186
Connecticut Railway Co. v. Palmer, 305 U. S. 493 714
Connolly's Estate v. Commissioner, 135 F. 2d 64 178
Consolidated Edison Co. v. Labor Board, 305 U. S. 197 12
Consolidated Rock Co. v. DuBois, 312 U. S. 510 214
Consolidated Turnpike v. Norfolk & O. V. R. Co., 228 U. S. 596 186
Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405 379, 381
Continental Securities Co. v. Belmont, 206 N. Y. 7 105
Cook v. Pennsylvania, 97 U. S. 566 657
Coos Bay Indian Tribe v. United States, 87 Ct. Cls. 143 339
Corkran Oil Co. v. Arnaudet, 199 U. S. 182 185
Corn-Planter Patent, 23 Wall. 181 376
Corn Products Refining Co. v. Federal Trade Comm'n, 324 U. S. 726 747, 755
Coulter v. Louisville & Nashville R. Co., 196 U. S. 599 190, 191
Cramer v. Arthur, 102 U. S. 612 89, 94
Page
Cramer v. United States, 261 U. S. 219 352
Crane v. Morris, 6 Pet. 598 169
Creswill v. Knights of Pythias, 225 U. S. 246 703
Crichton v. United States, 56 F. Supp. 876 804
Cristina, The [1938] A. C. 485 37, 41
Crites, Inc. v. Prudential Co., 322 U. S. 408 818
Crocker v. United States, 240 U. S. 74 64, 72
Cross, Ex parte, 20 Neb. 417 790
Crow Nation v. United States, 81 Ct. Cls. 238 349
Crown Die & Tool Co. v. Nye Tool Works, 261 U. S. 24 379
Cubbins v. Mississippi River Comm'n, 241 U. S. 351 510
Cumberland Coal Co. v. Board of Revision, 284 U. S. 23 191, 193
Cuno Engineering Corp. v. Automatic Devices Corp., 314 U. S. 84 328
Dade County v. United States, 142 F. 2d 230 232
Dana v. Securities & Exchange Comm'n, 125 F. 2d 542 210
Danforth v. United States, 308 U. S. 271 55, 78
Davenport v. Dows, 18 Wall. 626 104, 105
David v. Atlantic Co., 69 Ga. App. 643 708
Davies Warehouse Co. v. Bowles, 321 U. S. 144 9
Davis, The, 10 Wall. 15 37
Davis v. Beason, 133 U. S. 333 829
Davis v. Hardie, 108 Fla. 133 792
Davis v. Willey, 273 F. 397 6, 7
Day v. Lewis, 376 Ill. 509 766
Dayton-Goose Creek R. Co. v. United States, 263 U. S. 456 478
Dayton Power Co. v. Public Utilities Comm'n, 292 U. S. 290 620

Page

Deaver v. State, 24 Ala. App. 377 792
Deering v. Winona Harvester Works, 155 U. S. 286 377
De Lima v. Bidwell, 182 U. S. 1 673, 681, 684, 694
Department of Banking v. Pink, 317 U. S. 264 551
De Saussure v. Gaillard, 127 U. S. 216 126
Dieckmann v. United States, 88 F. 2d 902 233, 236
Director General of Railroads v. Viscose Co., 254 U. S. 498 479
Disston v. Commissioner, 144 F. 2d 115 20, 29
Divina Pastora, The, 4 Wheat. 52 34
Dize v. Maddrix, 144 F. 2d 584 702
Dobson v. Commissioner, 320 U. S. 489 4, 58, 173, 307, 334
Dobson v. United States, 27 F. 2d 807 226
Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373 298
Dodge v. Board of Education, 302 U. S. 74 828
Dodge v. Woolsey, 18 How. 331 104, 105
Donahue v. Susquehanna Collieries Co., 138 F. 2d 3 708
Donnelly v. United States, 228 U. S. 243 791
Dooley v. United States, 182 U. S. 222 673, 681, 682
Dooley v. United States, 183 U. S. 151 670, 673, 674, 681, 694
Dora, The [1919] P. 105 37
Dorchy v. Kansas, 264 U. S. 286 161
Dorr v. United States, 195 U. S. 138 674, 684
Douglas v. Jeannette, 319 U. S. 157 821
Douglas v. New York, N. H. & H. R. Co., 279 U. S. 377 120

Page

Dow Chemical Co. v. Williams Bros. Well Corp., 81 F. 2d 495 322, 323
Dowdell v. United States, 221 U. S. 325 674
Downes v. Bidwell, 182 U. S. 244 670, 673, 674, 682, 684, 685
Duel v. State Farm Auto. Ins. Co., 240 Wis. 161 157
Dunbar v. Myers, 94 U. S. 187 330
Duncan v. Thompson, 315 U. S. 1 712, 714
Duplex Co. v. Deering, 254 U. S. 443 475
Dushane v. Beall, 161 U. S. 513 6
Earle v. Carson, 188 U. S. 42 203
East Ohio Gas Co. v. Tax Comm'n, 283 U. S. 465 533, 539
Eastern-Central Assn. v. United States, 321 U. S. 194 803
Eastern Transportation Co. v. United States, 272 U. S. 675 220, 222, 223, 226, 227, 229
Eastman Kodak Co. v. Southern Photo Co., 273 U. S. 359 471
Educational Films Corp. v. Ward, 282 U. S. 379 827
Eggers v. National Radio Co., 208 Cal. 308 105
Electric Cable Co. v. Brooklyn Edison Co., 292 U. S. 69 327
Engebretson v. West, 133 Neb. 846 6
Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U. S. 157 125
E. Regensburg & Sons v. Helvering, 130 F. 2d 507 165, 171
Erie R. Co. v. Purdy, 185 U. S. 148 185
Ervin v. Quintanilla, 99 F. 2d 935 32, 38
Estate of. See name of estate.

Page

Ethyl Gasoline Corp. v. United States, 309 U. S. 436 266, 296, 298, 375, 379, 384
Exchange, The, 7 Cranch 116 34
Ex parte. See name of party.
Faber v. United States, 221 U. S. 649 673
Fashion Originators' Guild v. Federal Trade Comm'n, 312 U. S. 457 298
Fassett, In re, 142 U. S. 479 229
Favorita, The, 43 F. 2d 569 229
Fawcus Machine Co. v. United States, 282 U. S. 375 547
Federal Communications Comm'n v. Sanders Radio Station, 309 U. S. 470 212
Federal Land Bank v. Bismarck Co., 314 U. S. 95 263
Federal Land Bank v. Priddy, 295 U. S. 229 223
Federal Power Comm'n v. Hope Natural Gas Co., 320 U. S. 591 144, 146, 152, 566, 568, 600, 603, 605, 608, 609, 617, 621, 649, 650.
Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U. S. 575 139, 566, 595, 605
Federal Trade Comm'n v. Algoma Lumber Co., 291 U. S. 67 739, 758, 760
Federal Trade Comm'n v. Bunte Bros., 312 U. S. 349 532
Federal Trade Comm'n v. Pacific States Paper Assn., 273 U. S. 52 739, 758, 760
Federal Trade Comm'n v. Staley Mfg. Co., 324 U. S. 746 735, 741
Felix v. Scharnweber, 125 U. S. 54 186
Ferguson v. Dickson, 300 F. 961 312, 315
Ferguson v. District of Columbia, 270 U. S. 633 44
Fidelity, The, Fed. Cas. No. 4,758 37

Page

Fidelity-Philadelphia Trust Co. v. Rothensies, 324 U. S. 108 114, 115
Field's Estate v. Commissioner, 144 F. 2d 62 110
First National Bank v. Flershem, 290 U. S. 504 150
First National Bank v. Hartford, 273 U. S. 548 659
Fisher v. Commissioner, 132 F. 2d 383 21, 28
Fishermen's Cooperative Assn. v. State, 198 Wash. 413 670
Fiske v. Kansas, 274 U. S. 380 659
Fitzwater v. National Bank, 62 Kan. 163 105
Fleming v. Page, 9 How. 603 682
Fleming v. Post, 146 F. 2d 441 708
Fleming v. Warshawsky & Co., 123 F. 2d 622 708
Fletcher v. Porter, 20 F. 2d 23 203
Flint v. Stone Tracy Co., 220 U. S. 107 827
Florida v. Mellon, 273 U. S. 12 445, 446, 474
Florida v. United States, 282 U. S. 194 532, 634
Flournoy v. Wiener, 321 U. S. 253 187
Foley v. Ragen, 143 F. 2d 774 762
Foley v. Ragen, 52 F. Supp. 265 762
Forbes v. United States, 268 F. 273 234
Ford v. Ford Mfg. Co., 222 Ill. App. 76 396
Ford v. Snook, 205 App. Div. 194 396
Ford Motor Co. v. Beauchamp, 308 U. S. 331 827
Ford & Son v. Little Falls Fibre Co., 280 U. S. 369 513
Fort Berthold Indians v. United States, 71 Ct. Cls. 308 349, 366
Fort Smith & Western R. Co. v. Mills, 253 U. S. 206 709

Page

Fourteen Diamond Rings v. United States, 183 U. S. 176 673, 681, 694
Fox Film Corp. v. Doyal, 286 U. S. 123 379
Fox Film Corp. v. Muller, 296 U. S. 207 125
Fox River Paper Co. v. Railroad Comm'n, 274 U. S. 651 513
French v. Commissioner, 138 F. 2d 254 21
Frost & Co. v. Coeur D'Alene Mines Corp., 312 U. S. 38 66
Fry & Friedsam v. United States, 12 Cust. App. 486 89
Fullerton v. Texas, 196 U. S. 192 185, 186
Garrett v. Moore-McCormack Co., 317 U. S. 239 712, 714, 715
General American Tank Car Corp. v. Day, 270 U. S. 367 190
Genesee Chief, The, 12 How. 443 40
Georgia v. Chattanooga, 264 U. S. 472 464, 465, 470
Georgia v. Evans, 316 U. S. 159 447, 475
Georgia v. Tennessee Copper Co., 206 U. S. 230 447, 450
Gibson v. United States, 166 U. S. 269 391, 510
Gifford v. Helms, 98 U. S. 248 6
Gill v. Lynch, 367 Ill. 203 123
Gilman v. Philadelphia, 3 Wall. 713 391
Goltra v. Weeks, 271 U. S. 536 772
Gonzales v. Williams, 192 U. S. 1 673
Gouled v. United States, 255 U. S. 298 422
Graham, Ex parte, 3 Wash. 456 468
Grays Harbor Co. v. Coats-Fordney Co., 243 U. S. 251 233
Great Northern R. Co. v. Merchants Elevator Co., 259 U. S. 285 452

Page

Great Northern R. Co. v. Weeks, 297 U. S. 135 191
Greenleaf-Johnson Lumber Co. v. Garrison, 237 U. S. 251 392
Greer, Mills & Co. v. Stoller, 77 F. 1 467
Gregory v. Helvering, 293 U. S. 465 334
Griffiths v. Commissioner, 308 U. S. 355 334
Groel v. United Electric Co., 70 N. J. Eq. 616 105
Groesbeck v. Duluth, S. S. & A. R. Co., 250 U. S. 607 590
Grunert v. Spalding, 104 Wis. 193 162
Guess v. Montague, 140 F. 2d 500 702, 708
Guiseppi v. Walling, 144 F. 2d 608 245
Gulf, C. & S. F. R. Co. v. Dennis, 224 U. S. 503 161
Gulf Fisheries Co. v. Darrouzet, 17 F. 2d 374 670
Gulf Fisheries Co. v. MacInerney, 276 U. S. 124 657, 666, 670, 688
Gulf & Ship Island R. Co. v. Hewes, 183 U. S. 66 186
Hadden v. Merritt, 115 U. S. 25 94
Hallowell v. United States, 221 U. S. 317 791
Hamilton-Brown Shoe Co. v. Wolf Brothers, 240 U. S. 251 48
Hansen Packing Co. v. Armour & Co., 16 F. Supp. 784 467
Harding Highway, The, 53 F. 2d 938 225
Harkness v. Hyde, 98 U. S. 476 468
Harriman v. Northern Securities Co., 197 U. S. 244 571
Harrington v. Department of Labor & Industry, 252 Mich. 87 705
Harris v. United States, 227 U. S. 340 194

Page

Hartford Electric Light Co. v. Federal Power Comm'n, 131 F. 2d 953 528, 529, 533
Hartford-Empire Co. v. United States, 323 U. S. 386 379
Hassett v. Welch, 303 U. S. 303 116
Hawaii v. Mankichi, 190 U. S. 197 674, 685
Hawes v. Oakland, 104 U. S. 450 104
Hawk, Ex parte, 321 U. S. 114 46, 48, 49, 764, 765, 767
Hayman v. Galveston, 273 U. S. 414 822
Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U. S. 238 815, 818
Hazelton v. Sheckells, 202 U. S. 71 64
Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 F. 288 381
Hebert v. Louisiana, 272 U. S. 312 414
Hecht Co. v. Bowles, 321 U. S. 321 266
Heff, Matter of, 197 U. S. 488 791
Helvering v. Blair, 121 F. 2d 945 21
Helvering v. Enright, 312 U. S. 636 396, 397, 398
Helvering v. Griffiths, 318 U. S. 371 547, 735, 736
Helvering v. Hallock, 309 U. S. 106 110, 111, 113, 116
Helvering v. Hutchings, 312 U. S. 393 27
Helvering v. Insular Sugar Refining Corp., 141 F. 2d 713 165
Helvering v. McGlue's Estate, 119 F. 2d 167 395, 400
Helvering v. Rankin, 295 U. S. 123 805
Helvering v. Safe Deposit & Trust Co., 316 U. S. 56 213
Helvering v. St. Louis Union Trust Co., 296 U. S. 39 110
Helvering v. San Joaquin Fruit Co., 297 U. S. 496 181

Page

Helvering v. Winmill, 305 U. S. 79 547
Henderson v. Glens Falls Indemnity Co., 134 F. 2d 320 712
Henderson v. Usher, 125 Fla. 709 309, 315
Hendrick v. Maryland, 235 U. S. 610 190
Henkel v. Cincinnati, 177 U. S. 170 186
Henry v. United States, 46 F. 2d 640 234
Herbring v. Lee, 280 U. S. 111 187
Higgins v. Smith, 308 U. S. 473 334
Hill v. Murphy, 212 Mass. 1 105
Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229 13
Hite v. Luray, 175 Va. 218 390
Hoe v. Knap, 27 F. 204 380, 384
Hoehn v. Crews, 144 F. 2d 665 202
Hogan v. Commissioner, 141 F. 2d 92 2
Hoke v. United States, 227 U. S. 308 194
Holiday v. Johnston, 313 U. S. 342 44, 45, 792
Holzheimer v. Lit Brothers, 262 Pa. 150 170
Home for Incurables v. New York, 187 U. S. 155 186
Home Insurance Co. v. Dick, 281 U. S. 397 186
Home Insurance Co. v. New York, 134 U. S. 594 190, 191
Honesdale Co. v. Montgomery, 56 W. Va. 397 209
Honeyman v. Hanan, 300 U. S. 14 186
Hoopeston Canning Co. v. Cullen, 318 U. S. 313 157, 158
Hopkins v. Oxley Stave Co., 83 F. 912 463
House v. Mayo, 322 U. S. 710 47
House v. Mayo, 324 U. S. 42 763, 764, 765, 789
House v. Mayo, 122 Fla. 23 47
House v. State, 127 Fla. 145 47
House v. State, 130 Fla. 400 47

Page

Howard Hall Co. v. United States, 315 U. S. 495 822
Howe v. United States, 142 F. 2d 310 21
Hughes v. United States, 230 U. S. 24 510
Hull, Ex parte, 312 U. S. 546 762
Hume v. United States, 132 U. S. 406 72
Humes v. United States, 276 U. S. 487 311
Hurd v. Albert, 214 Cal. 15 162
Hurtado v. California, 110 U. S. 516 414, 415
Hurwitz v. North, 271 U. S. 40 822
Hutchings-Sealy National Bank v. Commissioner, 141 F. 2d 422 21
Hutchinson v. Barry, Inc., 44 F. Supp. 829 708
Huus v. New York & P. R. S. S. Co., 182 U. S. 392 673
Hysler v. Florida, 315 U. S. 411 431
Illinois Natural Gas Co. v. Central Illinois Co., 314 U. S. 498 621, 629, 630
Indian Territory Oil Co. v. Board of Equalization, 287 U. S. 573 185
Industrial Addition Assn. v. Commissioner, 323 U. S. 310 638, 639
Industrial Association of San Francisco v. United States, 268 U. S. 64 297
Inland Steel Co. v. United States, 306 U. S. 153 145, 148
In re. See name of party.
Insular Tax Cases, 182 U. S. 222, 244; 183 U. S. 151 673, 677
International Brotherhood of Teamsters v. Keystone Freight Lines, 123 F. 2d 326 11
International Steel & Iron Co. v. National Surety Co., 297 U. S. 657 127
Interstate Busses Corp. v. Blodgett, 276 U. S. 245 190

Page

Interstate Busses Corp. v. Holyoke Street R. Co., 273 U. S. 45 190
Interstate Commerce Comm'n v. Goodrich Transit Co., 224 U. S. 194 599, 620, 622
Interstate Commerce Comm'n v. Oregon-Washington R. Co., 288 U. S. 14 212
Interstate Commerce Comm'n v. United States, 289 U. S. 385 488
In the Matter of. See name of party.
Iowa-Des Moines National Bank v. Bennett, 284 U. S. 239 193
Iowa Railway & Light Co. v. Jones Auto Co., 182 Iowa 982 150
Irvine v. Spaeth, 314 U. S. 575 185
Isaacs v. Neece, 75 F. 2d 566 6
Jackson v. United States, 230 U. S. 1 510
J. C. Hart, The, 43 F. 2d 566 229
Jenkins v. International Bank, 106 U. S. 571 6
Jersey Central Power Co. v. Federal Power Comm'n, 319 U. S. 61 523, 540, 541
Jett Bros. Co. v. Carrollton, 252 U. S. 1 185
J. I. Case Co. v. Labor Board, 321 U. S. 332 15
John v. Paullin, 231 U. S. 583 120
John G. Stevens, The, 170 U. S. 113 224, 228
Johnson v. Cook, 304 U. S. 387 446, 447, 464, 470, 473
Johnson v. M'Intosh, 8 Wheat. 543 339
Johnson v. Risk, 137 U. S. 300 126
Johnson v. Yellow Cab Co., 321 U. S. 383 815
Johnson Lighterage Co. No. 24, The, 231 F. 365 38

Page

Jones v. Bowles, 322 U. S. 707 446, 473, 474
Jones v. Meehan, 175 U. S. 1 353, 360
Jones v. Pettibone, 2 Wis. 308 503
Jones ex rel. Louisiana v. Bowles, 322 U. S. 707 446, 473
Jupiter, The, [1924] P. 236 37
Jupiter No. 2, The, [1925] P. 69 37
Jupiter No. 3, The, [1927] P. 122 37
Kaegi v. Industrial Commission, 232 Wis. 16 163
Kansas v. Colorado, 206 U. S. 46 448
Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111 827
Kansas City Southern R. Co. v. Albers Commission Co., 223 U. S. 573 659
Katingo Hadjipatera, The, 119 F. 2d 1022 33
Katingo Hadjipatera, The, 40 F. Supp. 546 38
Kaukauna Water Power Co. v. Green Bay Canal Co., 142 U. S. 254 503
Kaukauna Water Power Co. v. Green Bay Canal Co., 75 Wis. 385 513
Kendall v. Winsor, 21 How. 322 382
Kennedy v. Waugh, 23 Wis. 468 162
Keogh v. Chicago & N. W. R. Co., 260 U. S. 156 452, 457, 468, 482, 485
Keyes v. United States, 119 F. 2d 444 232
Keystone Driller Co. v. General Excavator Co., 290 U. S. 240 815, 819
Keystone Realty Holding Co., In re, 117 F. 2d 1003 210, 213
Kihlberg v. United States, 97 U. S. 398 772
Kinney v. Anglim, 43 F. Supp. 431 20
Kirschbaum Co. v. Walling, 316 U. S. 517 703
Kitto v. State, 98 Neb. 164 790

Page

Klein v. Board of Supervisors, 282 U. S. 19 191
Klein v. United States, 283 U. S. 231 110
Klinger v. Missouri, 13 Wall. 257 126
Knotts v. Nollen, 206 Iowa 261 150
Kronprinzessin Cecilie, The, 192 F. 27 229
Kwik Set, Inc. v. Welch Grape Juice Co., 86 F. 2d 945 329
Labor Board v. American Potash & Chemical Corp., 113 F. 2d 232 704
Labor Board v. American Potash & Chemical Corp., 118 F. 2d 630 704
Labor Board v. Bachelder, 125 F. 2d 387 11
Labor Board v. Blackstone Mfg. Co., 123 F. 2d 633 10, 11
Labor Board v. Brezner Tanning Co., 141 F. 2d 62 10
Labor Board v. Cleveland-Cliffs Iron Co., 133 F. 2d 295 11
Labor Board v. Express Publishing Co., 312 U. S. 426 13, 17, 486
Labor Board v. Falk Corp., 308 U. S. 453 13
Labor Board v. Feinberg Hosiery Mill, 134 F. 2d 620 11
Labor Board v. Gluek Brewing Co., 144 F. 2d 847 11
Labor Board v. Hearst Publications, 322 U. S. 111 537, 800
Labor Board v. Jones & Laughlin, 301 U. S. 1 799
Labor Board v. Landis Tool Co., 145 F. 2d 152 10
Labor Board v. Link-Belt Co., 311 U. S. 584 13
Labor Board v. Newport News Shipbuilding Co., 308 U. S. 241 12
Labor Board v. Regal Knitwear Co., 140 F. 2d 746 804
Labor Board v. Southern Bell Tel. Co., 319 U. S. 50 739

Page

Labor Board v. Stackpole Carbon Co., 128 F. 2d 188 704
Labor Board v. Stone, 125 F. 2d 752 11
Labor Board v. Virginia Power Co., 314 U. S. 469 800
Labor Board v. Waterman S. S. Co., 309 U. S. 206 13, 799
Labor Board v. Weirton Steel Co., 135 F. 2d 494 10
Labor Board v. Williamson-Dickie Mfg. Co., 130 F. 2d 260 796
Lake Monroe, The, 250 U. S. 246 219, 222
Largent v. Texas, 318 U. S. 418 768
Lawrence v. State Tax Comm'n, 286 U. S. 276 191
Leathers v. Blessing, 105 U. S. 626 228
Lee v. United States, 58 F. 2d 879 232
Leeds & Catlin Co. v. Victor Talking Machine Co., 213 U. S. 301 377
Leitch Manufacturing Co. v. Barber Co., 302 U. S. 458 375
Lennon, In re, 166 U. S. 548 11
Le Tourneau Co. v. Labor Board, 143 F. 2d 67 796
Levering & Garrigues Co. v. Morrin, 289 U. S. 103 297
License Cases, 5 How. 504 666, 688
Liggett Co. v. Lee, 288 U. S. 517 494
Lindemann v. Rusk, 125 Wis. 210 162
L'Invincible, 1 Wheat. 238 34
Lisenba v. California, 314 U. S. 219 186, 404, 405, 431, 439
Livingston v. Moore, 7 Pet. 469 416
Ljubica Matkovic, The, 49 F. Supp. 936 38
Local 167 v. United States, 291 U. S. 293 297, 571, 576
Loeber v. Schroeder, 149 U. S. 580 185
Loewe v. Lawlor, 208 U. S. 274 298

Page

Logan v. United States, 58 F. 2d 697 318
Lone Star Gas Co. v. Texas, 304 U. S. 224 601, 625
Lone Wolf v. Hitchcock, 187 U. S. 553 339
Long v. The Tampico, 16 F. 491 38
Loughran v. Loughran, 292 U. S. 216 814
Louisiana v. Bowles, 322 U. S. 707 446, 473, 474
Louisiana v. Cummins, 314 U. S. 577 463
Louisiana v. Cummins, 314 U. S. 580 464
Louisiana v. Texas, 176 U. S. 1 464, 473
Louisville & Nashville R. Co. v. Layton, 243 U. S. 617 132
Low v. Austin, 13 Wall. 29 657, 666
Luckenbach S. S. Co. v. United States, 272 U. S. 533 176
Luke, The, 19 F. 2d 923 229
Luxton v. North River Bridge Co., 147 U. S. 337 233, 234
Lyeth v. Hoey, 305 U. S. 188 213, 396
Lynch v. New York, 293 U. S. 52 126, 127
Lyndhurst, The, 92 F. 681 229
Lyons v. Oklahoma, 322 U. S. 596 404, 407, 428, 429, 433, 437
Mabie v. Matteson, 17 Wis. 1 513
Maddrix v. Dize, 7 Wage Hour Rep. 313 702
Mallon v. Tonn, 163 Wis. 366 162
Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123 186
Maple Flooring Assn. v. United States, 268 U. S. 563 735
Mapleton v. Iowa Public Service Co., 209 Iowa 400 150
Market Street R. Co. v. Railroad Commission, 324 U. S. 548 800

Page

Marlin v. Lewallen, 276 U. S. 58 353
Marsh v. Whitmore, 21 Wall. 178 72
Marvin v. Trout, 199 U. S. 212 186
Mason v. Routzahn, 275 U. S. 175 398
Massachusetts v. Mellon, 262 U. S. 447 445, 446, 474
Massachusetts v. Missouri, 308 U. S. 1 464, 465, 466, 470, 475
Matter of. See name of party.
Matthews v. Rodgers, 284 U. S. 521 475
Maxwell v. Dow, 176 U. S. 581 415
May v. Heiner, 281 U. S. 238 113, 116
May v. New Orleans, 178 U. S. 496 657, 666, 670, 688
McCaughn v. Carver, 19 F. 2d 126 312, 315
McClain v. Ortmayer, 141 U. S. 419 330
McClaine v. Rankin, 197 U. S. 154 9
McCormick v. Burnet, 283 U. S. 784 116
McCullough v. Campbellsport, 123 Wis. 334 511
McDonald v. Apple River Power Co., 164 Wis. 450 513
McDonald v. Dewey, 202 U. S. 510 203
McDowell v. Gould, 166 Ga. 670 792
McGlennan v. Margowski, 90 Ind. 150 792
McGoldrick v. Compagnie Generale, 309 U. S. 430 160
McGoldrick v. Gulf Oil Corp., 309 U. S. 414 657, 666
McKnett v. St. Louis & S. F. R. Co., 292 U. S. 230 123
McLean Trucking Co. v. United States, 321 U. S. 67 456
McLeod v. Threlkeld, 319 U. S. 491 725
McMullen v. Hoffman, 174 U. S. 639 67

Page

McNabb v. United States, 318 U. S. 332 411, 422
McPherson Bros. Co. v. Superior Court, 274 U. S. 726 233
Meikle v. Drain, 69 F. 2d 290 6
Meinhard v. Salmon, 249 N. Y. 458 213
Memphis Gas Co. v. Beeler, 315 U. S. 649 185
Merchants' National Bank v. Richmond, 256 U. S. 635 703
Mercoid Corp. v. Mid-Continent Investment Co., 320 U. S. 661 376, 377, 382, 815
Merrill v. Fahs, 51 F. Supp. 120 314
Merrill-Ruckgaber Co. v. United States, 241 U. S. 387 772
Mexican Petroleum Corp. v. South Portland, 121 Me. 128 688
Micek v. Wamka, 165 Wis. 97 163
Michigan Central R. Co. v. Powers, 201 U. S. 245 190
Michoud v. Girod, 4 How. 503 72
Midland Steel Products Co. v. Labor Board, 113 F. 2d 800 796
Midland Valley R. Co. v. Barkley, 276 U. S. 482 479
Midstate Horticultural Co. v. Pennsylvania R. Co., 320 U. S. 356 704, 705
Miles Medical Co. v. Park & Sons Co., 220 U. S. 373 298
Miller v. Board of County Comm'rs, 290 U. S. 586 185
Minnesota v. National Tea Co., 309 U. S. 551 126
Minnesota v. Northern Securities Co., 184 U. S. 199 463
Minnesota v. United States, 305 U. S. 382 176
Minnesota Rate Cases, 230 U. S. 352 589
Minnesota Tea Co. v. Helvering, 302 U. S. 609 334

Page
Missouri v. Illinois, 180 U. S. 208 448, 450
Missouri v. Illinois, 200 U. S. 496 448, 463
Missouri v. Kansas Gas Co., 265 U. S. 298 621
Missouri v. Public Service Comm'n, 273 U. S. 126 161
Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Comm'n, 262 U. S. 276 605
Mitchel v. United States, 9 Pet. 711 359
Mitchell v. Louisville & Nashville R. Co., 379 Ill. 522 118, 129
Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35 805
Mondou v. New York, N. H. & H. R. Co., 223 U. S. 1 120
Monongahela Navigation Co. v. United States, 148 U. S. 312 513
Mooney v. Holohan, 294 U. S. 103 431, 764
Morrison v. California, 291 U. S. 82 170
Mortensen v. United States, 322 U. S. 369 194, 824
Morton Salt Co. v. Suppiger Co., 314 U. S. 488 384, 815
Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U. S. 502 375
Muir, Ex parte, 254 U. S. 522 34, 36
Munn v. Illinois, 94 U. S. 113 589
Munter v. Weil Corset Co., 261 U. S. 276 468
Murdock v. Memphis, 20 Wall. 590 125
Murrell, The, 200 F. 826 228
Muschany v. United States, 324 U. S. 49 710
Myers v. Bethlehem Corp., 303 U. S. 41 475, 477
Nahmeh v. United States, 267 U. S. 122 223
Nairn v. McCarthy, 120 F. 2d 910 7

Page
National Bank v. Case, 99 U. S. 628 203
National Labor Relations Board. See Labor Board.
National Tea Co. v. State, 205 Minn. 443 127
National Tea Co. v. State, 208 Minn. 607 127
Natural Gas Co. v. Slattery, 302 U. S. 300 477, 620
Natural Gas Pipeline Co. v. Federal Power Comm'n, 141 F. 2d 27 144
Nebraska Children's Home Society v. State, 57 Neb. 765 792
Neirbo Co. v. Bethlehem Corp., 308 U. S. 165 639
Newark Natural Gas Co. v. Newark, 242 U. S. 405 601, 624
New England Divisions Case, 261 U. S. 184 478
New Hampshire v. Louisiana, 108 U. S. 76 473
New Jersey v. New York City, 296 U. S. 259 15
New York, Ex parte, 256 U. S. 503 34
New York v. Barker, 179 U. S. 279 191
New York v. New Jersey, 256 U. S. 296 448
New York Central Securities Corp. v. United States, 287 U. S. 12 456
New York ex rel. Whitman v. Wilson, 318 U. S. 688 48, 764
New York, N. H. & H. R. Co. v. Interstate Commerce Comm'n, 200 U. S. 361 486
Nichols v. United States, 7 Wall. 122 176
Nichols v. United States, 64 Ct. Cls. 241 397
Nickey v. Mississippi, 292 U. S. 393 186
Norris v. Alabama, 294 U. S. 587 659
North v. Ringling, 149 Fla. 739 309
North Dakota v. Chicago & N. W. R. Co., 257 U. S. 485 452, 454, 464, 470, 487

Page

North Dakota v. Minnesota, 263 U. S. 365 448
Northern Pacific R. Co. v. Solum, 247 U. S. 477 479
Northern Pacific R. Co. v. United States, 227 U. S. 355 353
Northwestern Bands of Shoshone Indians v. United States, 95 Ct. Cls. 642 338, 340
Northwestern Electric Co. v. Federal Power Comm'n, 321 U. S. 119 533
Northwestern Electric Co. v. Federal Power Comm'n, 125 F. 2d 882 533
Northwestern Mutual Life Ins. Co. v. Wisconsin, 247 U. S. 132 827
Norwegian Nitrogen Co. v. United States, 288 U. S. 294 800
Nutter v. Andrews, 246 Mass. 224 396
Oakland v. Pacific Coast Lumber Co., 172 Cal. 332 551
Oakland v. United States, 124 F. 2d 959 232
Ocampo v. United States, 234 U. S. 91 674
Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U. S. 292 559, 800
Oklahoma v. Atchison, T. & S. F. R. Co., 220 U. S. 277 446, 451, 473
Oklahoma v. Atkinson Co., 313 U. S. 508 392
Oklahoma v. Cook, 304 U. S. 387 446, 447, 464, 470, 473
Oklahoma v. Gulf, C. & S. F. R. Co., 220 U. S. 290 473
Old Colony Trust Co. v. Commissioner, 279 U. S. 716 181
Olmstead v. United States, 277 U. S. 438 422
O'Neal v. United States, 11 F. 2d 869 226
O'Neil v. Brooklyn Savings Bank, 293 N. Y. 666 701

Page

O'Neil v. Brooklyn Savings Bank, 267 App. Div. 317 701
O'Neil v. Brooklyn Savings Bank, 180 Misc. 542 701, 714
Opp Cotton Mills v. Administrator, 312 U. S. 126 256, 275
Ornstein v. Chesapeake & Ohio R. Co., 284 U. S. 572 233
Osborn v. Ozlin, 310 U. S. 53 157
Osceola, The, 189 U. S. 158 225
Overnight Motor Co. v. Missel, 316 U. S. 572 707, 715, 718
Overstreet v. North Shore Corp., 318 U. S. 125 723, 724
Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U. S. 493 160
Pacific Employers Ins. Co. v. Pillsbury, 130 F. 2d 21 712
Pacific Mail S. S. Co. v. Lucas, 258 U. S. 266 712
Page v. Phelps, 108 Conn. 572 170
Pagel v. MacLean, 283 U. S. 266 161
Paine Lumber Co. v. Neal, 244 U. S. 459 475
Palko v. Connecticut, 302 U. S. 319 414
Palmer v. Bender, 287 U. S. 551 395
Palmer v. Commissioner, 302 U. S. 63 181, 696
Palmer v. Massachusetts, 308 U. S. 79 532
Paramount Publix Corp. v. Tri-Ergon Corp., 294 U. S. 464 327
Parker v. Motor Boat Sales, 314 U. S. 244 735
Patapsco Guano Co. v. North Carolina, 171 U. S. 345 669
Patterson v. Alabama, 294 U. S. 600 126, 161
Pearson v. Yewdall, 95 U. S. 294 416
Peck v. Jenness, 7 How. 612 209
Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146 725

Page

Pedersen v. Fitzgerald Construction Co., 318 U. S. 740 723
Pedersen v. Fitzgerald Construction Co., 288 N. Y. 687 722
Pedersen v. Fitzgerald Construction Co., 293 N. Y. 126 723
Pedersen v. Fitzgerald Construction Co., 262 App. Div. 665 722
Pedersen v. Fitzgerald Construction Co., 266 App. Div. 1032 723
Pedersen v. Fitzgerald Construction Co., 173 Misc. 188 722
Pennock v. Dialogue, 2 Pet. 1 382
Pennoyer v. Neff, 95 U. S. 714 239
Pennsylvania v. Quicksilver Mining Co., 10 Wall. 553 463
Pennsylvania v. West Virginia, 262 U. S. 553 449
Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421 392
Pennsylvania Gas Co. v. Public Service Comm'n, 252 U. S. 23 625
People v. Adams, 176 N. Y. 351 422
People v. Daly, 212 N. Y. 183 790
People v. Defore, 242 N. Y. 13 422
People v. Fisher, 249 N. Y. 419 412
People v. Jung Hing, 212 N. Y. 393 409
People v. Lytton, 257 N. Y. 310 409
People v. Malinski, 292 N. Y. 360 418
People v. McAnally, 221 Ill. 66 767
People v. McGrath, 202 N. Y. 445 436
People v. Mummiani, 258 N. Y. 394 418
People v. Siman, 284 Ill. 28 767

Page

People v. Snyder, 246 N. Y. 491 412
People v. Superior Court, 234 Ill. 186 767, 792
People ex rel. Day v. Lewis, 376 Ill. 509 766
People ex rel. Swolley v. Ragen, 390 Ill. 106 766
Peoria & Pekin Union R. Co. v. United States, 263 U. S. 528 639
Pepper v. Litton, 308 U. S. 295 214
Perry v. Huffman Automobile Co., 104 Neb. 211 704
Peru, Ex parte, 318 U. S. 578 34, 35, 36
Pesaro, The, 255 U. S. 216 34
Pesaro, The, 277 F. 473 39
Phelan v. O'Brien, 13 F. 656 6
Phelps v. Board of Education, 300 U. S. 319 827, 828
Phelps Dodge Corp. v. Labor Board, 313 U. S. 177 13, 263, 798
Philadelphia, W. & B. R. Co. v. Dubois, 12 Wall. 47 377
Philadelphia, W. & B. R. Co. v. Philadelphia Towboat Co., 23 How. 209 229
Phillips Co. v. Grand Trunk W. R. Co., 236 U. S. 662 704
Piquet v. Swan, 5 Mason 35 468
Pitts v. Drummond, 189 Okla. 574 317
Pittsburgh, C., C. & St. L. R. Co. v. Backus, 154 U. S. 421 190
Pittsburgh & Southern Coal Co. v. Louisiana, 156 U. S. 590 669
Plaquemines Fruit Co. v. Henderson, 170 U. S. 511 464
Plumley v. United States, 226 U. S. 545 772
Pomeroy, In re, 51 Mont. 119 162
Porto, Alexandre, The, [1920] P. 30 37
Post v. Campbell, 110 Wis. 378 162
Powell v. Alabama, 287 U. S. 45 46, 764

Page

Procter & Gamble Mfg. Co. v. United States, 19 C. C. P. A. (Customs) 415 684
Providence Tool Co. v. Norris, 2 Wall. 45 64, 72
Prudence Corp. v. Geist, 316 U. S. 89 715
Public Service Co. v. Lebanon, 305 U. S. 558 233, 234
Public Utilities Comm'n v. Attleboro Steam & Electric Co., 273 U. S. 83 524, 526, 621
Public Utilities Comm'n v. Landon, 249 U. S. 236 625
Public Utilities Comm'n v. United Fuel Gas Co., 317 U. S. 456 144, 151, 152
Public Utility Comm'rs v. Ynchausti & Co., 251 U. S. 401 673, 674
Puerto Rico v. Shell Co., 302 U. S. 253 90, 99
Puerto Rico R. Co. v. United States, 131 F. 2d 491 232, 236
Purcell v. New York Central R. Co., 296 U. S. 545 186
Putzier v. Richardson, 323 U. S. 677 185
Pyle v. Kansas, 317 U. S. 213 431, 764
Quickstep, The, 9 Wall. 665 228
Railroad Commission v. Pacific Gas & Electric Co., 302 U. S. 388 601, 625
Railroad Commission v. Southern Pacific Co., 264 U. S. 331 478
Ralli v. Troop, 157 U. S. 386 224
Rawlings v. Ray, 312 U. S. 96 9
Rawnsley v. Trenton Mutual Life Ins. Co., 9 N. J. Eq. 95 209
Reeves v. Williamson, 317 U. S. 593 185
Regal Knitwear Co. v. Labor Board, 324 U. S. 9 804
Regensburg & Sons v. Helvering, 130 F. 2d 507 165, 171
Reinecke v. Northern Trust Co., 278 U. S. 339 111
Rescue, The, 74 F. 847 228

Page

Reynolds v. United States, 98 U. S. 145 829
Rice v. Olson, 324 U. S. 786 764
Richmond v. Irons, 121 U. S. 27 204
Richter & Co. v. Light, 97 Conn. 364 396
Rigopoulos v. Kervan, 140 F. 2d 506 703, 708
Roberts v. Commissioner, 143 F. 2d 657 21
Robertson v. Railroad Labor Board, 268 U. S. 619 467
Robinette v. Helvering, 318 U. S. 184 306
Robinson v. Baltimore & Ohio R. Co., 222 U. S. 506 479
Robinson v. Johnston, 316 U. S. 649 283
Robinson v. Johnston, 118 F. 2d 998 283
Robinson v. Johnston, 130 F. 2d 202 283
Robinson v. Johnston, 50 F. Supp. 774 283
Roche v. Evaporated Milk Assn., 319 U. S. 21 236
Rocky Mountain Bell Tel. Co. v. Montana Federation of Labor, 156 F. 809 463
Ross, Estate of, 189 Cal. 317 551
Rowell v. Lindsay, 113 U. S. 97 376
Rowley v. Chicago & Northwestern R. Co., 293 U. S. 102 191
Royal Indemnity Co. v. United States, 313 U. S. 289 715
Ryerson v. United States, 312 U. S. 405 20, 21
Sage v. Hampe, 235 U. S. 99 710
St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265 131
St. Louis, I. M. & S. R. Co. v. Southern Express Co., 108 U. S. 24 233
St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281 120
Sally McDevitt, The, v. The J. W. Paxon, 24 F. 302 228

Page

Saltonstall v. Saltonstall, 276 U. S. 260 186
Sampsell v. Imperial Paper Corp., 313 U. S. 215 210
Sanford v. Commissioner, 308 U. S. 39 311, 313
Schechter Poultry Corp. v. United States, 295 U. S. 495 254
Schoenthal v. Irving Trust Co., 287 U. S. 92 475
Schumacher v. Cornell, 96 U. S. 549 376
Scott v. Donald, 165 U. S. 107 13
Scott v. Doughty, 124 Va. 358 390
Scranton v. Wheeler, 179 U. S. 141 390, 391, 393, 510
Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477 186
Seaboard Air Line R. Co. v. Watson, 287 U. S. 86 187
Securities & Exchange Comm'n v. Chenery Corp., 318 U. S. 80 536
Securities & Exchange Comm'n v. United States Realty Co., 310 U. S. 434 214
Semler v. Dental Examiners, 294 U. S. 608 822
Seneca Coal & Coke Co. v. Lofton, 136 F. 2d 359 708
Seney v. Swift & Co., 260 U. S. 146 48
Sensenbrenner v. Commissioner, 134 F. 2d 883 20, 21
Seufert Bros. Co. v. United States, 249 U. S. 194 353
Seymour v. Osborne, 11 Wall. 516 382
Sheets v. Commissioner, 95 F. 2d 727 313
Shoshone Tribe v. United States, 299 U. S. 476 338, 350
Shoshone Indians v. United States, 85 Ct. Cls. 331 350
Shuster v. Helvering, 121 F. 2d 643 181
Silverman v. Christian, 123 N. J. Eq. 506 7
Silverthorne Lumber Co. v. United States, 251 U. S. 385 422

Page

Sioux City Bridge v. Dakota County, 260 U. S. 441 190, 191
620 Church St. Corp., In re, 299 U. S. 24 44
Skipper v. Schumacher, 124 Fla. 384 47
Smith v. Commissioner, 131 F. 2d 254 20
Smith v. Eau Claire, 78 Wis. 457 511
Smith v. Hall, 301 U. S. 216 330
Smith v. Hines, 10 Fla. 258 309
Smith v. Illinois Bell Tel. Co., 282 U. S. 133 589, 620, 622
Smith v. McCullough, 270 U. S. 456 710, 714
Smith v. Nichols, 21 Wall. 112 330
Smith v. O'Grady, 312 U. S. 329 787, 792
Smith v. Shaughnessy, 318 U. S. 176 306
Smith v. Taecker, 133 Cal. App. 351 396
Smith v. Washington, 20 How. 135 511
Snowden v. Hughes, 321 U. S. 1 191
Snyder v. Massachusetts, 291 U. S. 97 431
Sonneborn Bros. v. Cureton, 262 U. S. 506 666, 669, 688
South Carolina v. Georgia, 93 U. S. 4 392, 393
Southern Gas Corp. v. Alabama, 301 U. S. 148 533, 539
Southern Pacific Co. v. Bogert, 250 U. S. 483 212
Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U. S. 531 145
Southern R. Co. v. Postal Telegraph Co., 179 U. S. 641 233
Southern R. Co. v. Watts, 260 U. S. 519 191
Southport Petroleum Co. v. Labor Board, 315 U. S. 100 12, 14, 17
Southwestern Bell Tel. Co. v. Public Service Comm'n, 262 U. S. 276 605
Sprague v. Ticonic Bank, 307 U. S. 161 209

Page

Spring City Co. v. Commissioner, 292 U. S. 182 399
Sprott v. United States, 20 Wall. 459 67
Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346 738
Standard Oil Co. v. United States, 221 U. S. 1 467, 571, 575
Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20 375
State v. Campbell, 53 Minn. 354 790
State Board v. Young's Market Co., 299 U. S. 59 299
State ex rel. Chase v. Calvird, 324 Mo. 429 792
State ex rel. Davis v. Hardie, 108 Fla. 133 792
State ex rel. House v. Mayo, 122 Fla. 23 47
State Tax Comm'n v. Van Cott, 306 U. S. 511 126
Steele v. Drummond, 275 U. S. 199 64
Steffler v. United States, 319 U. S. 38 44, 45
Stevens v. Hauser, 39 N. Y. 302 5
Stockton v. Baltimore & N. Y. R. Co., 32 F. 9 391
Stuart v. Hayden, 169 U. S. 1 203
Stuart v. State, 36 Ariz. 28 792
Stubblefield v. United States, 6 F. Supp. 440 312
Stubblefield v. United States, 79 Ct. Cls. 268 315
Sugar Institute v. United States, 297 U. S. 553 571, 575
Sullivan v. Sao Paulo, 122 F. 2d 355 38
Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350 191
Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381 258
Sweeney v. United States, 109 U. S. 618 772
Swift & Co. v. United States, 196 U. S. 375 486, 571, 575
Swift & Co. v. United States, 276 U. S. 311 486

Page

Swinson v. Chicago, St. P., M. & O. R. Co., 294 U. S. 529 132
Swolley v. Ragen, 390 Ill. 106 766
Taft v. Commissioner, 304 U. S. 351 312
Tar Products Corp. v. Commissioner, 130 F. 2d 866 395, 396, 398
Teamsters v. Keystone Freight Line, 123 F. 2d 326 11
Temple Emery, The, 122 F. 180 228
Tenner v. Dullea, 314 U. S. 692 768
Tennessee Coal Co. v. Muscoda Local, 321 U. S. 590 706, 714
Terminal Warehouse Co. v. Pennsylvania R. Co., 297 U. S. 500 453, 455, 482, 485, 490
Terry v. Little, 101 U. S. 216 214
Texas v. Florida, 306 U. S. 398 475, 477
Texas v. Interstate Commerce Comm'n, 258 U. S. 158 452, 454, 487
Texas Hotel Corp. v. Waco Development Co., 87 F. 2d 395 211
Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426 452, 479, 490
Texas & Pacific R. Co. v. Rigsby, 241 U. S. 33 132
Thomas Jefferson, The, 10 Wheat. 428 40
Thompson's Estate, In re, 179 Okla. 240 320
Thornton v. Mississippi, 323 U. S. 668 185
Tiger v. Western Investment Co., 221 U. S. 286 791
Tipton, Ex parte, 83 Cal. App. 742 792
Toland v. Sprague, 12 Pet. 300 468
Tollison, Ex parte, 73 Okla. Cr. 38 792

Page

Tomkins v. Missouri, 323 U. S. 485 46, 764, 789
Tot v. United States, 319 U. S. 463 805
Town of Williams v. Iowa Falls Electric Co., 185 Iowa 493 150, 153
Toy Toy v. Hopkins, 212 U. S. 542 791
Transportation Co. v. Chicago, 99 U. S. 635 511
Travis v. Ray, 41 F. Supp. 6 708
Tres Ritos Ranch Co. v. Abbott, 44 N. Mex. 556 688
Trist v. Child, 21 Wall. 441 64
Truax v. Corrigan, 257 U. S. 312 659
Tulee v. Washington, 315 U. S. 681 353
Turner Mfg. Co. v. Gmeinder, 183 Wis. 664 163
Twin City Pipe Line Co. v. Harding Glass Co., 283 U. S. 353 66
Twining v. New Jersey, 211 U. S. 78 414, 415, 431
Union Bridge Co. v. United States, 204 U. S. 364 392
United Fuel Gas Co. v. Railroad Comm'n, 278 U. S. 300 620
United Gas Co. v. Texas, 303 U. S. 123 703
United Gilpin Corp. v. Wilmore, 100 Colo. 453 12
United Leather Workers v. Herkert & Meisel Trunk Co., 265 U. S. 457 297
United Shoe Machinery Corp. v. United States, 258 U. S. 451 375, 463
United States v. Abilene & Southern R. Co., 265 U. S. 274 800
United States v. American Tobacco Co., 221 U. S. 106 571, 575
United States v. Anderson, 269 U. S. 422 399
United States v. Appalachian Electric Power Co., 311 U. S. 377 392, 509

Page

United States v. Baltimore & Ohio R. Co., 293 U. S. 454 634
United States v. Bassett, 21 How. 412 353
United States v. Bausch & Lomb Co., 321 U. S. 707 297, 571, 575
United States v. Bethlehem Steel Corp., 315 U. S. 289 58, 78
United States v. Blair, 321 U. S. 730 772
United States v. Board of Commissioners, 145 F. 2d 329 350
United States v. Borden Co., 308 U. S. 188 456, 457
United States v. Brig Malek Adhel, 2 How. 210 224
United States v. Bush & Co., 310 U. S. 371 94
United States v. California Canneries, 279 U. S. 553 639
United States v. Callahan Walker Co., 317 U. S. 56 772
United States v. Candelaria, 271 U. S. 432 318
United States v. Candelaria, 16 F. 2d 559 318
United States v. Carey, 143 F. 2d 445 235, 236
United States v. Carolina Freight Carriers Corp., 315 U. S. 475 595, 634, 822
United States v. Carter, 217 U. S. 286 72
United States v. Carver, 260 U. S. 482 48
United States v. Celestine, 215 U. S. 278 791
United States v. Certain Land, 46 F. Supp. 921 51, 55
United States v. Chandler-Dunbar Co., 229 U. S. 53 390, 392, 508
United States v. Chavez, 290 U. S. 357 791
United States v. Chicago, M., St. P. & P. R. Co., 294 U. S. 499 461, 595, 634
United States v. Chicago, M., St. P. & P. R. Co., 312 U. S. 592 390, 507, 509

Page
United States v. Choctaw Nation, 179 U. S. 494 353
United States v. Commodore Park, 143 F. 2d 720 387
United States v. Cornell Steamboat Co., 202 U. S. 184 34
United States v. Creek Nation, 295 U. S. 103 338
United States v. Cress, 243 U. S. 316 502, 504, 514, 515
United States v. Dakota-Montana Oil Co., 288 U. S. 459 3, 547
United States v. Darby, 312 U. S. 100 706
United States v. Florian, 312 U. S. 656 233
United States v. Gleason, 175 U. S. 588 772
United States v. Grace Evangelical Church, 132 F. 2d 460 51
United States v. Great Lakes Towing Co., 1 Fed. Antitrust Cas. 253 12
United States v. Hellard, 322 U. S. 363 317
United States v. Hutcheson, 312 U. S. 219 297
United States v. Jefferson Electric Mfg. Co., 291 U. S. 386 170
United States v. John McShain, Inc., 308 U. S. 512 772
United States v. Joint Traffic Assn., 171 U. S. 505 456, 458, 490
United States v. Ju Toy, 198 U. S. 253 792
United States v. Kagama, 118 U. S. 375 790
United States v. Kirby Lumber Co., 284 U. S. 1 547
United States v. Lee, 106 U. S. 196 34, 35
United States v. Marin, 136 F. 2d 388 235, 236
United States v. Mason & Hanger Co., 260 U. S. 323 772
United States v. Masonite Corp., 316 U. S. 265 815
United States v. McGowan, 302 U. S. 535 791
Page
United States v. Miller, 317 U. S. 369 81
United States v. Morgan, 307 U. S. 183 145, 148, 152, 267
United States v. Morley Construction Co., 98 F. 2d 781 704
United States v. Muschany, 139 F. 2d 661 51
United States v. 94.68 Acres of Land, 45 F. Supp. 1016 55, 72
United States v. Nye, 21 How. 408 353
United States v. O'Donnell, 303 U. S. 501 352
United States v. Pan American Corp., 304 U. S. 156 822
United States v. Parker, 103 F. 2d 857 284, 290
United States v. Parker, 19 F. Supp. 450 284, 290
United States v. Payne, 264 U. S. 446 353
United States v. Pelzer, 312 U. S. 399 20, 25, 395
United States v. Phellis, 257 U. S. 156 397, 399
United States v. Powers, 307 U. S. 214 258
United States v. Pullman Co., Civil Action No. 994, E. D. Pa. 1944 12
United States v. River Rouge Co., 269 U. S. 411 391
United States v. Rose, 23 How. 262 353
United States v. Santa Fe Pacific R. Co., 314 U. S. 339 339, 340, 347, 352, 359
United States v. 17,280 Acres of Land, 47 F. Supp. 267 240
United States v. Sherwood, 312 U. S. 584 222
United States v. Shoshone Tribe, 304 U. S. 111 350, 353
United States v. Socony Vacuum Co., 310 U. S. 150 296, 458, 463
United States v. South-Eastern Underwriters Assn., 322 U. S. 533 160
United States v. Southern Pacific Co., 259 U. S. 214 456

Page

United States v. Swift & Co., 286 U. S. 106 571, 575
United States v. Terminal Railroad Assn., 224 U. S. 383 571
United States v. Title Ins. Co., 265 U. S. 472 353
United States v. Trans-Missouri Freight Assn., 166 U. S. 290 456, 458, 490
United States v. Two Acres of Land, 144 F. 2d 207 63
United States v. 243.22 Acres of Land, 129 F. 2d 678 232
United States v. Union Pacific R. Co., 226 U. S. 470 571, 575
United States v. Univis Lens Co., 316 U. S. 241 297, 298, 471, 571, 575
United States v. Vehicular Parking, Ltd., Civil Action No. 259, D. Del. 1944 12
United States v. Whitridge, 197 U. S. 135 88, 89
United States v. Wilder, Fed. Cas. No. 16,694 37
United States v. Winans, 198 U. S. 371 353
U. S. ex rel. Bongiorno v. Ragen, 54 F. Supp. 973 762
U. S. ex rel. Foley v. Ragen, 143 F. 2d 774 762
U. S. ex rel. Foley v. Ragen, 52 F. Supp. 265 762
U. S. Navigation Co. v. Cunard S. S. Co., 284 U. S. 474 483, 485
Universal Oil Co. v. Globe Co., 322 U. S. 471 322
Urban v. Brailey, 85 Neb. 796 792
Utah Power & Light Co. v. Pfost, 286 U. S. 165 533
Uxmal, The, 40 F. Supp. 258 38
Vera Cruz No. 2, The, 9 L. R., Prob. Div. 96 [1884] 225
Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65 475
Vidal v. Philadelphia, 2 How. 127 66
Virginia v. West Virginia, 246 U. S. 565 450

Page

Wabash Valley Electric Co. v. Young, 287 U. S. 488 591
Waley v. Johnston, 316 U. S. 101 46
Walish v. Milwaukee, 95 Wis. 16 511
Walker v. Sauvinet, 92 U. S. 90 416
Wall v. Chesapeake & Ohio R. Co., 256 U. S. 125 185
Walling v. American Stores Co., 133 F. 2d 840 493
Walling v. Belo Corp., 316 U. S. 624 266
Walling v. Block, 139 F. 2d 268 493
Walling v. Helmerich & Payne, 323 U. S. 37 266
Walling v. Jacksonville Paper Co., 317 U. S. 564 497
Walling v. Reuter Co., 321 U. S. 671 15, 17
Walling v. Wiemann Co., 138 F. 2d 602 493
Ward v. Texas, 316 U. S. 547 438
Waring v. The Mayor, 8 Wall. 110 654, 657, 662, 669
Warner & Co. v. Lilly & Co., 265 U. S. 526 267
Washington Chocolate Co. v. King County, 21 Wash. 2d 630 655
Washington ex rel. McPherson Bros. Co. v. Superior Court, 274 U. S. 726 233
Washington Irving, The, 250 F. 797 229
Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33 463
Waterman S. S. Corp. v. Labor Board, 119 F. 2d 760 704
Water Power Cases, 148 Wis. 124 513
Weber v. Chicago, R. I. & P. R. Co., 175 Iowa 358 170
Weeks v. United States, 232 U. S. 383 422, 423
Welch v. Paine, 120 F. 2d 141 21, 26
Welch v. Paine, 130 F. 2d 990 21

Page

Wells v. United States, 318 U. S. 257 44
Wentworth v. Racine County, 99 Wis. 26 162
Werner v. Illinois Central R. Co., 379 Ill. 559 118, 129
West Coast Hotel Co. v. Parrish, 300 U. S. 379 713
West Coast Life Ins. Co. v. Merced Irrigation Dist., 114 F. 2d 654 162
Westenrider v. United States, 134 F. 2d 772 712
Western & Atlantic R. Co. v. Henderson, 279 U. S. 639 805
Western Distributing Co. v. Public Service Comm'n, 285 U. S. 119 620, 622
Western Live Stock v. Bureau, 303 U. S. 250 827
Western Maid, The, 257 U. S. 419 41
Western Securities Co. v. Silver King Mining Co., 57 Utah 88 396
West India Oil Co. v. Domenech, 311 U. S. 20 673
W. G. Mason, The, 142 F. 913 228
Whitfield v. Ohio, 297 U. S. 431 186
Whitman v. Wilson, 318 U. S. 688 764
Whitney v. Butler, 118 U. S. 655 203
Whitney v. California, 274 U. S. 357 186
Whittaker v. Brictson Mfg. Co., 43 F. 2d 485 107
Whitten v. Dabney, 171 Cal. 621 209
Wichita Indians v. United States, 89 Ct. Cls. 378 339
Wick v. Superior Court, 278 U. S. 574 233, 234
Willcox v. Consolidated Gas Co., 212 U. S. 19 601, 624

Page

Williams, Ex parte, 277 U. S. 267 185
Williams v. Iowa Falls Electric Co., 185 Iowa 493 150, 153
Williams v. Kaiser, 323 U. S. 471 45, 46, 48, 763, 764, 789
Willink v. United States, 240 U. S. 572 510
Willis v. Bayles, 105 Ind. 363 792
Willow River Club v. Wade, 100 Wis. 86 503
Wilmington Trust Co. v. Helvering, 316 U. S. 164 4
Wilson v. United States, 232 U. S. 563 194
Winters v. United States, 207 U. S. 564 362
Wisconsin v. Illinois, 278 U. S. 367 448
Wisconsin v. Pelican Insurance Co., 127 U. S. 265 446
Wisconsin Railroad Comm'n v. Chicago, B. & Q. R. Co., 257 U. S. 563 478
Wood v. Dummer, 30 Fed. Cas. 435 209
Woodbridge v. United States, 263 U. S. 50 379
Wood Mowing Machine Co. v. Skinner, 139 U. S. 293 126
Woodruff v. Parham, 8 Wall. 123 666, 669, 683, 685, 687, 693
Woods v. City Bank, 312 U. S. 262 213
Woolsey v. Best, 299 U. S. 1 48
Worcester v. Georgia, 6 Pet. 515 348, 353, 359, 360, 362, 366, 789
Yonkers v. United States, 320 U. S. 685 532
Young v. Higbee Co., 324 U. S. 204 704
Ziffrin, Inc. v. Reeves, 308 U. S. 132 299

TABLE OF STATUTES
Cited in Opinions

(A) Statutes of the United States.

	Page
1789, July 31, c. 5, § 18, 1 Stat. 29	83
1789, Sept. 24, c. 20, § 11, 1 Stat. 73	439
1796, May 19, c. 30, 1 Stat. 469	786
1799, Mar. 2, c. 22, § 61, 1 Stat. 627	83
1832, July 13, c. 203, 4 Stat. 577	370
1834, June 30, c. 161, 4 Stat. 729	335, 786
1836, July 4, c. 357, 5 Stat. 117	370
1841, Aug. 19, c. 9, § 8, 5 Stat. 440	4
1846, May 22, c. 23, 9 Stat. 14	83
1851, Mar. 3, c. 41, 9 Stat. 631	335
1862, July 5, c. 135, 12 Stat. 512	335
1864, Mar. 21, cc. 36, 37, 13 Stat. 32	335
1865, Feb. 23, c. 45, 13 Stat. 432	335
1867, Mar. 2, c. 176, § 2, 14 Stat. 517	4
1867, July 20, c. 32, 15 Stat. 17	335
1873, Mar. 3, c. 268, 17 Stat. 602	83
1874, Dec. 15, c. 2, 18 Stat. 291	335
1885, Mar. 3, c. 341, 23 Stat. 362	786
1887, Feb. 8, c. 119, § 6, 24 Stat. 390	786
1887, Mar. 3, c. 359, 24 Stat. 505	386
1890, July 2, c. 647, 26 Stat. 209	154
1890, July 2, c. 647, § 1, 26 Stat. 209	293
1890, July 2, c. 647, § 7, 26 Stat. 210	439
1890, July 3, c. 655, 26 Stat. 216	335
1890, Aug. 18, c. 797, 26 Stat. 316	229
1890, Oct. 1, c. 1244, § 52, 26 Stat. 567	83
1893, Mar. 2, c. 196, 27 Stat. 531	117
1894, July 16, c. 138, 28 Stat. 109	335
1894, Aug. 27, c. 349, § 25, 28 Stat. 509	83
1898, July 1, c. 541, §§ 11, 60, 30 Stat. 544	4
1899, Mar. 3, c. 425, 30 Stat. 1121	386
1900, Apr. 12, c. 191, 31 Stat. 77	652
1901, Mar. 2, c. 803, 31 Stat. 895	652
1902, July 1, c. 1369, 32 Stat. 691	652
1906, May 8, c. 2348, 34 Stat. 182	786
1906, June 28, c. 3572, § 2, 34 Stat. 539	316
1906, June 29, c. 3591, 34 Stat. 584	439
1908, Apr. 22, c. 149, § 6, 35 Stat. 66	117
1910, June 18, c. 309, 36 Stat. 539	439
1910, June 25, c. 395, § 2, 36 Stat. 825	193
1912, Apr. 18, c. 83, §§ 3, 6, 7, 37 Stat. 86	316
1913, Oct. 22, c. 32, 38 Stat. 208	439, 774

Page

1913, Dec. 23, c. 6, § 23, 38 Stat. 251 200
1914, Oct. 15, c. 323, § 2, 38 Stat. 730 ..... 726, 746
1914, Oct. 15, c. 323, § 3, 38 Stat. 730 726
1914, Oct. 15, c. 323, § 11, 38 Stat. 730 ..... 726, 746
1914, Oct. 15, c. 323, § 16, 38 Stat. 730 439
1914, Oct. 15, c. 323, § 19, 38 Stat. 730 9
1916, Aug. 29, c. 416, 39 Stat. 548 652
1916, Sept. 7, c. 451, 39 Stat. 728 439
1916, Sept. 7, c. 451, § 9, 39 Stat. 728 215
1916, Sept. 8, c. 463, §§ 202, 402, 39 Stat. 756 308
1917, Mar. 3, c. 163, 39 Stat. 1106 49
1917, July 2, c. 35, 40 Stat. 241 ..... 49, 229
1918, Apr. 11, c. 51, 40 Stat. 518 ..... 49, 229
1919, Feb. 24, c. 18, § 402, 40 Stat. 1057 308
1920, Feb. 28, c. 91, § 422, 41 Stat. 488 439
1920, Mar. 9, c. 95, §§ 1, 2, 3, 6, 41 Stat. 525 215
1920, June 5, c. 250, 41 Stat. 988 439
1921, May 27, c. 14, § 403, 42 Stat. 9 83
1924, June 2, c. 234, § 303, 43 Stat. 253 308
1924, June 2, c. 234, § 320, 43 Stat. 253 ..... 303, 308
1925, Feb. 13, c. 229, 43 Stat. 936 774
1925, Feb. 13, c. 229, § 3, 43 Stat. 936 335
1925, Feb. 13, c. 229, § 8, 43 Stat. 936 ..... 842, 846, 851, 856, 864, 876, 884
1925, Mar. 2, c. 428, §§ 1, 2, 5, 8, 9, 43 Stat. 1112 215
1926, Feb. 26, c. 27, § 302, 44 Stat. 9 ..... 108, 113
1926, Feb. 26, c. 27, § 303, 44 Stat. 9 308

Page

1927, Mar. 3, c. 302, 44 Stat. 1349 335
1929, Feb. 28, c. 377, 45 Stat. 1407 335
1930, June 17, c. 497, 46 Stat. 590 652
1930, June 17, c. 497, §§ 303, 350, 402, 502, 514, 515, 516, 517, 522, 624, 46 Stat. 590 83
1930, June 23, c. 572, 46 Stat. 797 635
1931, Feb. 26, c. 307, 46 Stat. 1421 ..... 49, 229
1932, June 6, c. 209, § 501, 47 Stat. 169 303
1932, June 6, c. 209, § 503, 47 Stat. 169 ..... 303, 308
1932, June 6, c. 209, § 504, 47 Stat. 169 18
1932, June 22, c. 721, 47 Stat. 326 282
1933, June 16, c. 91, § 205, 48 Stat. 220 439
1934, Mar. 24, c. 84, §§ 6, 7, 10, 48 Stat. 456 652
1934, May 9, c. 263, § 9, 48 Stat. 670 164
1934, May 10, c. 277, § 43, 48 Stat. 694 393
1934, May 18, c. 301, 48 Stat. 781 282
1934, June 12, c. 474, § 350, 48 Stat. 943 83
1934, June 14, c. 516, 48 Stat. 957 386
1935, June 14, c. 240, 49 Stat. 340 652
1935, July 5, c. 372, §§ 7, 8, 9, 10, 49 Stat. 449 793
1935, Aug. 24, c. 641, 49 Stat. 771 164
1935, Aug. 26, c. 687, §§ 201, 204, 301, 313, 49 Stat. 838 515
1936, June 19, c. 592, 49 Stat. 1526 746
1936, June 19, c. 592, §§ 1, 3, 49 Stat. 1526 726
1936, June 22, c. 690, §§ 901–917, 49 Stat. 1747 164
1936, June 30, c. 881, 49 Stat. 2036 49

Page

1937, Aug. 17, c. 690, § 1, 50 Stat. 693..... 293
1938, May 28, c. 289, § 22, 52 Stat. 447..... 177
1938, May 28, c. 289, § 23, 52 Stat. 447..... 1
1938, May 28, c. 289, §§ 42, 43, 48, 52 Stat. 447... 393
1938, May 28, c. 289, § 111, 52 Stat. 447..... 1, 542
1938, May 28, c. 289, § 112, 52 Stat. 447..... 542
1938, May 28, c. 289, § 113, 52 Stat. 447..... 1, 542
1938, May 28, c. 289, § 114, 52 Stat. 447..... 1
1938, May 28, c. 289, § 505, 52 Stat. 447..... 18
1938, June 21, c. 556, § 1, 52 Stat. 821... 581, 626, 635
1938, June 21, c. 556, § 2, 52 Stat. 821... 138, 581, 626
1938, June 21, c. 556, §§ 4, 5, 52 Stat. 821. 138, 581, 635
1938, June 21, c. 556, § 6, 52 Stat. 821..... 581
1938, June 21, c. 556, § 7, 52 Stat. 821..... 581, 626
1938, June 21, c. 556, §§ 8, 9, 10, 11, 52 Stat. 821... 581
1938, June 21, c. 556, § 13, 52 Stat. 821..... 138
1938, June 21, c. 556, § 14, 52 Stat. 821..... 138, 581
1938, June 21, c. 556, §§ 15, 17, 52 Stat. 821..... 138
1938, June 21, c. 556, § 19, 52 Stat. 821..... 138, 581, 626, 635
1938, June 22, c. 575, Chapter X, 52 Stat. 821..... 100
1938, June 22, c. 575, §§ 106, 111, 112, 113, 126, 156, 158, 170, 179, 180, 196, 197, 52 Stat. 883..... 100
1938, June 22, c. 575, § 203, 52 Stat. 883..... 204
1938, June 22, c. 575, § 206, 52 Stat. 883..... 100, 204
1938, June 22, c. 575, §§ 216, 221, 52 Stat. 883..... 100

Page

1938, June 22, c. 575, §§ 222, 243, 249, 52 Stat. 883. 204
1938, June 25, c. 676, § 2, 52 Stat. 1060..... 697
1938, June 25, c. 676, §§ 3, 4, 5, 52 Stat. 1060..... 244
1938, June 25, c. 676, § 6, 52 Stat. 1060..... 244, 697
1938, June 25, c. 676, § 7, 52 Stat. 1060..... 697, 720
1938, June 25, c. 676, §§ 8, 10, 11, 12, 52 Stat. 1060.. 244
1938, June 25, c. 676, § 13, 52 Stat. 1060..... 490
1938, June 25, c. 676, § 14, 52 Stat. 1060..... 244
1938, June 25, c. 676, § 15, 52 Stat. 1060..... 697
1938, June 25, c. 676, § 16, 52 Stat. 1060..... 697, 720
1938, June 25, c. 676, § 17, 52 Stat. 1060..... 244, 697
1939, Apr. 25, c. 87, 53 Stat. 590 386
1939, May 22, c. 140, 53 Stat. 752..... 335
1939, May 25, c. 149, 53 Stat. 757 386
1939, Aug. 7, c. 502, 53 Stat. 1226 652
1939, Aug. 11, c. 685, 53 Stat. 1404 117
1940, June 26, c. 432, §§ 5, 6, 54 Stat. 615..... 244
1940, June 28, c. 440, § 2, 54 Stat. 676..... 49
1940, July 2, c. 508, § 1, 54 Stat. 712..... 49
1940, Sept. 9, c. 717, 54 Stat. 872..... 49
1940, Sept. 18, c. 722, §§ 1, 5, 54 Stat. 899..... 439
1940, Oct. 8, c. 757, § 501, 54 Stat. 974..... 542
1940, Oct. 17, c. 888, 54 Stat. 1178..... 204
1941, May 2, c. 84, § 2, 55 Stat. 148..... 49
1941, May 6, c. 86, § 7, 55 Stat. 151..... 49
1941, June 30, c. 262, § 9, 55 Stat. 393..... 49

Page

1941, Dec. 18, c. 593, Tit. II, § 201, 55 Stat. 839.. 49
1941, Dec. 22, c. 617, 55 Stat. 852 652
1942, Feb. 7, c. 49, 56 Stat. 83..... 581
1942, Apr. 6, c. 210, § 3, 56 Stat. 198..... 774
1942, June 5, c. 340, § 13, 56 Stat. 317..... 49
1942, June 11, c. 404, § 12, 56 Stat. 357..... 439
1942, Oct. 21, c. 619, 56 Stat. 798 164
1942, Oct. 21, c. 619, § 134, 56 Stat. 798..... 393
1942, Oct. 21, c. 619, § 454, 56 Stat. 798..... 18
1942, Oct. 21, c. 619, Tit. VIII, § 801, 56 Stat. 798..... 49
1943, July 1, c. 185, § 12, 57 Stat. 347 49
1944, Feb. 25, c. 63, 58 Stat. 21 49
1944, June 29, c. 322, 58 Stat. 625 652
1944, June 29, c. 323, 58 Stat. 626 652
Constitution. See Index at end of volume.
Criminal Code.
§§ 41, 112, 113.....49
Internal Revenue Code.
§ 22..... 177, 331
§§ 112, 113..... 542
Judicial Code.
§ 24 215
§ 128 229
§ 233 439
§ 237..... 154, 182, 548, 697, 720, 760, 821, 823
§ 240..... 42, 49, 215, 393, 439, 697
§ 262..... 42, 834
§ 345 229
Revised Statutes.
§§ 1, 161, 248, 249, 251.. 83
§ 355..... 229
§§ 1136, 3734..... 49
§§ 4884, 4886, 4915..... 370
§ 5057 4
§ 5151 200

Page

U. S. Code.
Title 1, § 1..... 83
Title 5, §§ 22, 242..... 83
Title 7,
§ 608 652
§§ 609, 644–659..... 164
Title 8, §§ 154, 156..... 652
Title 10, § 1336..... 49
Title 11,
§§ 29, 96..... 4
§ 207 204
§ 501 ..... 100, 204
Title 12, §§ 64, 181..... 200
Title 15,
§§ 1, 2..... 154, 439
§§ 3, 4 439
§ 12..... 193
§ 13..... 439, 726
§§ 14, 18, 19..... 439
§ 21..... 439, 726
§§ 22, 26 439
§ 44 193
§ 45 726
§ 717 ..... 138, 581, 626, 635
Title 16,
§ 792 635
§§ 792 et seq., 824, 825 515
Title 18,
§§ 397 et seq., 398, 420; 420 (Supp. III) 193
§ 548..... 786
Title 19,
§§ 3, 66 (Supp. III), 1303, 1351 et seq., 1402..... 83
§ 1483 652
§ 1624 83
Title 21, § 16..... 193
Title 26,
§ 22 ..... 177, 331
§ 1000 303
§ 1002 ..... 303, 308
Title 28,
§ 41 ..... 386, 439, 774
§ 43 ..... 439, 774
§§ 44–48 774
§ 225 229
§ 341 439
§ 344..... 154, 182, 548, 760, 780, 821, 823
§ 345 774

Page

U. S. Code—Continued.
Title 28—Continued.
§ 347 ..... 42, 439
§ 350..... 842, 846, 851, 856, 864, 876, 884
§ 377 42
§ 383 9
§ 466 42
§ 723 49
§ 792 774
Title 29,
§ 208 244
§ 213 490
Title 31, § 372..... 83
Title 33, §§ 908, 914, 915, 916..... 697
Title 35, § 40 370
Title 40, § 258..... 229
Title 41, §§ 35–45 (Supp. V)..... 49
Title 45,
§ 1 et seq..... 117
§ 55..... 697
§ 56..... 117
Title 46,
§§ 596, 597, 644, 688 697
§ 743 215
§§ 801–842 439
Title 48, §§ 1042, 1236, 1238..... 652
Title 49,
§§ 1, 3, 6, 15, 16... 439
§§ 306, 309..... 774
Title 50,
§ 171 229
§ 611, n. (Appendix) 49
Agricultural Adjustment Act, 1933 164
Agricultural Adjustment Act, 1935, § 21..... 164
Anti-Racketeering Act..... 193
Army Appropriation Act, 1901 (Spooner Amendment) 652
Bankruptcy Act,
§§ 2, 8, 11, 60..... 4
§ 77B 204
§§ 106, 111–113, 126, 156, 158, 170, 179, 180, 196, 197, 216, 221.. 100
Chapter X..... 100

Page

Chandler Act..... 204
Clayton Act,
§ 2..... 439, 726, 746
§ 3 ..... 439, 726
§§ 4, 6, 7, 8..... 439
§ 11 ..... 439, 726, 746
§§ 12, 16..... 439
§ 19 9
Declaration of Taking Act.. 49
§§ 1–5..... 229
Emergency Tariff Act, § 403. 83
Employers' Liability Act.... 697
§ 6 117
Fair Labor Standards Act,
§ 2 697
§§ 3–5 244
§ 6 ..... 244, 697
§ 7 ..... 697, 720
§§ 8, 10–12 244
§ 13 490
§ 14 244
§ 15 697
§ 16 ..... 697, 720
§ 17 ..... 244, 697
Federal Denture Act..... 193
Federal Employers' Liability Act 697
§ 6 117
Federal Kidnapping Act.... 282
Federal Power Act, §§ 201, 204, 301, 313..... 515
Federal Reserve Act, § 23... 200
Federal Safety Appliance Act 117
Federal Trade Commission Act 193
§ 5 726
Filipino Rehabilitation Commission Act..... 652
First War Powers Act..... 49
Food, Drug, & Cosmetic Act. 193
Foraker Act..... 652
General Allotment Act, § 6.. 786
Harter Act..... 215
Hepburn Act..... 439
Interstate Commerce Act,
§§ 1, 3, 6, 15, 16..... 439
§§ 206, 209..... 774
Jones Act..... 697
Judiciary Act, 1789, § 11.... 439
Jurisdictional Act (Shoshone Indians), § 7..... 335

Page

Kidnapping Act..... 282
Limitation of Liability Act.. 215
Longshoremen's & Harbor Workers' Compensation Act..... 697
Mann Act, §§ 1, 2, 8..... 193
Mann-Elkins Act..... 439
Merchant Marine Act..... 439
Military Appropriation Act, 1944, § 12..... 49
Miller-Tydings Amendment, 1937 293
Minimum Wage Act..... 49
National Bank Act..... 200
National Defense Act, 1940, § 1 49
National Defense Appropriation Act, Second Supplemental, 1941..... 49
National Labor Relations Act, §§ 7–10 793
Natural Gas Act,
§ 1..... 581, 626, 635
§ 2..... 138, 581, 626
§§ 4, 5..... 138, 581, 635
§ 6 581
§ 7..... 581, 626
§§ 8–11 581
§ 13 138
§ 14 ..... 138, 581
§§ 15, 17 138
§ 19..... 138, 581, 626, 635
Naval Appropriation Act, 1942, § 7 49
Philippine Independence Act, 1934, §§ 6, 7, 10..... 652
Philippine Organic Act, 1902 652
Prevailing Minimum Wage Act 49
Public Vessel Act, 1925, §§ 1, 2, 5, 8, 9..... 215
Revenue Act, 1916, § 202... 308
Revenue Act, 1918, § 402... 308
Revenue Act, 1924, § 320... 303
Revenue Act, 1926,
§ 302 ..... 108, 113
§ 303 308
Revenue Act, 1932,
§ 501 303
§ 503 ..... 303, 308

Page

Revenue Act, 1932—Cont'd.
§ 504 18
§ 804 308
Revenue Act, 1934..... 542
§ 43 393
Revenue Act, 1936, Tit. VII, §§ 901–917 164
Revenue Act, 1938,
§ 22 117
§ 23 1
§§ 42, 43, 48..... 393
§ 111 ..... 1, 542
§ 112 542
§ 113 ..... 1, 542
§ 114 1
§ 505 18
Revenue Act, 1940 (Second), § 501..... 542
Revenue Act, 1942,
§ 134..... 393
§ 454..... 18
§ 801..... 49
Revenue Act, 1943, §§ 403, 701 49
Robinson-Patman Act..... 746
§§ 1, 3 726
Safety Appliance Act..... 117
Second Revenue Act, 1940, § 501 542
Second Supplemental National Defense Appropriation Act, 1941.... 49
Sherman Act..... 154, 193, 370
§ 1..... 293, 439
§ 2..... 439, 836
§§ 3, 4, 7..... 439
Shipping Act, 1916..... 439
§ 9..... 215
Soldiers' & Sailors' Civil Relief Act, 1940..... 204
Spooner Amendment, Army Appropriation Act, 1901 652
Sugar Quota Law..... 652
Suits in Admiralty Act, §§ 1, 2, 3, 6..... 215
Tariff Act, 1930..... 652
§§ 303, 350, 402, 502, 514–517, 522, 624..... 83

Page

Transportation Act, 1920, § 422 439
Transportation Act, 1940, §§ 1, 5 439
Tucker Act 386
Urgent Deficiencies Act 439
Wagner Act 793
Walsh-Healey Act 49
War Purposes Act, 1917 229
White Slave Traffic Act, § 8. 193

(B) STATUTES OF THE STATES AND TERRITORIES.

California.
Labor Code, 1937, §§ 204, 205, 219 697
Colorado.
1937 Sess. Laws, cc. 146, 261; 1941 Sess. Laws, c. 227 293
Stats. Ann., c. 165, § 20. 293
Fair Trade Act, § 2 293
Unfair Practices Act ... 293
District of Columbia.
Code, 1929, Tit. 6, §§ 177, 179 193
Code, 1940, §17–101 229
Code, 1940, §§ 22–2701, 22–2702, 22–2705 to 22–2712 193
Florida.
1941 Stats., § 731.34 308
Comp. Gen. Laws, 1927, Vol. 3, § 5779 331
Statute of Frauds 331
Illinois.
Rev. Stats., 1941, c. 146, § 36 117
Rev. Stats., 1943, c. 37, § 346; c. 146, §§ 16, 36 117
Smith-Hurd Ann. Stats., c. 65, § 2 760
Civil Practice Act, § 72. 760
Venue Act 117
New York.
Constitution, 1939, Art. 6, § 7; 1944 Amendment, Art. 6, § 7 401
Code Crim. Proc., §§ 165, 542 401
New York—Continued.
Debtor & Creditor Law, § 243 697
Gilbert's Anno. Crim. Code & Penal Law, 1943, § 528 401
Labor Law, c. 31, § 196. 697
Ohio.
Gen. Code, §§ 871–1 to 871–12, 871–38, 1465–37, 1465–53, 1465–54, 1465–60, 1465–68, 1465–69, 1465–69a, 1465–70, 1465–72, 1465–73, 1465–74, 1465–75, 1465–90 780
General Corporation Act, § 8623–55 100
Philippine Islands.
Constitution, 1935 652
West Virginia.
Constitution, Art. 10, § 1 182
Code, 1941, Art. III, c. 11, §§ 1, 14 182
Wisconsin.
1866 Laws, Private & Local, c. 122; 1872, c. 115 499
1943 Stats., §§ 30.01, 31.07 499
1943 Stats., §§ 201.18, 201.50, 269.44 154
Rev. Stats., 1858, c. XLI, §§ 2, 3; c. LVI, § 1 499
Rev. Stats., 1941, § 103.39 697

(C) PROCLAMATIONS.

Establishing forest reserves, 33 Stat. 2307; 34 Stat. 3099, 3198, 3206, 3247, 3251; 37 Stat. 1678 335

(D) TREATIES.

	Page
1791, July 2, 7 Stat. 39 (Indian)	335
1848, Feb. 2, Art. X, 9 Stat. 922, Guadalupe Hidalgo (Mexico)	335
1851, Sept. 17, Art. V, 11 Stat. 749 (Indian)	335
1863, July 2, Arts. II, III, IV, 18 Stat. 685 (Indian)	335
1863, July 30, Arts. I–IV, 13 Stat. 663 (Indian)	335
1863, Oct. 1, 18 Stat. 689 (Indian)	335
1863, Oct. 12, 13 Stat. 681 (Indian)	335
1865, Mar. 6, 14 Stat. 667 (Indian)	786
1865, Mar. 8, 14 Stat. 671 (Indian)	786
1868, July 3, Art. II, 15 Stat. 673 (Indian)	335
1898, Dec. 10, Arts. II, III, 30 Stat. 1754 (Spain)	652

CASES ADJUDGED
IN THE
SUPREME COURT OF THE UNITED STATES
AT
OCTOBER TERM, 1944.

CHOATE *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 93. Argued January 2, 1945.—Decided January 29, 1945.

1. A taxpayer who transferred an oil lease and equipment for cash and a royalty interest, *held* entitled, upon a return of income tax, to an allowance for the unrecovered cost of the equipment. P. 3.
2. Under the Revenue Act of 1938, depletion is not applicable to equipment used in the operation of an oil lease. P. 3.
3. The Tax Court's determination that the transaction in question involved an absolute sale of the equipment was conclusive on review. *Dobson* v. *Commissioner,* 320 U. S. 489; *Wilmington Co.* v. *Helvering,* 316 U. S. 164. P. 3.

141 F. 2d 641, reversed.

CERTIORARI, 323 U. S. 692, to review a judgment which, upon an appeal by the Commissioner, reversed a decision of the Tax Court.

Mr. James H. Yeatman for petitioner.

Mr. Joseph S. Platt, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *Warren F. Wattles* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In 1936 Choate and Hogan, a partnership of which the petitioner was a member, acquired an oil and gas lease. They drilled six producing wells on the leased land and operated the property until August 1938. At that time they sold to Sylva Oil Co. for a cash consideration of $110,000 all their right, title and interest in the lease "together with all wells and the equipment thereof, including pumps, casing, piping, tanks, lease house, and all other personal property on or used in connection" with the premises. But they expressly reserved to themselves "1/8 of the 8/8ths of all oil and gas and casinghead gas which may be produced and saved" from the land. Thereafter Sylva Oil Co. drilled additional wells and operated the lease. Choate and Hogan in their partnership return for 1938 reported the transaction as a sale. Respondent in his deficiency notice ruled that the transaction constituted a sublease. The Tax Court took the same view, holding that the partners must look to depletion for the return of their capital. It held that the principle of recovery by depletion was applicable where a royalty interest was retained and that a cash bonus was to be regarded as in the nature of an advance royalty. It held, however, that there had been an absolute sale of the equipment, that its cost was not recoverable by depletion, and that the partners were entitled to an allowance for the unrecovered cost of the equipment transferred. The Commissioner challenged the latter ruling—in the Circuit Court of Appeals for the Tenth Circuit as respects Choate, in the Circuit Court of Appeals for the Fifth Circuit as respects Hogan. The Commissioner won in the Tenth Circuit (141 F. 2d 641) and lost in the Fifth. *Hogan* v. *Commissioner,* 141 F. 2d 92. It was to resolve that conflict that we granted the petition in the present case limited to that single question.

The Commissioner makes an elaborate argument based on the assumption that there was no sale of the equipment. The assumption is that after the partnership transferred its interest in the lease its investment was no longer in the leasehold and equipment as such but was an economic interest in an oil producing enterprise—an interest which is depletable since it is measured by the production of oil. But there are two difficulties with that argument. In the first place, we find nothing in the Revenue Act of 1938, 52 Stat. 447, or in the Treasury Regulations which provides for depletion of equipment used in the operation of oil and gas wells. A deduction is allowed for depreciation by § 23 (l) which permits a "reasonable allowance for the exhaustion, wear and tear of property used in the trade or business." And see Treasury Regulations 101, Art. 23 (m)–18. Sec. 23 (m) provides that in the case of "mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case" may be taken as a deduction. And see Treasury Regulations 101, Art. 23 (m)–10. Depletion is applicable to wasting assets—to the exhaustion of natural resources, not of property used in a business. See 4 Mertens, Law of Federal Income Taxation (1942) § 24.02. That distinction between depletion and depreciation runs through the basis provisions of the Act. See § 111 (a), § 113 (a) and (b), § 114 (a) and (b). And the history of the depletion provisions indeed makes clear that only intangible drilling and development costs, not costs represented by physical property, are returnable by way of depletion. See *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459; 4 Mertens, *op. cit.*, § 24.48; Treasury Regulations 101, Art. 23 (m)–16 (a). In the second place, the Tax Court found that the parties intended a cash sale of the equipment. That question is argued here as if it were open for redetermination by us. It is not. It is the

kind of issue reserved for the Tax Court under *Dobson* v. *Commissioner,* 320 U. S. 489, and *Wilmington Trust Co.* v. *Helvering,* 316 U. S. 164, 167–168. Once a sale of the equipment is conceded, it is not denied that petitioner is entitled to an allowance for the unrecovered cost of the equipment transferred. § 111 (a), § 113 (a) and (b). No question is presented concerning the allocation of a portion of the purchase price to the equipment.

Reversed.

HERGET, TRUSTEE IN BANKRUPTCY, *v.* CENTRAL NATIONAL BANK & TRUST CO.

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

No. 322. Argued January 9, 10, 1945.—Decided January 29, 1945.

Section 11 (e) of the Bankruptcy Act bars after two years from the date of adjudication in bankruptcy an action brought by the trustee in bankruptcy to set aside and recover a preferential transfer; and a state statute of limitations can not operate to extend the period. P. 8.

141 F. 2d 150, affirmed.

CERTIORARI, 323 U. S. 691, to review the affirmance of a judgment dismissing the complaint in a suit by a trustee in bankruptcy to set aside and recover an alleged preferential transfer.

Mr. William D. Donnelly for petitioner.

Mr. Walter H. Moses, with whom *Messrs. John M. Elliott* and *Walter Bachrach* were on the brief, for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

This case presents the narrow issue of whether § 11e of the Bankruptcy Act, 11 U. S. C. § 29e, bars at the end of

two years from the date of adjudication in bankruptcy an action brought by the trustee in bankruptcy to set aside and recover a preferential transfer.

On April 11, 1938, N. L. Rogers & Company, Inc., filed a voluntary petition in bankruptcy and was duly adjudged a bankrupt on the same day. On March 3, 1943, the petitioner trustee filed a complaint under § 60 of the Bankruptcy Act, 11 U. S. C. § 96, against the respondent bank to set aside and recover payments totalling over $300,000 alleged to have been given illegally by the bankrupt to the respondent within four months prior to the filing of the bankruptcy petition. The District Court dismissed the complaint on the ground that the suit had been instituted more than two years subsequent to the date of adjudication in bankruptcy and hence was barred by § 11e. It thus overruled the trustee's contention that Illinois law allowed him five years in which to bring this action and that this five-year limitation was controlling since it fell within the provision of § 11e allowing suits "within such further time as the federal or state law may permit." 53 F. Supp. 265. The court below affirmed this judgment. 141 F. 2d 150. In our view, such a result is plainly right.

Two-year limitations on suits by and against trustees have long been integral parts of federal bankruptcy statutes. Section 8 of the Bankruptcy Act of 1841, 5 Stat. 440, 446, 447, applied a two-year limitation on any "suit at law or in equity" by or against any assignee of the bankrupt. Courts held that this related only to suits involving claims held by the bankrupt before assignment, rather than to suits on claims arising after the bankruptcy proceedings began,[1] but its applicability as to rights accruing to the assignee on the date of the assignment by virtue

[1] See *In re Conant*, 5 Blatch. 54, Fed. Cas. No. 3086; *Stevens* v. *Hauser*, 39 N. Y. 302. Cf. *Banks* v. *Ogden*, 2 Wall. 57, 70.

of the Bankruptcy Act apparently was not raised or determined.

Section 2 of the Bankruptcy Act of 1867, 14 Stat. 517, 518, which was reenacted in substantially the same form in Revised Statutes § 5057, placed a similar limitation on any "suit at law or in equity . . . by or against such assignee . . . touching the property and rights of property" of the bankrupt. Here again the limitation was held to apply only to suits growing out of disputes and transactions prior to assignment.[2] *Dushane* v. *Beall,* 161 U. S. 513. But in *Bailey* v. *Glover,* 21 Wall. 342, 346, this Court stated that this limitation "applies to all judicial contests between the assignee and other persons touching the property or rights of property of the bankrupt transferable to or vested in the assignee." See also *Gifford* v. *Helms,* 98 U. S. 248, 252; *Jenkins* v. *International Bank,* 106 U. S. 571, 575. The inference seems clear from this that suits to set aside preferential transfers made prior to the assignment would have been held to fall within the reach of the two-year limitation.

Section 11d of the Bankruptcy Act of 1898, 30 Stat. 544, 549, provided that "Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed." State and lower federal courts explicitly and uniformly held that this two-year limitation controlled the trustee's right to set aside and recover preferential transfers under § 60 of the Act.[3] But courts differed as to whether § 11d or state statutes of limitation applied to causes of action inherited by the trustee from the bankrupt or the bankrupt's creditors.[4]

---

[2] See *Bowen* v. *Delaware, L. & W. R. Co.,* 153 N. Y. 476, 47 N. E. 907. Cf. *Phelan* v. *O'Brien,* 13 F. 656.

[3] *Davis* v. *Willey,* 273 F. 397; *Meikle* v. *Drain,* 69 F. 2d 290; *Arnold Grocery Co.* v. *Shackelford,* 140 Ga. 585, 79 S. E. 470.

[4] Among those cases holding that § 11d applied are *Isaacs* v. *Neece,* 75 F. 2d 566, *Engebretson* v. *West,* 133 Neb. 846, 277 N. W. 433, and

It was this conflict under § 11d of the 1898 Act that was primarily responsible for the framing of the new § 11e in 1938. This latter provision, which is controlling in this case, settles the problem by stating in part that "A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the federal or state law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by federal or state law had not expired at the time of the filing of the petition in bankruptcy."

In light of the judicial construction and application of analogous provisions in earlier bankruptcy acts, it is significant that Congress in § 11e failed to enlarge the time for bringing suits arising under the Bankruptcy Act by making state statutes of limitation of longer duration applicable to such federal causes of action. None of the prior provisions had been construed so as to apply state statutes of limitations to actions by trustees based on claims arising under the bankruptcy statutes. And the courts had frankly and unmistakably imposed the two-year limitation of §11d of the 1898 Act, which is the immediate predecessor of § 11e, to suits by trustees to set aside and recover preferential transfers. The legislative background and history, as well as the language of § 11e, are barren of any basis for concluding that Congress intended to make suits of this nature subject to longer limitations imposed by state laws.[5] Congress could have

---

Callaghan v. *Bailey*, 293 N. Y. 396, 57 N. E. 2d 729. Cases holding that the state statutes of limitation applied include *Davis* v. *Willey*, 273 F. 397, and *Silverman* v. *Christian*, 123 N. J. Eq. 506, 198 A. 832. See also *Charlesworth* v. *Hipsh, Inc.*, 84 F. 2d 834; *Nairn* v. *McCarthy*, 120 F. 2d 910.

[5] H. Rep. No. 1409 (75th Cong., 1st Sess.) p. 20, stated that "A new provision in subdivision e permits receivers and trustees within 2 years after the adjudication to institute suits on claims against which the period of limitation fixed by federal or state law had not expired at

expressly restricted the field within which the two-year limitation was to be operative had it so wished. Its failure to do so cannot be ignored.

The actual language used in § 11e is clearly appropriate to an action under § 60. Section 11e is not limited by its words to actions inherited by the trustee; nor does it discriminate against actions by the trustee accruing to him under the Act. It provides simply that the trustee must bring action on any claim in behalf of the estate within two years subsequent to the date of adjudication or within such further time as the federal or state law permits, provided that such law did not bar the action on the date when the petition was filed.

Here the only applicable law is § 60 of the Bankruptcy Act, which generates the cause of action and which contains no time limitations as to actions brought pursuant thereto. And since the trustee's right to set aside and recover preferential transfers relates to transactions occurring prior to the filing of the petition and since this right did not accrue before the date on which the petition was filed, such an action obviously cannot be excluded from the limitation on the ground that it was barred by federal or state law at the time the petition was filed. Hence the trustee was bound to "institute proceedings in

---

the time of the bankruptcy or within such further time as the federal or state law may permit."

S. Rep. No. 1916 (75th Cong., 3d Sess.) p. 13, stated: "The provisions of the existing law in regard to suits by or against trustees have been revised and modified, and receivers are included. The period of limitations in respect to such suits has been restricted in the bill to 2 years after the date of adjudication instead of 2 years after the date of the closing of the estate."

See also Joint Hearings before the Subcommittees of the Committees on the Judiciary (72d Cong., 1st Sess.) on S. 3866, Part 4, pp. 932–933; 6 Journal of Nat. Assoc. of Referees in Bankruptcy 65; 1 Collier on Bankruptcy (14th Ed.) 1186.

behalf of the estate" to set aside and recover any preferential transfers "within two years subsequent to the date of adjudication." More than two years having elapsed between the date of adjudication and the commencement of the suit in this instance, the courts below properly held that the action was barred under § 11e.

Inasmuch as the federal Bankruptcy Act has created the liability and has also fixed the limitation of time for commencing actions to enforce it, we have no occasion to consider the trustee's arguments concerning the applicability and construction of the Illinois statutes of limitation. Cf. *Campbell* v. *Haverhill,* 155 U. S. 610; *McClaine* v. *Rankin,* 197 U. S. 154; *Rawlings* v. *Ray,* 312 U. S. 96; *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144, 155, 156.

The judgment of the court below is

Affirmed.

REGAL KNITWEAR CO. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 86. Argued December 8, 1944.—Decided January 29, 1945.

1. A cease and desist order of the National Labor Relations Board and an order of the Circuit Court of Appeals for its enforcement may validly provide that the order shall apply to the employer's "successors and assigns." P. 16.
2. An order of the Circuit Court of Appeals for the enforcement of a cease and desist order of the Board, though applying in terms to "successors and assigns," would have a scope no broader than that prescribed by Rule 65 of the Rules of Civil Procedure for the District Courts—"Every order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." P. 14.

3. Whether one brings himself in contempt of an enforcement order as a "successor" or "assign" depends on an appraisal of his relations and behavior, not upon mere construction of the terms of the order. P. 15.

140 F. 2d 746, affirmed.

CERTIORARI, 323 U. S. 692, to review a decree granting enforcement of an order of the National Labor Relations Board.

Mr. John P. Chandler submitted for petitioner.

Mr. Malcolm F. Halliday, with whom *Solicitor General Fahy, Mr. Alvin J. Rockwell* and *Misses Ruth Weyand* and *Fanny M. Boyls* were on the brief, for respondent.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The National Labor Relations Board, after appropriate proceedings, issued a cease and desist order against the petitioner, 49 N. L. R. B. 560, and thereafter obtained from the Circuit Court of Appeals for the Second Circuit an order for its enforcement. 140 F. 2d 746. We granted certiorari, limited to a single question on which there was a conflict in practice between different circuits. 323 U. S. 692. The Board has followed the formula which orders not only a particular respondent, but also "its officers, agents, successors and assigns" to cease and desist. The question is whether enforcement will be granted without deleting "successors and assigns" from those enjoined. The Circuit Courts of Appeals for the First, Second, Third, Fourth, and Eighth Circuits, and the Court of Appeals for the District of Columbia have upheld the authority of the Board to include such a provision.[1] In some of these cases

[1] *Labor Board* v. *Brezner Tanning Co.,* 141 F. 2d 62, 65 (C. C. A. 1st); *Labor Board* v. *Blackstone Mfg. Co.,* 123 F. 2d 633, 635 (C. C. A. 2d); *Labor Board* v. *Weirton Steel Co.,* 135 F. 2d 494, 498–99 (C. C. A. 3d); *Labor Board* v. *Landis Tool Co.,* 145 F. 2d 152, 157

change of ownership was shown to be probable and in other cases there was no such proof. The Second Circuit, in refusing to delete the provision, said: "In allowing these words to stand we wish to make it clear, however, that we do not hold that a 'successor' or an 'assign' will be in contempt of our order if it should (even after notice of the order, but without participating with the respondent in any disobedience by it) do exactly those things which the order forbids. In other words, we do not hold that those words impose any liability which would not exist without them." *Labor Board* v. *Blackstone Mfg. Co.*, 123 F. 2d 633, 635; see also *Bethlehem Steel Co.* v. *Labor Board*, 120 F. 2d 641, 650–51 (App. D. C.). The Circuit Court of Appeals for the Seventh Circuit, on the other hand, consistently eliminates the provision as to successors and assigns from the order,[2] but recognizes that successors or assigns under some circumstances are bound by the Board's order, even without the words.[3]

When one court of appeals strikes out the provision but says its absence may in some circumstances have the same effect as if it were there, and another court of appeals approves the provision but says its presence may have no more effect than if it were out, there is more than a faint suggestion that the conflict is over semantics rather than over practical realities.

(C. C. A. 3d); *Labor Board* v. *Feinberg Hosiery Mill*, 134 F. 2d 620 (C. C. A. 4th); *Labor Board* v. *Gluek Brewing Co.*, 144 F. 2d 847, 857 (C. C. A. 8th); *Bethlehem Steel Co.* v. *Labor Board*, 120 F. 2d 641, 650–51 (App. D. C.).

[2] *Labor Board* v. *Bachelder*, 125 F. 2d 387, 388; *Labor Board* v. *Stone*, 125 F. 2d 752, 757. The Sixth Circuit has also refused in one case to include the phrase. *Labor Board* v. *Cleveland-Cliffs Iron Co.*, 133 F. 2d 295, 302.

[3] See also *In re Lennon*, 166 U. S. 548; *International Brotherhood of Teamsters* v. *Keystone Freight Lines*, 123 F. 2d 326, 329; *Labor Board* v. *Cleveland-Cliffs Iron Co.*, 133 F. 2d 295, 302.

The formula that includes successors and assigns, among others, is one probably borrowed from the jargon of conveyancing. Doubtless these words often are used, not out of consideration of their appropriateness, but because of their familiarity. Courts of equity sometimes have used this formula in their decrees.[4] Before the enactment of the Labor Relations Act the Federal Trade Commission issued orders containing these familiar provisions.[5] The Securities and Exchange Commission has done the same.[6] The Bituminous Coal Division of the Department of the Interior does likewise.[7] The National Labor Relations Board has employed this formula consistently since 1937,[8] and some state labor boards have followed the example.[9] Not only have circuit courts of appeals, except of the Seventh Circuit, generally enforced orders containing this provision, but this Court has several times done so. *Southport Petroleum Co.* v. *Labor Board,* 315 U. S. 100, 106, note 6.[10]

---

[4] See decrees in *United States* v. *Pullman Co.,* Civil Action No. 994, E. D. Pa. 1944; *United States* v. *Vehicular Parking, Ltd.,* Civil Action No. 259, D. Del. 1944; *Aluminum Colors, Inc.* v. *Empire Plating Co.,* 5 F. Supp. 687; *United States* v. *Great Lakes Towing Co.,* 1 Decrees and Judgments in Federal Antitrust Cases, 253–54 (N. D. Ohio, 1915); *United Gilpin Corp.* v. *Wilmore,* 100 Colo. 453, 456, 68 P. 2d 34, 35.

[5] *Matter of Superior Woolen Mills,* 8 F. T. C. 283, 288 (1924); *Matter of American Snuff Co.,* 11 F. T. C. 144, 160 (1927); *Matter of Sherwin-Williams Co.,* 36 F. T. C. 25, 72, 74 (1943).

[6] *Securities & Exchange Commission* v. *Aldrich Blake, Inc.,* 1 S. E. C. Jud. Dec. 19, 21.

[7] *Matter of Cove Hill Coal Co.,* 7 F. R. 7572, 7574; *Matter of Waltrip & Sons,* 7 F. R. 7864.

[8] *Matter of Hill Bus Co.,* 2 N. L. R. B. 781, 800.

[9] *Matter of The Great Atlantic & Pacific Tea Co.,* Case No. CU–333, New York State Labor Relations Board; *Matter of W. T. Grant Co.,* Case No. 82, Pennsylvania Labor Relations Board.

[10] Citing *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, enforcing, as modified, 4 N. L. R. B. 71, 108; *Labor Board* v. *Newport News Shipbuilding Co.,* 308 U. S. 241, enforcing 8 N. L. R. B. 866, 877;

The dearth of cases in which actual controversies have been precipitated by this more general than discriminating use of this ritual indicates that its significance both for good and ill is greater in anticipation than in retrospect.

Administrative agencies have considerable latitude to shape their remedies within the scope of their statutory authority and, where the infirmity is inadequacy of findings to show appropriateness of the choice made in the particular case, are ordinarily entitled to have the case remanded for further consideration. *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194; *Addison* v. *Holly Hill Fruit Products,* 322 U. S. 607, 616. The courts, nevertheless, may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law. *Chase National Bank* v. *Norwalk,* 291 U. S. 431, 436–37; *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 234; *Scott* v. *Donald,* 165 U. S. 107, 117; *Alemite Mfg. Corp.* v. *Staff,* 42 F. 2d 832.

The Federal Rules of Civil Procedure provide that: "Every order granting an injunction and every restraining order . . . is binding only upon the parties to the action,

---

Labor Board v. *Falk Corp.,* 308 U. S. 453, enforcing 6 N. L. R. B. 654, 666; *Labor Board* v. *Waterman Steamship Corp.,* 309 U. S. 206, enforcing 7 N. L. R. B. 237, 252; *Labor Board* v. *Link-Belt Co.,* 311 U. S. 584, enforcing 12 N. L. R. B. 854, 883; *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, enforcing, as modified, and remanding 19 N. L. R. B. 547, 603.

It is suggested, at least inferentially, that *Labor Board* v. *Express Publishing Co.,* 312 U. S. 426, is authority against the position of the Court in the case at bar. However, the order there under review contained these same words. *Matter of Express Publishing Co.,* 13 N. L. R. B. 1213, 1226. While this Court limited the enforcement order in certain other respects, it did not strike the words "successors and assigns." The issue was not passed on, but its very absence from a case concerning permissible breadth of orders suggests the innocuous character of the provision as compared with that passed on in the Express case.

their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." [11] This is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in "privity" with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.

The term "successors and assigns" in an enforcement order of course may not enlarge its scope beyond that defined by the Federal Rules of Civil Procedure. Successors and assigns may, however, be instrumentalities through which defendant seeks to evade an order or may come within the description of persons in active concert or participation with them in the violation of an injunction. If they are, by that fact they are brought within scope of contempt proceedings by the rules of civil procedure. We have indicated that Labor Board orders are binding upon successors and assigns who operate as "merely a disguised continuance of the old employer." *Southport Petroleum Co.* v. *Labor Board,* 315 U. S. at 106. We have also said of an injunction to restrain violation of the Fair Labor Standards Act, which is somewhat analogous to Labor Board orders, that "Not only is such an injunction enforcible by contempt proceedings against the corporation, its agents and officers and those individuals associated with it in the conduct of its business, but it may also, in appropriate circumstances, be enforced against those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons."

---

[11] Rule 65 (d), which is derived from § 19 of the Clayton Act, 38 Stat. 738; 28 U. S. C. § 383.

Walling v. *Reuter Co.*, 321 U. S. 671, 674. In both of these cases the reference is not merely to succession, but to a relation between the defendant and the successor which might of itself establish liability within the terms of Rule 65.

We do not undertake to decide whether or under what circumstances any kind of successor or assign will be liable for violation of a Labor Board order. It is true that we have said that "Questions of construction had better be ironed out before enforcement orders issue than upon contempt proceedings." (*J. I. Case Co.* v. *Labor Board*, 321 U. S. 332, 341.) But it is apparent from Rule 65, and from the views of one circuit court of appeals as to the narrow effect of the words in the order and of another as to the broad effect of the order without the words, that whether one brings himself in contempt as a "successor or assign" depends on an appraisal of his relations and behavior and not upon mere construction of terms of the order. If defendants enter upon transactions which raise doubts as to the applicability of the injunction, they may petition the court granting it for a modification or construction of the order. Cf. *New Jersey* v. *New York City*, 296 U. S. 259. While such relief would be in the sound discretion of the court, we think courts would not be apt to withhold a clarification in the light of a concrete situation that left parties or "successors and assigns" in the dark as to their duty toward the court. Enforcement orders are issued to effectuate the purposes of the Act, not for the entrapment of parties, and courts no less than parties desire to avoid unwitting contempts as well as to punish deliberate ones.

No concrete case is before us. We have here an abstract controversy over the use of these words, and it is as sterile as abstract controversies usually are. The employer objects to the words of the order merely as words. They do not enlarge its own obligation, and if

it complies with the order, little by way of obligation could be passed to a successor or assign by the order that is not in any event imposed by statute. The Board is not here attempting to reach or to hold anyone in contempt by virtue of such orders. No successor or assign appears before us complaining that these words put him in jeopardy. No one can be punished for contempt because of these words until after a judicial hearing, in which their operation could be determined on a concrete set of facts. All that is before us is the question whether we will hold abstractly that this provision is an illegal one to include in a cease and desist order of the Labor Board or an enforcement order of the Court.

Whether it is wise that an order attempt to define its own effect on others than parties to the action when the law has already done so is not for us to say. We cannot say that "successors and assigns" as well as "officers and agents" may not under some circumstances be among those reached by the order within the scope of Rule 65 and hence cannot say that it is not a permissible provision.

Affirmed.

MR. CHIEF JUSTICE STONE, dissenting, with whom MR. JUSTICE ROBERTS and MR. JUSTICE REED concur.

An injunction is a continuing threat to those named as subject to it, of the pains of contempt proceedings if they disobey its provisions. The opinion of the Court recognizes that the present injunction running against the employer's "successors and assigns" purports to include within its sweep some who are not subject to its command and is thus a threat to those over whom the Court has no authority. The opinion also admits that the persons who are bound by the present decree would be as effectively bound if the decree were to omit the words

"successors and assigns." See *Walling* v. *Reuter Co.*, 321 U. S. 671, 674–675, and cases cited.

It has long been deemed to be an abuse of power for a federal court to enjoin practices in which a defendant has not engaged and which are unrelated to those which may be properly enjoined. See *Labor Board* v. *Express Publishing Co.*, 312 U. S. 426, and cases cited. To me it seems no less a misuse of authority for a court, as well as for the Labor Board itself, to threaten those who are not subject to its command. This is the more so where the tendency of the threat is to inflict an unauthorized penalty on the employer by deterring third persons from dealing with him to acquire his property and business, in circumstances in which that may lawfully be done.

That there have been numerous cases before this Court where the Board's order has not been challenged in this respect, is significant only as showing how extensive the abuse has become and how ready employers and the lower courts have been to acquiesce in threatened wrong when the injury seemed not to be immediate. But these are not reasons for our acquiescence, when the question is brought to us for decision for the first time. It is no part of the function of the Board or of courts to make unwarranted threats against suitors or innocent third persons. Such misleading and unwarranted use of the phrase should be avoided, either by striking it from the decree or so qualifying it as to designate the class of "successors and assigns" to whom it may be lawfully applied. Cf. *Southport Co.* v. *Labor Board*, 315 U. S. 100, 107.

FONDREN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 88. Argued December 11, 12, 1944.—Decided January 29, 1945.

1. Irrevocable trusts for the benefit of minors provided for distribution of specified percentages when the beneficiaries reached the ages of 25 and 30 and of the remainder when they reached 35. The trustee was authorized to apply income and corpus toward maintenance and education of the beneficiaries if, contrary to expectations, necessity therefor should arise. *Held* that gifts to the trusts were gifts of "future interests in property," within the meaning of § 504 (b) of the Revenue Act of 1932 and Treasury Regulations 79, so that the $5,000 exclusion prescribed by that section was not allowable. P. 24.
2. To bring the statutory exclusion into force, it is not enough that the donee has acquired vested rights; he must have the right presently to use, possess, or enjoy the property. P. 20.
3. The fact that the beneficiary is specified and *in esse*, or that the amount of the gift is definite and certain, does not render the statutory exclusion applicable, where enjoyment of the property is postponed. P. 26.
4. Section 504 (b) makes no distinction between gifts for the benefit of minors and gifts to adults. P. 28.
5. It does not follow from the result here reached that the statutory exclusion would not be applicable in any case to gifts for the benefit of minors. P. 29.
6. A settled construction of a statute, which Congress has reenacted, should be followed. P. 29.

141 F. 2d 419, affirmed.

CERTIORARI, 323 U. S. 685, to review the affirmance of a decision of the Tax Court, 1 T. C. 1036, sustaining the Commissioner's assessment of a deficiency in gift taxes.

Mr. W. M. Cleaves, with whom *Mr. E. E. Townes* was on the brief, for petitioners.

Mr. J. Louis Monarch, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clarke, Jr.* and *Mr. Sewall Key* were on the brief, for respondent.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

In 1935, 1936 and 1937 petitioner, Ella F. Fondren, and her husband, since deceased, created seven separate irrevocable trusts, each in favor of a grandchild of tender years; and each of them made gifts to each trust of corporate stock having the fair market value of $5,975. The donors made gift tax returns for 1937, claiming the statutory exclusion of $5,000 for each gift, and accordingly reported taxable gifts for each trust of $975. Gift taxes were paid on this basis.

The Commissioner made deficiency assessments, disallowing the exclusions on the ground that the gifts were of "future interests in property" within the meaning of the Revenue Act of 1932, c. 209, 47 Stat. 169, and Treasury Regulations 79 (1936 ed.).[1] The Tax Court upheld the Commissioner, the cases being consolidated for hearing and decision. 1 T. C. 1036. The Circuit Court of Appeals affirmed the Tax Court's decision, one judge dissenting. 141 F. 2d 419. Certiorari was granted, 323 U. S. 685, because of the importance of the question as

[1] The statute is as follows:

"Sec. 504. Net Gifts.

"(a) *General Definition.*—The term 'net gifts' means the total amount of gifts made during the calendar year, less the deductions provided in section 505.

"(b) *Gifts Less Than $5,000.*—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year."

The pertinent part of the Regulation is quoted in the text below.

affecting the taxability of gifts made for the benefit of minor children and because of alleged or apparent conflict with decisions of other courts.[2]

The sole issue is whether the gifts were of "future interests" within the meaning of the statute and the regulation. The latter provides:

"Art. 11. . . . 'Future interests' is a legal term, and includes reversions, remainders, and *other interests or estates,* whether vested or contingent, and whether or not supported by a particular interest or estate, *which are limited to commence in use, possession, or enjoyment at some future date or time. . . .*" (Emphasis added.)

Upon the facts the issue turns on whether the interests acquired by the minor beneficiaries were "limited to commence in use, possession, or enjoyment at some future date or time." *Ryerson* v. *United States,* 312 U. S. 405; *United States* v. *Pelzer,* 312 U. S. 399.

Under these decisions it is not enough to bring the exclusion into force that the donee has vested rights. In addition he must have the right presently to use, possess or enjoy the property. These terms are not words of art, like "fee" in the law of seizin, *United States* v. *Pelzer, supra,* at 403, but connote the right to substantial present economic benefit. The question is of time, not when title vests, but when enjoyment begins. Whatever puts the barrier of a substantial period between the will of the beneficiary or donee now to enjoy what has been

---

[2] The petition alleged conflict with *Smith* v. *Commissioner,* 131 F. 2d 254 (C. C. A. 8th); *Sensenbrenner* v. *Commissioner,* 134 F. 2d 883 (C. C. A. 7th); and *Kinney* v. *Anglim,* 43 F. Supp. 431 (N. D. Calif.). Cf. also *Disston* v. *Commissioner,* 144 F. 2d 115 (C. C. A. 3d). The decision, one judge dissenting, overruled the prior decision in *Commissioner* v. *Taylor,* 122 F. 2d 714, cert. denied, 314 U. S. 699. A petition for writ of certiorari was filed in the *Disston* case on October 12, 1944, and now is pending.

given him and that enjoyment makes the gift one of a future interest within the meaning of the regulation.

Accordingly, it has been held that if the income of a trust is required to be distributed periodically, as annually, but distribution of the corpus is deferred, the gift of the income is one of a present interest, that of the corpus one *in futuro*. *Fisher* v. *Commissioner,* 132 F. 2d 383; *Sensenbrenner* v. *Commissioner,* 134 F. 2d 883. *A fortiori,* if income is to be accumulated and paid over with the corpus at a later time, the entire gift is of a future interest,[3] although upon specified contingency some portion or all of the fund may be paid over earlier.[4] The contingency may be the exercise of the trustee's discretion, either absolute or contingent.[5] It may also be the need of the beneficiary, not existing when the trust or gift takes effect legally, but arising later upon anticipated though unexpected conditions, either to create a duty in the trustee to pay over or to permit him to do so in his discretion.[6]

In the light of these principles and decisions, it is necessary to consider the terms of the trusts and the circum-

---

[3] *Welch* v. *Paine,* 120 F. 2d 141; *Commissioner* v. *Taylor,* 122 F. 2d 714, 715, cert. denied, 314 U. S. 699; *Commissioner* v. *Brandegee,* 123 F. 2d 58; *Commissioner* v. *Phillips' Estate,* 126 F. 2d 851; *Commissioner* v. *Gardner,* 127 F. 2d 929; *Welch* v. *Paine,* 130 F. 2d 990; *Commissioner* v. *Wells,* 132 F. 2d 405; *French* v. *Commissioner,* 138 F. 2d 254; *Roberts* v. *Commissioner,* 143 F. 2d 657; *Howe* v. *United States,* 142 F. 2d 310; *Hutchings-Sealy National Bank* v. *Commissioner,* 141 F. 2d 422; *Helvering* v. *Blair,* 121 F. 2d 945.

[4] *Ibid.*

[5] *Welch* v. *Paine,* 120 F. 2d 141; *Commissioner* v. *Taylor,* 122 F. 2d 714, 715, cert. denied, 314 U. S. 699; *Commissioner* v. *Brandegee,* 123 F. 2d 58; *Commissioner* v. *Phillips' Estate,* 126 F. 2d 851; *Commissioner* v. *Gardner,* 127 F. 2d 929; *Winterbotham* v. *Commissioner,* 46 B. T. A. 972; cf. *Ryerson* v. *United States,* 312 U. S. 405, 408.

[6] Cf. authorities cited note 3 *supra.*

stances in which the gifts were made. The trust instruments were substantially uniform except for variations in the names of the beneficiaries and, in case of death, their successors in interest. The trusts were irrevocable, the donors retaining no beneficial interest in the estates. Each instrument named the donor, W. W. Fondren, as trustee, and Ella F. Fondren, the other donor, as successor trustee. They reserved the rights as donors to remove any trustee, except Mr. Fondren, and to name successor trustees. Subject to these reservations and the directions set forth below, the trustee was given substantially complete control.

The trusts' stated purpose was "to provide for the personal comfort, support, maintenance, and welfare" of the grandchildren. But from the explicit recitals of the instruments,[7] as well as the evidence, including a stipulation, it is clear that the parents of each child were so situated that, when the gifts were made, they were fully able to provide for and educate him. And, from the same recitals, it is clear there was little reason to believe that any parent would not continue so until the child's majority. Accordingly, in each instance, the trust was to continue until the child should attain the age of thirty-five. Hence also the income was to be accumulated, except upon the contingencies specified below, and each beneficiary was to receive 25 per cent of the corpus and accumulations at age twenty-five, 33⅓ per cent at age thirty, and the remainder at age thirty-five.

Aware of the uncertainties of our world, however, the donors directed in Article 3:

". . . [T]he Trustee shall provide for the support, maintenance and education of our said Grandson, using only the income of said estate for the purpose if it be sufficient. If it be necessary to use any of the corpus of

[7] Cf. the recitals quoted in the text below.

the estate for that purpose *and in the judgment of the Trustee it is best to do so,* said Trustee *may make advancements out of the corpus* of said trust estate for such purpose for the benefit of our said Grandson.

"It is contemplated, however, that our said Grandson will have other adequate and sufficient means of support, and that it will not be necessary to use either the income or the corpus of the trust estate hereby created to properly provide for his education, maintenance and support; and, if the income from the trust estate be not needed for these purposes, then all of the income from said trust estate not so needed shall be by the Trustee passed to capital account of said trust estate, and shall be and become a part of said trust estate, it being our hope that all of the earnings and income of said trust estate during the period of this trust may be used to augment the trust estate and be delivered to our said Grandson at the periods herein provided for. *It is expressly provided, however, that our said Grandson shall be properly maintained,* educated and supported, and *if it be necessary to use all of the income and even all of the corpus* of the trust estate hereby created and all augmentations thereof, *it shall be the duty of the Trustee to see that this obligation shall be properly and reasonably discharged. . . .*" (Emphasis added.)

In view of the apparently conflicting terms of this article for use of the corpus, the exact scope of the trustee's discretion is by no means clear. But this need not be determined. Whether the disposition is in his judgment entirely, as the first clause indicates, or under the second is so only with reference to how much of the fund may be needed,[8] the trustee cannot act in any case to apply

[8] Petitioner presents the case as if no discretion whatever were vested in the trustee as to making the payments over. However, in the first provision for use of the corpus such use is authorized "if it be necessary . . . and in the judgment of the Trustee it is best to

corpus or income for the support, maintenance and education of the beneficiary until necessity arises.

Under the particular facts, this requirement is important in two respects. It is, as petitioners urge, a limitation upon the trustee's discretion. His power is not unconfined. Even though the existence and amount of need may be in the first instance for his determination, it does not follow that, need existing, the trustee arbitrarily could refuse to make the application. The case therefore is not one in which present enjoyment is dependent upon an exercise of the trustee's absolute discretion.

But this does not show, as petitioners seem to think, that the minor beneficiaries had, at the moment of the gift, a present right of enjoyment. It rather shows the contrary—that their right was not absolute and immediate, but was conditioned, during minority and afterward until the times specified for distribution, upon a contingency which might never arise. That contingency, by the explicit terms of the trust, was the existence of need which was then nonexistent and, in the stated contemplation of the donors, was not likely to occur in the future, at any rate during the child's minority. The circumstances surrounding the donors and the donees confirm these recitals. The case is one therefore in which the gift, if presently vested, made enjoyment contingent upon the occurrence of future events, not only uncertain, but by the recitals of the instrument itself improbable of occurrence. The gifts con-

---

do so"; in the other provision the duty imposed, "if it be necessary to use all of the income and even all of the corpus," is one "to see that this obligation shall be properly and reasonably discharged." If the first clause limits the second, the trustee's discretion is bounded only by what he thinks "it is best to do," and in any event under the latter his duty is only to see that the obligation is "properly and reasonably" discharged. Presumably also the trustee would have some room for judgment on whether particular circumstances would amount to necessity and particular measures would be required to meet it.

sequently were of "future interests in property" within the meaning of § 504 (b).

Petitioners' contrary argument, apart from the misconception that legal vesting of the interest without more satisfies the statute,[9] rests chiefly upon considerations arising from the legislative history and from the fact that gifts for the benefit of children under legal disability to manage their own property must make provision for its control by trustees or otherwise.

Special stress is placed on the fact that each gift was made to or for the benefit of a specifically named beneficiary then *in esse* and for a definite amount. As the *Pelzer* opinion noted, 312 U. S. at 403, the committee reports recommending the legislation stated: "The exemption being available only in so far as the donees are ascertainable, the denial of the exemption in the case of gifts of future interests is dictated by the apprehended difficulty, *in many instances,* of determining the number of eventual donees and the values of their respective gifts." [10] (Emphasis added.) And in the *Pelzer* case the Court found that the gift involved these difficulties, as well as postponement of enjoyment to the happening of a future uncertain event, since the right of enjoyment was contingent in any event upon the beneficiaries' surviving the ten-year period specified for accumulation of income. 312 U. S. at 404.

---

[9] Several of petitioners' statements of their contentions ignore the contingency upon which enjoyment is deferred in this case, namely the occurrence at some future time of the need or necessity of the beneficiary which would bring the trustee's power or duty to provide for support or maintenance from the trust fund into play. It is not necessary to note these contentions specifically further than to say, in addition to what has been said already, that they assume as the answer to it the very issue in the case.

[10] H. Rep. No. 708, 72d Cong., 1st Sess., 29; S. Rep. No. 665, 72d Cong., 1st Sess., 41.

Both conclusions would seem applicable in this case, the chief difference being that the period of postponement, which the beneficiaries must survive before enjoyment begins, is indefinite rather than for a specified time. That is true in any case where the length of the period is governed by a contingency. But the regulation, adopted almost in the language of the committee reports,[11] does not limit the denial of the exemption to instances where the deferment of enjoyment is at all events for a period which is definite and certain. Cf. *Commissioner* v. *Glos,* 123 F. 2d 548, 550. Clearly the statute is not to be applied differently, to grant or deny the exemption, if there is postponement, merely because in one case the period is under any eventuality for a certain, specified length of time, whereas in another it is of uncertain or indefinite length. The important thing is the certainty of postponement, not certainty of the length of its duration.

Furthermore, if there is postponement, the exemption is denied whether or not the administrative difficulties anticipated in the committee reports inhere in the particular gift. *Commissioner* v. *Glos, supra; Welch* v. *Paine,* 120 F. 2d 141. Those reports specifically state these difficulties are present "in many instances." But they also state that "the term 'future interests in property' refers to *any* interest or estate, whether vested or contingent, limited to commence in possession or enjoyment at a future date." [12] They thus contemplate, as does the regulation framed in similar terms, vested as well as contingent interests and estates. And there is nothing to indicate that gifts to specified donees *in esse* and in definite amounts are to be excluded from the denial, if by the terms of the gift enjoyment is deferred to a future time. Again, the crucial thing is postponement of enjoyment, not the fact that the

[11] Cf. text at note 12 *infra.*

[12] Cf. note 10 *supra.*

beneficiary is specified and *in esse* or that the amount of the gift is definite and certain.[13]

The considerations, which petitioners advance to support their position, from the minority of the beneficiaries and their consequent legal disability to manage and control their property are intermingled with others relating to the motives of the donors in making the gifts. It is said that their purpose was to provide for the "comfort, support, maintenance and welfare," including education, of the grandchildren; that the latter were incapable of taking over the management and control of the property; that accordingly it was necessary for some arrangement to be made for vesting this power in trustees or others capable of exercising it; that the trustees were given no power to withhold either income or corpus in case of need; and consequently the whole fund became available to the beneficiary for his maintenance "immediately upon the consummation of the gift," so that he was vested at once with the right of present enjoyment as fully as any child of tender years could be and in no way differently, taking account of his disability, than any owner of property by title in fee simple.

---

[13] The absence of these factors is relevant as showing the more clearly that postponement exists and therefore the exemption does not apply. Their presence does not show that there is no postponement or that the exemption applies. The administrative difficulties relating to these matters "in many instances" were reasons for denying the exemption. They do not and were not intended to encompass the full scope of the denial. As the statute extended the exemption "in the specified amount, to all gifts, whether large or small, 'made to any person,'" *Helvering* v. *Hutchings,* 312 U. S. 393, 397, so it denied the exemption to all gifts, whether large or small, vested or contingent, made to any person, whether specified and *in esse* or ascertainable only in the future, and whether for a specific or a presently unascertainable amount, if the gift is one of a "future interest in property," that is, one as to which enjoyment is postponed to some future time.

So far as the argument turns on the motive of the donors, it may be answered that the statute and the regulation make no such test. If motive has bearing, it is only by reason of its effect upon the element of time and whatever relation may be given, by the particular terms of the gift, to it and the disclosing of a purpose to provide for or against immediate enjoyment. The statute in this respect purports to make no distinction between gifts to minors and gifts to adults. If there is deferment in either case the exemption is denied. Consequently in this case the donors' laudable desire to make provision for their grandchildren in case of future need cannot nullify the deferment which the recited absence of present need, coupled with the terms of the trust, brought about. Again, contingency of need in the future is not identical with the fact of need presently existing. And a gift effective only for the former situation is not effective, for purposes of relief from the tax, as if the latter were specified, whether the donee is an adult or a minor.

Upon the facts, furthermore, the trusts hardly can be taken as designed primarily for the periods covered by the children's minority. They did not terminate with the ending of that period. The graduated scale of payments, beginning at age twenty-five and ending at thirty-five, together with the prohibition of payment earlier except in case of necessity, shows principal concern for a period of adult life. And, from the fact that this would be the period when the grandchildren normally would be assuming family responsibilities of their own, the inference well might be drawn that the chief purpose was to give aid and some security in that time. The contingent provision, in case of earlier need, cannot be taken therefore to represent the donors' primary concern as expressed in the instruments. Cf. *Fisher* v. *Commissioner,* 132 F. 2d 383, 386.

But, whether so or not, in the particular circumstances that need was but a contingency to be realized, if at all, in the future. And, until realized, the contingency stood squarely in the way of any child's receiving a single dollar from the fund.

Finally it is urged that unless these gifts are to be taken as conferring the right to immediate enjoyment, no gift for the benefit of a child of tender years can be so regarded since in any such case "some competent person must be the primary judge as to the necessity and extent of reasonable requirements of the beneficiary." The argument is appealing, in so far as it seeks to avoid imputing to Congress the intention to "penalize gifts to minors merely because the legal disability of their years precludes them for a time from receiving their income in hand currently." Cf. *Disston* v. *Commissioner,* 144 F. 2d 115, 119. But we think it is not applicable in the facts of this case, since by the terms of the trusts and the facts recited in the instruments none of the fund, whether income or corpus, could be applied immediately for the child's use or enjoyment.

It does not follow, as petitioners say, that if the exemption does not apply in this case it can apply in no other made for a minor's benefit. Whenever provision is made for immediate application of the fund for such a purpose, whether of income or of corpus, the exemption applies. Whether, in the case of a gift requiring such an application of the income, but providing for retention of a corpus no more than reasonably sufficient to produce the income required for this purpose and to insure its continued payment during minority, the donation would fall within the exemption, as to corpus as well as income, is a question not presented on this record and therefore not determined.

The regulation has received the construction now reaffirmed with substantial consistency. The statute, with

the meaning thus settled, has been reenacted by Congress.[14] The construction should be followed until Congress sees fit to change it.

The judgment is

Affirmed.

REPUBLIC OF MEXICO ET AL. *v.* HOFFMAN.

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

No. 455. Argued January 11, 12, 1945.—Decided February 5, 1945.

1. The decisions of the two courts below that the vessel in question was not in the possession or service of the Mexican government are supported by the evidence. P. 33.
2. A merchant vessel owned but not possessed by a friendly foreign government *held* not immune from a suit in rem in admiralty, where the Department of State has refrained from certifying that it allows the immunity or recognizes ownership of the vessel without possession by the foreign government as a ground for immunity. Pp. 36, 38.
3. Since the Department of State has long and consistently followed the policy of recognizing immunity from suit of a vessel in the possession and service of a foreign government, the courts have allowed such immunity upon proof of such possession and use even when not certified by the Department of State. P. 36.
4. It is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the Government, though it has had numerous opportunities, has not seen fit to recognize. P. 38.

143 F. 2d 854, affirmed.

CERTIORARI, 323 U. S. 697, to review the affirmance of a judgment for the libellant in a suit in rem in admiralty.

Mr. Morris Lavine for petitioners.

---

[14] Congress withdrew the exclusion, as to gifts in trust, in the Revenue Act of 1938, c. 289, 52 Stat. 447, § 505, amending § 504 (b) of the 1932 Act. But it was restored, though reduced to $3,000, by the Revenue Act of 1942, c. 619, 56 Stat. 798, § 454.

Mr. Harold A. Black, with whom *Messrs. Farnham P. Griffiths* and *Allan P. Matthew* were on the brief, for respondent.

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

The question is whether, in the absence of the adoption of any guiding policy by the Executive branch of the government, the federal courts should recognize the immunity from a suit in rem in admiralty of a merchant vessel solely because it is owned though not possessed by a friendly foreign government.

Respondent, owner and master of the Lottie Carson, an American fishing vessel, filed a libel in rem in the district court for southern California against the Baja California, her engines, machinery, tackle and furniture, for damage alleged to have been caused when the Baja California negligently caused her tow to collide with the Lottie Carson in Mexican waters. The Mexican Ambassador to the United States, acting in behalf of his government, thereupon filed in the district court a suggestion that the Baja California at all times mentioned in the libel and at the time of her seizure was owned by the Republic of Mexico and in its possession, and engaged in the transportation of cargoes between the ports of the Republic of Mexico and elsewhere. Libellant put in issue the allegations of the suggestion that title to the Baja California was at any time in the Mexican government and denied that she was in that government's possession, public service or use. Trial of these issues proceeded upon stipulated evidence.

In the meantime the United States Attorney for the District, acting under the direction of the Attorney General, filed in the district court a communication from the Secretary of State to the Attorney General, in which the State Department called attention to the claim of the Mexican government, already detailed. The Department

took no position with respect to the asserted immunity of the vessel from suit other than to cite *Ervin* v. *Quintanilla,* 99 F. 2d 935, and *Compania Espanola* v. *The Navemar,* 303 U. S. 68. In *Ervin* v. *Quintanilla, supra,* the asserted immunity from suit of the San Ricardo, a vessel of the Mexican government, was allowed by the court on the ground that at the time of her seizure upon a libel in rem she was in the possession and service of that government. And in *Compania Espanola* v. *The Navemar, supra,* the State Department having failed to recognize the claimed immunity of the Spanish vessel Navemar, alleged to have been expropriated by and in the possession of the friendly Republic of Spain at the time of her seizure upon a libel in rem, this Court denied the claimed immunity on the ground that the libelled vessel was not shown to have been in the possession and public service of the foreign government.

The district court was unable to find, under the rule of *The Navemar, supra,* any ground for relinquishing the jurisdiction over the vessel, and accordingly denied the claim of immunity. The Mexican government then filed an answer to the libel by which it put in issue the material allegations of the libel on the merits and renewed its claim of sovereign immunity from the suit. The court then proceeded with the trial on the merits.

A second suggestion was then filed by the United States Attorney at the direction of the Attorney General, transmitting a communication from the State Department, stating that it accepted as true the contention that the Baja California was the property of the Mexican government and that it recognized a statement by the Mexican Ambassador that his government would meet any liability decreed against the vessel as a binding international undertaking. The district court denied the claim of immunity, finding that the ship was in "the possession, opera-

tion, and control" of the Compania Mexicana de Navigacion del Pacifico, S. de R. L. This was a privately owned and operated Mexican corporation engaged in the commercial carriage of cargoes for hire for private shippers. On the merits the district court gave judgment for the libellant.

The Circuit Court of Appeals for the Ninth Circuit affirmed, 143 F. 2d 854, holding on the authority of *The Navemar, supra,* and *The Katingo Hadjipatera,* 119 F. 2d 1022, that the Baja California, although owned by the Mexican government, was not immune from suit because not in its possession and service. We granted certiorari, 323 U. S. 697, on a petition which presented the question whether title of the vessel without possession in the Mexican government is sufficient to call for judicial recognition of the asserted immunity.

The decisions of the two courts below that the vessel was not in the possession or service of the Mexican government are supported by evidence and call for no extended review here. It is sufficient that it appears that before the injury to the Lottie Carson the Baja California was delivered by the Mexican government to the privately owned and operated Mexican corporation under a contract for a term of five years. As provided by the contract the corporation was to operate the vessel at its own expense in a private freighting venture on the high seas between Mexican ports and between them and foreign ports, and did so operate the vessel until her seizure upon the libel. The officers and crew were selected, controlled and paid by the corporation. For the use of the vessel the corporation agreed to pay to the Mexican government fifty per cent of the net profits of operations but undertook to bear all net losses.

The principal contention of petitioner is that our courts should recognize the title of the Mexican government as

a ground for immunity from suit even though the vessel was not in the possession and public service of that government. Ever since *The Exchange,* 7 Cranch 116, this Government has recognized such immunity from suit, of a vessel in the possession and service of a friendly foreign government, *L'Invincible,* 1 Wheat. 238, 252; *The Divina Pastora,* 4 Wheat. 52, 64; *United States* v. *Cornell Steamboat Co.,* 202 U. S. 184, 190; *Ex parte Muir,* 254 U. S. 522, 531–533; *The Pesaro,* 255 U. S. 216, 219; *Ex parte New York,* 256 U. S. 503, 510; *Compania Espanola* v. *The Navemar, supra,* 74; *Ex parte Peru,* 318 U. S. 578, 588, a practice which seems to have been followed without serious difficulties to the courts or embarrassment to the executive branch of the government. And in *The Exchange,* Chief Justice Marshall introduced the practice, since followed in the federal courts, that their jurisdiction in rem acquired by the judicial seizure of the vessel of a friendly foreign government, will be surrendered on recognition, allowance and certification of the asserted immunity by the political branch of the government charged with the conduct of foreign affairs when its certificate to that effect is presented to the court by the Attorney General. *United States* v. *Lee,* 106 U. S. 196, 209; *Ex parte Muir, supra,* 533; *The Pesaro, supra,* 217; *Compania Espanola* v. *The Navemar, supra,* 74; *Ex parte Peru, supra,* 588. This practice is founded upon the policy recognized both by the Department of State and the courts that the national interests will be best served when controversies growing out of the judicial seizure of vessels of friendly foreign governments are adjusted through diplomatic channels rather than by the compulsion of judicial proceedings. *Compania Espanola* v. *The Navemar, supra; Ex parte Peru, supra.*

In the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immu-

nity exist. That is to say, it is for them to decide whether the vessel when seized was that of a foreign government and was of a character and operated under conditions entitling it to the immunity in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations. See *Ex parte Peru, supra,* 588.

Every judicial action exercising or relinquishing jurisdiction over the vessel of a foreign government has its effect upon our relations with that government. Hence it is a guiding principle in determining whether a court should exercise or surrender its jurisdiction in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs. "In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction." *United States* v. *Lee, supra,* 209; *Ex parte Peru, supra,* 588.

It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.[1] The judicial seizure of the property of a friendly state may be regarded as such an affront to

[1] This salutary principle was not followed in *Berizzi Bros. Co.* v. *The Pesaro,* 271 U. S. 562, where the court allowed the immunity, for the first time, to a merchant vessel owned by a foreign government and in its possession and service, although the State Department had declined to recognize the immunity. The propriety of thus extending the immunity where the political branch of the government had refused to act was not considered.

Since the vessel here, although owned by the Mexican Government, was not in its possession and service, we have no occasion to consider the questions presented in the *Berizzi* case. It is enough that we find no persuasive ground for allowing the immunity in this case, an important reason being that the State Department has declined to recognize it.

its dignity and may so affect our relations with it, that it is an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination that the vessel shall be treated as immune. *Ex parte Peru, supra,* 588. But recognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations.

When such a seizure occurs the friendly foreign government may adopt the procedure of asking the State Department to allow it. But the foreign government may also present its claim of immunity by appearance in the suit and by way of defense to the libel. In such a case the court will inquire whether the ground of immunity is one which it is the established policy of the department to recognize. *Ex parte Muir, supra,* 533; *Compania Espanola* v. *The Navemar, supra,* 74. Such a policy, long and consistently recognized and often certified by the State Department and for that reason acted upon by the courts even when not so certified, is that of allowing the immunity from suit of a vessel in the possession and service of a foreign government.

It has been held below, as in *The Navemar,* to be decisive of the case that the vessel when seized by judicial process was not in the possession and service of the foreign government. Here both courts have found that the Republic of Mexico is the owner of the seized vessel. The State Department has certified that it recognizes such ownership, but it has refrained from certifying that it allows the immunity or recognizes ownership of the vessel without possession by the Mexican government as a ground for immunity. It does not appear that the Department has ever allowed a claim of immunity on that ground, and we are cited to no case in which a federal court

has done so. In *The Davis,* 10 Wall. 15, this Court held that a salvage lien was enforcible against property belonging to but not in actual possession of the United States, and in this it followed a decision of Judge Story in *United States* v. *Wilder,* Fed. Cas. No. 16,694. And in *The Fidelity,* Fed. Cas. No. 4,758, Chief Justice Waite said of the ruling of *The Davis:* "Property does not necessarily become a part of the sovereignty because it is owned by the sovereign. To make it so it must be devoted to the public use and must be employed in carrying on the operations of the government."

In the case of *The Navemar, supra,* the Spanish Ambassador asserted on behalf of the Spanish Republic that the seized vessel was the property of the Republic, acquired by expropriation from a Spanish National, but the claim of immunity which had not been recognized by our government was rejected by the Court on the ground that the Spanish government was not in possession of the vessel at the time of her arrest.[2]

The lower federal courts have consistently refused to allow claims of immunity based on title of the claimant

[2] *The Cristina,* [1938] A. C. 485, in which the immunity was recognized, seems to have proceeded on the ground that the possession taken in behalf of the friendly foreign government was actual. Similarly in *The Arantzazu Mendi,* [1939] A. C. 256, 263, the sovereign was "in fact in possession of the ship." In *The Jupiter,* [1924] P. 236, 241, 244 (cf. *The Jupiter No. 2,* [1925] P. 69; *The Jupiter No. 3,* [1927] P. 122, 125), it appeared that before the suit was brought the master had repudiated the possession and ownership of the plaintiffs and held the vessel for the claimant government. And in *The Porto Alexandre,* [1920] P. 30, 34, the vessel had been requisitioned under the order of the foreign government and on the particular voyage was carrying freight for that government. In *The Annette; The Dora,* [1919] P. 105, 111, an alternative ground of decision was that the sovereign had parted with possession. The Court said: "If it is not in possession, the Court interferes with no sovereign right of the government by arresting the vessel, nor does it, by arresting the vessel, compel the government to submit to the jurisdiction or to abandon its possession."

foreign government without possession, both before *The Navemar, supra, Long* v. *The Tampico,* 16 F. 491, 493, 494 (opinion by Judge Addison Brown); *The Johnson Lighterage Co. No. 24,* 231 F. 365; *The Attualita,* 238 F. 909; *The Carlo Poma,* 259 F. 369, 370, reversed on other grounds, 255 U. S. 219; *The Beaverton,* 273 F. 539, 540; and since, *Ervin* v. *Quintanilla, supra,* 941; *The Uxmal,* 40 F. Supp. 258, 260; *The Katingo Hadjipatera,* 40 F. Supp. 546, 119 F. 2d 1022; *The Ljubica Matkovic,* 49 F. Supp. 936.

Whether this distinction between possession and title may be thought to depend upon the aggravation of the indignity where the interference with the vessel ousts the possession of a foreign state, *Sullivan* v. *Sao Paulo,* 122 F. 2d 355, 360, it is plain that the distinction is supported by the overwhelming weight of authority. More important, and we think controlling in the present circumstances, is the fact that, despite numerous opportunities like the present to recognize immunity from suit of a vessel owned and not possessed by a foreign government, this government has failed to do so. We can only conclude that it is the national policy not to extend the immunity in the manner now suggested, and that it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize. We have considered but do not find it necessary to discuss other contentions of petitioner, as they are without merit.

Affirmed.

MR. JUSTICE FRANKFURTER, concurring.

In *Berizzi Bros. Co.* v. *The Pesaro,* 271 U. S. 562, this Court held for the first time that "merchant ships owned and operated by a foreign government have the same immunity that warships have." It did so not because the

Department of State by appropriate suggestion or through its established policy had indicated that due regard for our international relations counseled such an abnegation of jurisdiction over government-owned merchantmen. On the contrary. In answer to an inquiry by Judge Mack, before whom the Pesaro's claim to immunity was first raised, the Department of State took this position: "It is the view of the Department that government-owned merchant vessels or vessels under requisition of governments whose flag they fly employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war. The Department has not claimed immunity for American vessels of this character." *The Pesaro,* 277 F. 473, 479–480, note 3; and see 2 Hackworth, Digest of International Law, pp. 429–430, 438–439. Thus, in *Berizzi Bros. Co.* v. *The Pesaro, supra,* this Court felt free to reject the State Department's views on international policy and to formulate its own judgment on what wise international relations demanded. The Court now seems to indicate, however, that when, upon the seizure of a vessel of a foreign government, sovereign immunity is claimed, the issue is whether the vessel "was of a character and operated under conditions entitling it to the immunity in conformity with the principles accepted by the department of the government charged with the conduct of our foreign relations."

If this be an implied recession from the decision in *Berizzi Bros. Co.* v. *The Pesaro,* I heartily welcome it. Adjudication should not borrow trouble by worrying about a case not calling for decision. It is for me not borrowing trouble to raise the relation of the *Pesaro* decision to the situation now before the Court. I appreciate that the disposition of the present case turns on the want of possession by the Republic of Mexico. My difficulty is that "possession" is too tenuous a distinction on the basis of which to differentiate between foreign government-

owned vessels engaged merely in trade that are immune from suit and those that are not. Possession, actual or constructive, is a legal concept full of pitfalls. Even where only private interests are involved the determination of possession, as bankruptcy cases, for instance, abundantly prove, engenders much confusion and conflict. Ascertainment of what constitutes possession or where it is, is too subtle and precarious a task for transfer to a field in which international interests and susceptibilities are involved.

If the Republic of Mexico now saw fit to put one junior naval officer on merchantmen which it owns but are operated by a private agency under arrangements giving that Government a financial interest in the venture, it would, I should suppose, be embarrassing to find that Mexico herself did not intend to be in possession of such ships. And, certainly, the terms of the financial arrangement by which the commercial enterprise before the Court is carried on can readily be varied without much change in substance to manifest a relation to the ship by Mexico which could not easily be deemed to disclose a want of possession by Mexico.

The fact of the matter is that the result in *Berizzi Bros. Co.* v. *The Pesaro, supra,* was reached without submission by the Department of State of its relevant policies in the conduct of our foreign relations and largely on the basis of considerations which have steadily lost whatever validity they may then have had. Compare the overruling of *The Thomas Jefferson,* 10 Wheat. 428 (1825), by *The Genesee Chief,* 12 How. 443 (1851). The views of our State Department against immunity for commercial ships owned by foreign governments have been strongly supported by international conferences, some held after the decision in the *Pesaro* case. See Lord Maugham in *Compania Naviera Vascongado* v. *The Cristina* [1938] A. C. 485, 521–523. But the real change has been the enor-

mous growth, particularly in recent years, of "ordinary merchandising" activity by governments. See *The Western Maid,* 257 U. S. 419, 432. Lord Maugham in the *Cristina* thus put the matter:

"Half a century ago foreign Governments very seldom embarked in trade with ordinary ships, though they not infrequently owned vessels destined for public uses, and in particular hospital vessels, supply ships and surveying or exploring vessels. These were doubtless very strong reasons for extending the privilege long possessed by ships of war to public ships of the nature mentioned; but there has been a very large development of State-owned commercial ships since the Great War, and the question whether the immunity should continue to be given to ordinary trading ships has become acute. Is it consistent with sovereign dignity to acquire a tramp steamer and to compete with ordinary shippers and ship-owners in the markets of the world? Doing so, is it consistent to set up the immunity of a sovereign if, owing to the want of skill of captain and crew, serious damage is caused to the ship of another country? Is it also consistent to refuse to permit proceedings to enforce a right of salvage in respect of services rendered, perhaps at great risk, by the vessel of another country?" [1938] A. C. 485, 521–522.

And so, sensible as I am of the weight to which the decision in the *Pesaro* is entitled, its implications in the light of the important developments in the international scene that twenty years have brought call for its reconsideration. The Department of State, in acting upon views such as those expressed by Lord Maugham, should no longer be embarrassed by having the decision in the *Pesaro* remain unquestioned, and the lower courts should be relieved from the duty of drawing distinctions that are too nice to draw.

It is my view, in short, that courts should not disclaim jurisdiction which otherwise belongs to them in relation

to vessels owned by foreign governments however operated except when "the department of the government charged with the conduct of our foreign relations," or of course Congress, explicitly asserts that the proper conduct of these relations calls for judicial abstention. Thereby responsibility for the conduct of our foreign relations will be placed where power lies. And unless constrained by the established policy of our State Department, courts will best discharge their responsibility by enforcement of the regular judicial processes.

MR. JUSTICE BLACK joins in this opinion.

HOUSE *v.* MAYO, STATE PRISON CUSTODIAN.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS AND PETITION FOR WRIT OF CERTIORARI.

No. 921. Decided February 5, 1945.

A petition to the federal district court for a writ of habeas corpus, by one confined under a state court sentence for burglary, alleged that the trial court, without warning and over the petitioner's protests, forced him to plead to the information without the aid and advice of his counsel, whose presence he requested. The district judge denied the petition and also denied a certificate of probable cause for an appeal under 28 U. S. C. § 466. The circuit court of appeals denied a timely application for allowance of an appeal. *Held:*

1. The case is reviewable here by certiorari not under § 240 (a) but under § 262 of the Judicial Code. P. 44.

2. Review here by certiorari under § 262 extends not only to the question whether the circuit court of appeals abused its discretion in refusing to allow the appeal but also to questions on the merits sought to be raised by the appeal. P. 44.

3. The petition for habeas corpus sufficiently alleged a denial of the petitioner's constitutional right to a fair trial. P. 46.

4. The decision of the district court denying habeas corpus on the ground that the questions sought to be raised had been fairly adjudicated by the state courts was unsupported, since the basis

of the state court decisions relied on was in each instance that the particular remedy sought was not one provided by state law. P. 47.

5. Where a state court adjudicates the merits of a state prisoner's federal questions, and this Court either reviews or declines to review its decision, a federal court will not ordinarily reexamine on habeas corpus the questions thus adjudicated. But that rule is inapplicable when the basis of the state court's decision is that the particular remedy sought is one which the state law does not provide. P. 48.

6. The circuit court of appeals erred in not considering whether the case was an appropriate one for a certificate of probable cause under 28 U. S. C. § 466, and also in not issuing the certificate. P. 48.

7. The motion for leave to file a petition for habeas corpus in this Court is denied and the cause is remanded to the district court for further proceedings in conformity with the opinion of this Court. P. 48.

Certiorari granted; decisions below reversed.

Albert R. House, pro se.

PER CURIAM.

Petitioner is confined in the Florida state prison under sentence for burglary. He filed a petition for habeas corpus in the United States District Court for Southern Florida, which denied the petition without calling for a return and without a hearing. The district judge also denied a certificate of probable cause for an appeal to the circuit court of appeals under 28 U. S. C. § 466. Section 466 requires such a certificate for an appeal from a judgment denying a petition for habeas corpus when the petition complains of "detention . . . by virtue of process issued out of a State court." Since the statute authorizes either the district court or "a judge of the circuit court of appeals" to issue the certificate, the district judge, in his order, stated that petitioner might apply to a judge of the court of appeals for the certificate and for the allowance of his appeal.

Petitioner thereupon filed with the circuit court of appeals a timely application for an appeal in forma pauperis, addressed to the "Chief Justice" of that court. The appli-

cation was submitted to the court and by it denied on the grounds that petitioner had not presented the certificate of probable cause required by § 466, and that the district judge, on the contrary, had found that no probable cause existed. The court did not consider whether the case was one requiring it or a circuit judge to make the certificate of probable cause.

The case comes here on a motion for leave to file a petition for certiorari and a motion for leave to file a petition for habeas corpus. The questions for decision are: (1) whether this Court has the power to issue a writ of certiorari; (2) if it has, whether it may review the merits of the decision of the district court; and (3) whether the district court erred in denying the petition for habeas corpus on the grounds it assigned for its decision.

This Court cannot issue a writ of certiorari in the present case under § 240 (a) of the Judicial Code, 28 U. S. C. § 347 (a). *Ferguson* v. *District of Columbia,* 270 U. S. 633. Our authority under that section extends only to cases "in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia." Here the case was never "in" the court of appeals, for want of a certificate of probable cause.

But § 262 of the Judicial Code, 28 U. S. C. § 377, authorizes this Court "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of [its jurisdiction], and agreeable to the usages and principles of law." By virtue of that section we may grant a writ of certiorari to review the action of the court of appeals in declining to allow an appeal to it. *In re 620 Church St. Corp.,* 299 U. S. 24, 26, and cases cited; *Holiday* v. *Johnston,* 313 U. S. 342, 348, n. 2; *Wells* v. *United States,* 318 U. S. 257; *Steffler* v. *United States,* 319 U. S. 38. And not only does our review extend to a determination of whether the circuit court of appeals abused its discretion in refusing to allow the appeal, but if so, it extends

also to questions on the merits sought to be raised by the appeal. See *Holiday* v. *Johnston, supra; Steffler* v. *United States, supra.* We hold that the same principles are applicable here. Hence we are brought to the question whether the district court rightly denied the petition.

Petitioner alleges in his petition for habeas corpus and in supplemental papers filed in the district court, that having completed the service of two earlier sentences, he is now confined in the Florida penitentiary solely by virtue of a twenty-year sentence for burglary. The sentence was originally imposed in 1925 upon his plea of guilty to an information charging the offense. He alleges that he was represented by his own attorney at the trial of the two prior offenses; that his attorney then went to his office in another city, and was to return on September 30 or October 1, 1925; that petitioner was brought before the court to be sentenced for those offenses on September 11, 1925, when his attorney was absent; that without previous warning an information was handed up making the present charge of burglary. Petitioner alleges further that he asked for time to communicate and consult with his attorney, but that this request was denied; that he was forced to plead guilty within a few minutes after receiving a copy of the information; that at that time he was in his twenties, uneducated, and a stranger in the town. The petition also alleged that petitioner had "exhausted all legal remedies . . . to obtain his freedom" in the state courts. In supplemental papers filed with the district court, he made particular reference to the several proceedings in which he had sought unsuccessfully to raise his constitutional question in the state courts.

Since the petition for habeas corpus was denied without requiring the respondent to answer and without a hearing, we must assume that the petitioner's allegations are true. *Williams* v. *Kaiser,* 323 U. S. 471, 473–474. From them it appears that the trial court, without warning, and over

petitioner's protests, forced him to plead to the information without the aid and advice of his counsel, whose presence he requested. This was a denial of petitioner's constitutional right to a fair trial, with the aid and assistance of counsel whom he had retained. *Powell* v. *Alabama,* 287 U. S. 45; *Ex parte Hawk,* 321 U. S. 114, 115–116. We need not consider whether the state would have been required to appoint counsel for petitioner on the facts alleged in the petition. Compare *Betts* v. *Brady,* 316 U. S. 455, with *Williams* v. *Kaiser, supra,* and *Tomkins* v. *Missouri,* 323 U. S. 485. It is enough that petitioner had his own attorney and was not afforded a reasonable opportunity to consult with him. The fact that petitioner pleaded guilty after the denial of his request for time to consult with his counsel, does not deprive him of his constitutional right to counsel. *Williams* v. *Kaiser, supra; Tomkins* v. *Missouri, supra.*

In denying the petition, the district court did not consider whether this deprivation of constitutional right is remediable in a federal habeas corpus proceeding. Cf. *Ex parte Hawk, supra.* In *Waley* v. *Johnston,* 316 U. S. 101, 104–105, and cases cited, we pointed out that the writ is an appropriate remedy in the federal courts in "those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights," at least where "the facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal." Nor did the district court reach the question whether petitioner had exhausted his state remedies, which is prerequisite to relief by habeas corpus in the federal court. *Ex parte Hawk, supra,* 117. We find it unnecessary to pass on either question in the first instance, or to consider whether the district court should have called for an answer and set the case for a hearing. We express no opinion upon these

questions, since the district court rested its decision wholly on different grounds, which we alone consider here.

The district court was of the opinion that "petitioner has had a full, complete, and competent consideration and decision in the Supreme Court of Florida of all the various matters here sought again to be presented." The district court had reference to the decisions of the Florida Supreme Court referred to by petitioner in his papers filed with the district court. They were: *House* v. *State,* 127 Fla. 145, 172 So. 734, a writ of error from petitioner's conviction; [1] *House* v. *State,* 130 Fla. 400, 177 So. 705, an application for leave to file a coram nobis proceeding; and the denial by the Florida Supreme Court without opinion of three petitions for habeas corpus filed by petitioner. By each form of proceeding petitioner attempted to raise the questions he now raises in the present petition; but in each instance, so far as appears, the Florida Supreme Court, without considering the merits of petitioner's contentions and without affording a hearing on the merits, denied relief to petitioner, on the ground that the particular remedy sought was not the appropriate one under Florida law to raise those contentions. See *House* v. *State,* 127 Fla. 145, 148; *House* v. *State,* 130 Fla. 400, 406; cf. *Skipper* v. *Schumacher,* 124 Fla. 384, 401–404, 169 So. 58.

The district court also referred to a denial by this Court of a petition for certiorari, filed here after the denial by the Florida Supreme Court of one of the applications for habeas corpus. See *House* v. *Mayo,* 322 U. S. 710. The

[1] In a habeas corpus proceeding, the Florida Supreme Court decided that the judgment against petitioner, entered in 1927, was defective in that it did not contain an adjudication of guilt. *State ex rel. House* v. *Mayo,* 122 Fla. 23, 164 So. 673. The court remanded petitioner to the trial court for the imposition of a proper sentence. On February 22, 1936, the trial court resentenced petitioner to the same term originally imposed. The opinion referred to in the text, 127 Fla. 145, was on a writ of error from petitioner's conviction, taken after the resentence in 1936.

district court thought that this was an expression "of the opinion that no meritorious question is presented by the matters of which petitioner here complains." But as we have often said, a denial of certiorari by this Court imports no expression of opinion upon the merits of a case. See *Hamilton-Brown Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251, 258; *Seney* v. *Swift & Co.,* 260 U. S. 146, 151; *United States* v. *Carver,* 260 U. S. 482, 490; *Atlantic Coast Line R. Co.* v. *Powe,* 283 U. S. 401, 403–404. It is true that where a state court has considered and adjudicated the merits of a petitioner's contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily reexamine upon writ of habeas corpus the questions thus adjudicated. See *Ex parte Hawk, supra,* 118. But that rule is inapplicable where, as here, the basis of the state court decision is that the particular remedy sought is not one allowed by state law, for in such a case this Court lacks jurisdiction to review the decision. *Woolsey* v. *Best,* 299 U. S. 1, 2; *New York ex rel. Whitman* v. *Wilson,* 318 U. S. 688, 690; *Williams* v. *Kaiser, supra,* 473, 476–479.

The decision of the district court is thus not supported by the grounds assigned for it, and should have been reversed by the court of appeals. And the judges of that court erred in not considering whether the case was an appropriate one for a certificate of probable cause, as they were authorized to do by 28 U. S. C. § 466. We think that they also erred in not issuing the certificate.

The motions for leave to proceed in forma pauperis and for leave to file the petition for certiorari are granted. The petition for certiorari is granted, the order of the court of appeals and judgment of the district court are reversed and the cause is remanded to the district court for further proceedings in conformity to this opinion.

The motion for leave to file a petition for habeas corpus in this court is denied. *Ex parte Abernathy,* 320 U. S. 219; *Ex parte Hawk, supra.*

So ordered.

MR. JUSTICE ROBERTS is of opinion that the writ of certiorari should be denied.

MUSCHANY ET AL. *v.* UNITED STATES.

NO. 31. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.*

Argued October 18, 1944.—Decided February 5, 1945.

Option contracts for the purchase of land by the United States from the petitioners provided for payment by petitioners of a 5% commission to the Government's optioning agent and stipulated that if condemnation proceedings should be instituted the option price should constitute just compensation. In subsequent condemnation proceedings the Government disaffirmed the contracts. The district court upheld the contracts; the circuit court of appeals reversed. On review here, *held:*

1. The contracts contemplated that the agent's commission should be added to the vendors' net price. P. 56.

2. Issues of fraud, misrepresentation and duress are not before this Court, since the trial court made findings supported by substantial evidence against the Government on those issues; the findings were not reversed by the circuit court of appeals; and the issues were not argued here. P. 57.

3. Evidence that the Government's purchasing agent engaged in questionable conduct in securing options from other vendors was not relevant to the issue of the validity of the petitioners' contracts. P. 58.

---

*Together with No. 32, *Andrews et al.* v. *United States,* also on writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit.

4. Mere disparity between the original cost of the lands to the seller and the sale price to the Government does not render the contracts invalid. P. 58.

5. The provision of § 1 of the Act of July 2, 1940, prohibiting use of the "cost-plus-a-percentage-of-cost system of contracting," is applicable to purchases of lands. P. 60.

6. The contracts did not violate the provision of § 1 of the Act of July 2, 1940, forbidding use (under that section) of the "cost-plus-a-percentage-of-cost system of contracting." P. 61.

7. The contracts were not invalid as contrary to public policy. P. 64.

(a) The nature of the agent's interest and the contingent character of his fee are not such as to vitiate the contracts. P. 65.

(b) In the absence of a plain indication of public policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, this Court should not assume to declare Government contracts contrary to public policy. P. 66.

(c) The provisions of §§ 41, 112 and 113 of the Criminal Code and of the Act of March 3, 1917, do not manifest a public policy against the use of contracts of the type here involved. P. 67.

(d) Nor does the action of Congress on subsequent legislation indicate that the contracts are contrary to public policy. P. 68.

139 F. 2d 661, reversed.

CERTIORARI, 321 U. S. 760, to review the reversal of judgments in two condemnation proceedings which involved the validity of contracts of the United States for the purchase of lands.

Mr. William R. Gentry for petitioners in No. 31. *Mr. Samuel M. Watson*, with whom *Mr. Redick O'Bryan* was on the brief, for petitioners in No. 32.

Mr. Paul A. Freund, with whom *Solicitor General Fahy*, *Assistant Attorney General Littell* and *Mr. Norman MacDonald* were on the brief, for the United States.

MR. JUSTICE REED delivered the opinion of the Court.

Writs of certiorari were allowed to petitioners by this Court in these two cases to review the action of the Cir-

cuit Court of Appeals for the Eighth Circuit.[1] That appellate court reversed the action of the District Court of the Eastern District of Missouri which had upheld the validity of contracts between petitioners and the United States for the purchase of land for the Weldon Springs, Missouri, ordnance plant.[2] The contracts were pleaded by petitioners as defendants in eminent domain suits to establish the proper condemnation award.

The petitions for certiorari were granted, 321 U. S. 760, because of asserted conflict with *United States* v. *Grace Evangelical Church,* 132 F. 2d 460. Jurisdiction of this Court rests on § 240 of the Judicial Code.

Under the authority of the Second Supplemental National Defense Appropriation Act of 1941, 54 Stat. 872, the President approved the Weldon Springs project on October 17, 1940. Pursuant to this approval, the War Department claims that it proceeded to acquire the necessary land under the act of July 2, 1917, 40 Stat. 241, as restricted by the National Defense Act of July 2, 1940, 54 Stat. 712. The statutory authority of the War Department to proceed as it did is not questioned except on the issue of whether the purchase contracts entered into in acquiring the needed land violate the first section of the act of July 2, 1940, which provides:

"*Provided further,* That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War." 54 Stat. 713.

The duty to act for the War Department in obtaining the land lay in the office of the Quartermaster General and specifically in the Real Estate Branch of that office. In an effort to expedite the acquisition of the needed land,

[1] *United States* v. *Muschany,* 139 F. 2d 661.

[2] *United States* v. *Certain Land,* 46 F. Supp. 921.

the head of that branch, Colonel R. D. Valliant, contracted with R. Newton McDowell to act as the agent for the Government in securing options, on forms approved by the United States and attached to the employment contract, from the owners for submission to and acceptance by the United States. Mr. McDowell's compensation for acting as agent was a "five per cent (5%) commission . . . to be paid by the vendor." [3]

The employment of McDowell as agent to secure options for the United States was confirmed by the War Department to the Citizens Committee, an informal organization of those who owned property which was needed for the proposed project. McDowell went to work to

[3] The pertinent parts of the McDowell agency contract are:

"3. The Optioner shall diligently endeavor to acquire such options, not only within such time, but at the reasonable value of the land to be acquired, and subject at all time to the directions of the Government. The form of option contracted to be executed, and all terms, covenants and conditions thereof, shall be on the form approved by the Government, and a copy of which is to be attached hereto and made a part hereof. It is understood that the Government is to have the exclusive right to take up or reject any option to any parcel of land optioned by said Optioner hereunder, except as hereinafter provided.

"4. . . . The Optioner shall procure from the vendors in all cases where options are accepted on behalf of the United States, an order to the Kansas City Title and Insurance Company, to prepare certificates of title and deeds and it shall be his responsibility to see that said certificates of title and deeds are transmitted to the proper Government official for examination. The certificates of title to be furnished by The Kansas City Title and Insurance Company will be on forms similar to the one attached hereto and made a part hereof and funds to effect closing of purchases by the Title Company will be furnished by the Government to the Title Company in form of checks payable to each vendor in the amount of the purchase price set forth in the accepted options."

"8. For all services hereunder the compensation of the Optioner shall consist solely of the five per cent (5%) commission *in* each purchase, to be paid by the vendor, as more specifically set forth in the form of option attached hereto and made a part hereof."

carry out his contract. He held meetings at which he explained to the landowners the plan to secure options and the option form itself. From his explanation the landowners must have understood that their sale price would have deducted from it McDowell's commission and other expenses. This was also the understanding of the Government, as is shown not only by the documents themselves which were approved by the Government but also specifically by the testimony of Colonel Valliant. While McDowell was employed and his commission set by the Government, it was arranged that McDowell should collect his money from the vendor so that a single voucher would cover the purchase price and the expenses.

The approved form of option, which was a part of McDowell's contract with the Government, was used by McDowell in the particular transactions which are under examination in these proceedings. The option accords with the requirements of the McDowell contract and in addition provides for an agreed valuation at the option price in case of condemnation.[4] The offer was accepted by the Government.

---

[4] "Upon exercise of this option by the Government, the undersigned agrees to pay to R. Newton McDowell a commission of five per cent (5%) of the gross sales price as full payment for the services of said R. Newton McDowell in procuring such sale, preparing the deed or deeds for the conveyance of said land and arranging for settlement and closing of the transaction.

"Upon furnishing of final certificate of title as above showing title to be vested in the United States of America, the agreed purchase price above mentioned will be paid by the Government to the undersigned.

"If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings."

There were a large number of landowners in the required area. Options were obtained from 270, including the petitioners, and with one exception the options were accepted by the Government at the optioned price. Almost half of the contracts were closed by acceptance of deeds and payment of the price. Criticism of the prices and manner of purchase developed and the War Department repudiated the remaining contracts and turned to condemnation. The repudiation followed upon the conclusion among other things that the contracts violated the statutory provision against the cost-plus-a-percentage-of-cost system of contracting, page 52, *supra,* and were contrary to public policy because of the contingent interest of McDowell, which was antagonistic to the Government.

Petitioners' options were among those accepted only to be repudiated later, the Government then instituting condemnation proceedings to obtain petitioners' lands. In the two condemnation proceedings instituted against petitioners, judgments were entered upon a declaration of taking which vested titles in the United States. 46 Stat. 1421. Thereafter the petitioners here filed their answers in which they consented to the condemnation and demanded that the price which was fixed in the option, accepted by the Government, be adopted by the trial court as just compensation. In reply the Government set up its repudiation of the contracts on numerous grounds including fraud, such unfairness to the Government because of gross overvaluation that the contract should not be enforced in equity and good conscience as well as the disregard of the statutory proscription and public policy, which was referred to in the preceding paragraph as the ground for repudiation.

The two cases were decided in favor of the validity of the contracts and the compensation was fixed at the price

stated in the contract without revaluation. Consequently there was no occasion for the trial courts to determine whether valuation measured by just compensation would have varied from the agreed price. The Government makes no objection to this manner of determining compensation if the accepted options (contracts) are valid. Compare *Danforth* v. *United States,* 308 U. S. 271, 282. In one case the findings of fact and a comment appear as a memorandum opinion in *United States* v. *Certain Land,* 46 F. Supp. 921. In the other case, the decree was entered without separate findings of fact or opinion after adoption of the memorandum in the first case. We perceive nothing in the record to distinguish the cases here and shall dispose of them in a single opinion.[5]

The following determination appears in the opinion of the trial court for these cases, 46 F. Supp. at page 928:

"There is an absence of any showing that facts were concealed, that misrepresentations were made, or that duress was used. The price stated in the option contract is not unconscionable. There is no fraud, actual or constructive, in this case." [6]

As a result of this conclusion, the issues of corrupt action in these two instances are decided contrary to the Gov-

---

[5] A stipulation consolidates the record of the two cases before us and a third case, not here involved, *United States* v. *94.68 Acres of Land,* 45 F. Supp. 1016, and authorizes its use "as a part of the record in each of the two" cases here on review. While the cases have not been consolidated, one was set on our docket for hearing following the other, the United States has filed a single brief and petitioners a joint reply brief.

[6] In the *Muschany* case, the average valuation of eight Government witnesses, for land upon which the option was taken at $4,500, was $1,972. The average valuation of seven of respondent's witnesses was $4,546. 46 F. Supp. 925.

No finding of value appears for the *Andrews* case but the evidence shows an average valuation by Government witnesses of $3,114 and by the vendor and one of his witnesses of $12,000.

ernment's contention at the trial. No such contention was made by the Government here. The findings also stated, at page 925:

"There is no evidence that the option price of forty-five hundred dollars included the amount the defendants asked for the land plus McDowell's fee of 5% of sale price, the Kansas City Title Insurance Company's fee of 1½% for examining title, the stamp tax or the recording fee."

We treat the finding and determination as applicable to both cases.

On appeal the Circuit Court of Appeals found, contrary to the trial court's finding quoted above, that the commission and expenses were added to the vendors' net price. We agree with the appellate court. While no direct evidence appears as to the addition of the expenses to the vendors' net price, it seems clear from the agreement between the Government and McDowell, the option contract, the statements of McDowell at public meetings, the advice given by the citizens' committee and Colonel Valliant's testimony that it was generally understood that the option price was to be calculated in this way. Although Messrs. Muschany and Andrews were not asked specifically as to how they figured their gross prices stated in the options, both were present at a meeting at which McDowell explained his contract. Since the vendors agreed by the contract to pay all commissions and expenses, they must have added these expenses to what they expected to receive net for their land. Whether the addition was by precise arithmetical computation or by intuitive action is immaterial. The mere fact that no separate statement of the items appears in the evidence in these cases would not overturn the force of this general and definite understanding.

The Court of Appeals was of the opinion that the contracts with the landowners were cost-plus-a-percentage-

of-cost and therefore invalid. Any further examination by it of the Government's contention that the contract was contrary to public policy was unnecessary. Petitioners here attack the first conclusion. The Government defends the action of the appellate court on this ground and also because, independently of the cost-plus prohibition, the contracts between the landowners and the Government were contrary to public policy.

Prior to consideration of the two principal issues raised by the petitioners and respondent in their arguments before this Court, it seems necessary to refer to the allegations of fraud, unconscionable dealing, bad faith and misrepresentation on which respondent relied in the trial court as invalidating petitioners' contracts. As is indicated, *ante,* pp. 55–56, the trial court specifically found against the respondent on these issues. Nor did the Circuit Court of Appeals reverse the trial court's findings. Fraud, misrepresentation and duress were not argued before this Court. Since the trial court's findings on these issues are supported by substantial evidence, it is not for this Court to undertake an independent examination of these issues as such, or under the guise of determining "just compensation." [7] Only recently this

[7] Petitioners in No. 31 contracted to sell the government certain land for $4,500, which they had purchased in 1939 for $1,000. The record indicates that since purchasing this land in 1939, various improvements had been made. At the time of purchase there was no highway leading from the main road to the property; a thicket was cleared and a road constructed which passed over an adjoining piece of property. The cultivable area of land was increased by clearing timber thickets from part of the property. A local drainage district surfaced with rock the river frontage of the property, presumably to stop erosion. There is also evidence indicating that petitioners in No. 31 made a very good buy when they purchased this land for $1,000. It was in the hands of prior owners who had allowed $800 in back taxes to accumulate on the property. As to petitioners in No. 32, they sold land to the government in 1940 at a price of $12,000 for which they paid $2,250

Court restated the rules relating to the weight to be given fact determinations by inferior judicial or quasi-judicial bodies. *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 297–98; *Dobson* v. *Commissioner*, 320 U. S. 489, 321 U. S. 231. Therefore this case comes before this Court without any suggestion of fraud or unfairness such as would justify holding the contracts invalid. Since these matters are not before us, we need express no opinion on this aspect of the case.

The federal district court admitted evidence which indicated that McDowell engaged in questionable conduct in securing options from sellers other than the petitioners in the instant case. Such evidence is not relevant to the issue of the validity of petitioners' contracts. The enforceability of petitioners' contracts is not to be determined or colored by McDowell's alleged dealings with other parties; these other contracts are not involved in the instant case and circumstances which might urge a different result with respect to them must be carefully eliminated lest petitioners be penalized for illegal acts of others.

There remains to be considered the question whether mere disparity between the original cost of these lands to the seller and the sale price to the government makes the contracts illegal—whether a contract with the government is invalid on a mere showing that it was highly profitable but not unconscionable. Congress' adoption of statutes providing for the renegotiation of war contracts indicates that in certain instances the government seeks to recover abnormally high contract profits. That Congress could

---

in 1934. The lapse of a six-year period of time, the change in economic conditions from those of a severe agricultural depression to one of wartime agricultural prosperity furnishes some explanation for the disparity between the price paid for the land in 1934 and the price at which it was valued in 1940.

have extended the coverage of these provisions to these contracts is unquestioned; the fact that it did not do so cannot be disregarded by this Court.[8]

It goes without saying that in all dealings with the government, contractors and agents alike are under an obligation to deal strictly within the limits of the statutes and with absolute honesty. Criminal sanctions enforce this rule. Similarly, the doctrines of fraud, unconscionable dealing and unjust enrichment are to be strictly applied to insure fair and honest dealing between the government and its citizens. These remedies are available whenever and wherever transgressions take place. However, the right to determine the policies or methods by which property is to be acquired rests with Congress.

Applicability of cost-plus-a-percentage-of-cost clause. Prior to the present war emergency the Secretary of War had broad powers to acquire land for military purposes by purchase at prices deemed reasonable by him or by condemnation.[9] There were no restrictions as to the manner in which he should exercise this power to purchase, but his power to contract for construction work was sharply limited by statute.[10] These restrictions, if continued, would have seriously impeded the War Department's preparation for war. Thereupon Congress passed the act of July 2, 1940, which removed certain of these prior statutory restrictions. The act did, however, restrict the broad powers conferred therein by prohibiting the use of

---

[8] Legislation in regard to the renegotiation of war contracts is not applicable to either of the contracts involved in this case. See Revenue Act of 1942, ch. 619, 56 Stat. 798, Title VIII—Renegotiation of War Contracts—§ 801 (c) (6); Revenue Act of 1943, c. 63, 58 Stat. 21, 78th Cong., 2d Sess., Title VII, § 701 (b), § 403 (c) (6).

[9] Act of July 2, 1917, 40 Stat. 241; Act of April 11, 1918, 40 Stat. 518.

[10] R. S. § 1136; R. S. § 3734; 10 U. S. C. § 1336; the Walsh-Healey or Prevailing Minimum Wage Act, 49 Stat. 2036.

cost-plus-a-percentage-of-cost contracts; use of cost-plus-a-fixed-fee contracts was expressly approved by the act.[11] The question is raised as to whether the prohibition of cost-plus-a-percentage-of-cost contracts applies to the War Department's purchase of these lands with appropriations for the fiscal year 1941.

We are of the opinion that the first section of the act of July 2, 1940, see footnote 11, indicates that the purchase of land by the War Department is subject to the provisions of that section; therefore, the proviso in the section which

---

[11] 54 Stat. 712: "That (a) in order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto (including Government-owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; . . . *Provided*, That the limitations contained in sections 1136 and 3734 of the Revised Statutes, as amended, and any statutory limitation with respect to the cost of any individual project of construction, shall be suspended until and including June 30, 1942, with respect to any construction authorized by this Act: *Provided further*, That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled 'An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes', approved June 30, 1936 (49 Stat. 2036; U. S. C., Supp. V, title 41, secs. 35–45), shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section: *Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War."

prohibits use of the cost-plus-a-percentage-of-cost system of contracting must be taken to apply to purchases of land. The act of July 2, 1917, 40 Stat. 241, 518, authorizing the purchase of land, is limited by the quoted section from 54 Stat. 712.

Our next inquiry is as to whether the contract with the vendors, note 4, *supra,* violates this prohibition against cost-plus-a-percentage-of-cost contracts. Evidently the proviso was inserted to avoid the abuses which were prevalent before and during the first World War from the Government's guarantee of cost plus a profit to contractors.[12]

The purpose of Congress was to protect the Government against the sort of exploitation so easily accomplished under cost-plus-a-percentage-of-cost contracts under which the Government contracts and is bound to pay costs, undetermined at the time the contract is made and to be incurred in the future, plus a commission based on a percentage of these future costs. The evil of such contracts is that the profit of the other party to the contract increases in proportion to that other party's costs expended in the performance. The danger guarded against by the Congressional prohibition was the incentive

---

[12] 86 Cong. Rec. 7839, 7841, 7843. The proviso as adopted by the Senate read: "That what is known as the cost-plus system of contracting shall not be used under this section." We do not know the precise reason for the change from this language to the present, as it took place in conference. The statement from the managers on the part of the House reads:

"[The conference bill] substitutes for the limitation upon the use of the cost-plus system of contracting a provision which bars the use of the cost-plus-a-percentage-of-cost system but allows the Secretary of War, when he deems it necessary, to use the cost-plus-a-fixed-fee form of contract." H. Rep. No. 2578, 76th Cong., 3d Sess., p. 6.

It might be inferred that the change was made to accord with the clause allowing cost-plus-a-fixed-fee. Whatever the reason for the change the final form is less restrictive on the War Department than the "cost-plus" system which was first forbidden.

to a government contractor who already had a binding contract with the Government for payment of undetermined future costs to pay liberally for reimbursable items because higher costs meant a higher fee to him, his profit being determined by a percentage of cost. Congress certainly did not intend to prevent a party who was merely submitting a bid to the Government from computing the amount of his bid by taking into consideration his costs and then adding a certain percentage of the cost as his profit, the resulting sum bid being fixed in amount and not subject to change. Congress, by changing the original prohibition in the act from one outlawing any "cost-plus" system of contracting so as to expressly authorize use of a "cost-plus-a-fixed-fee" form of contract, indicated it did not care how the contractor computed his fee or profit so long as the fee or profit was finally and conclusively fixed in amount at the time when the Government became bound to pay it by its acceptance of the bid. By eliminating the risk of loss and permitting the guarantee of a satisfactory but fixed fee, Congress sought prompt performance and lower over-all expenditures for contracts in a rising labor and commodity market than would be offered by contractors who were compelled themselves to assume the risk of these unpredictable costs.

The vendors' contract, when read with the McDowell contract, shows that the Government arranged for a fee to its agent based on a percentage of the purchase price. This does not fall within the language of cost-plus-a-percentage-of-cost. The offer was to sell to the Government at a fixed, definite price. The Government when it accepted this offer agreed to pay this set amount and no more. The contract contains no provision allowing adjustment of price based on possible future indeterminate expenses. The vice of cost-plus contracts is not inherent in the vendors' contract. That vice basically is the incen-

tive to the contractor to inflate his future costs to increase his profits since the Government is already bound to pay any future undetermined "costs." The amounts to be paid under petitioners' contracts are not subject to change by future action of the vendor. The Government knew the total cost when it became bound on the contract. If we read the vendors' contract as affected by the McDowell contract, no cost-plus contract emerges. The United States knew its agent's fee to the penny when it accepted the option. It was five per cent of the gross sale price. Notes 3 and 4 *supra.* That is to say, the price to be paid for the land was subject to the approval of the Government. The War Department could accept or reject the offers submitted by McDowell. When the War Department approved each offer, it fixed the precise fee which McDowell was to receive. The arrangement may have been improvident from the point of view of the Government. But that question goes to the quality of management by its procurement officers. The fact that the procurement system is improvident obviously does not make it illegal. Illegality does not emerge from inadequate supervision of prices by the Real Estate Branch. Such official failures are not chargeable to a third party dealing with the Government in good faith. It may be unwise for the Government to pay its purchasing agent a commission which is figured on cost of purchases to the Government but there is no statutory prohibition. Since the United States is the purchaser of the land at the option price, no one can receive cost plus anything. Neither the vendors nor McDowell agrees to buy from a third party and sell to the Government at an advance. The vendors' contract has neither the form nor the vice of a cost-plus contract.[13]

[13] But see *United States* v. *Two Acres of Land,* 144 F. 2d 207.

Public policy. The Government advances a further and distinct argument for affirming the judgment of the Circuit Court of Appeals that the vendors' contract is invalid. This is that the contracts of Muschany and Andrews are invalid as against public policy because of the interest of McDowell which is antagonistic to the United States and because of the contingent character of the McDowell fee which, it is asserted, is paid by the vendors for the procurement of the contract of sale. We think that it is inadmissible to view the McDowell contract and the vendors' contracts as unrelated. On account of the vendors' thorough understanding of McDowell's agency, as discussed in the preceding division of this opinion, their contracts must be read as though the McDowell contract was written into them to show his agency for the Government.

When this is done, it is clear that the objection to the vendors' paying a fee contingent on the securing of a Government contract disappears. While in form the McDowell fee and other expenses are paid by the vendors, it was so handled, as is shown by the finding of the trial court, that "the several transactions [might be] closed with the issuance of one, instead of several vouchers, for each tract." 46 F. Supp. at 925–26. The evidence indicates that in reality McDowell was the Government's agent and that his commission, although nominally paid by the vendor, amounted to a payment by the Government to him as its agent. Contingent fee contracts to secure Government business for the employer of the recipient have been held invalid because of their tendency to induce improper solicitation of public officers and the exercise of political pressure. *Steele* v. *Drummond,* 275 U. S. 199, 206.[14] For

[14] Cf. *Providence Tool Co.* v. *Norris,* 2 Wall. 45; *Trist* v. *Child,* 21 Wall. 441, 449–52; *Hazelton* v. *Sheckells,* 202 U. S. 71, 78, 79; *Crocker* v. *United States,* 240 U. S. 74, 78–81.

the most part these cases have involved situations where a would-be contractor has hired a third person on a contingent fee basis to procure for the former a contract with the Government. But neither the language of these cases nor the policy behind them applies to the situation involved in this case, where the Government, not the would-be contractor, hires an agent for the purpose of soliciting offers from owners of needed land, the agent's compensation to be contingent on submission of offers acceptable to the Government. We have here a contingent fee contract of an entirely different type. It is the Government here who pays the contingent fee and pays it not for securing a contract from the Government but a contract for the Government. The agent acts under the highest legal and moral responsibilities to his principal, the Government. There is no place for financial temptation or political pressure to influence public officials. Tendentious fraud does not exist in such a contingent contract. It may be most desirable to pay agents only in the event that they are successful in accomplishing their purpose. We are dealing here with public policy. Congress may think that it is wise to outlaw contingent contracts such as this but until it does we cannot say that they are contrary to public policy, any more than we could say cost-plus contracts are contrary to public policy in the absence of legislation to that effect.

In reaching the foregoing conclusion on the contingent fee aspect of the problem, we laid aside consideration, from the standpoint of public policy, of the fact that the contingent fee is to be measured by a certain percentage of the purchase price. We now consider that. The record gives no satisfactory explanation for the apparently ingenuous action of the Real Estate Branch of the War Department in paying a commission on the purchase price to its soliciting agent. Certainly the officers realized the possibility of and temptation to price inflation.

Necessity for speedy acquisition could not have been their motive in view of the possibilities of a declaration of taking. 46 Stat. 1421. It well may be that experience with condemnation awards and the cost of acquisition by salaried government servants appeared to foreshadow more expense than the plan adopted.[15]

It may have been the Department's conclusion that its officers could regulate the offer of prices above the market by a refusal to accept the options. Colonel Valliant visited the area to gather information during the purchases. Our inquiry at this point, since corruption is not shown, is as to whether the likelihood of disadvantage to the Government is so menacing as to prohibit such contracts regardless of the effect in a particular case.

No other case has come to our attention which has declared that a commission or purchase contract is invalid on the ground of public policy. Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. *Vidal* v. *Philadelphia,* 2 How. 127, 197–98. As the term "public policy" is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy. *Twin City Pipe Line Co.* v. *Harding Glass Co.,* 283 U. S. 353; *Frost & Co.* v. *Coeur D'Alene Mines Corp.,* 312 U. S. 38. It is a matter of public importance that good faith contracts of the United States should not be lightly invalidated. Only dominant public policy would justify such action. In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral

[15] Testimony of Under Secretary Patterson, April 29, 1941, before the subcommittee of the Committee on Appropriations, House of Representatives, on the Military Establishment Appropriation Bill for 1942, 77th Cong., 1st Sess., p. 106.

standards, this Court should not assume to declare contracts of the War Department contrary to public policy.[16] The courts must be content to await legislative action.

The Government calls attention to Criminal Code, §§ 41, 112 and 113, and the act of March 3, 1917, 39 Stat. 1106,[17] as indicative of a declared public policy against an agent of the United States being permitted to have a pecuniary interest in a contract when that interest would be enhanced in value at an expense to the United States. But these sections relate to a Government official's representation of the Government in matters involving a private corporation or firm in which the Government agent has an interest, or a Government official's receipt of consideration for procuring a contract from the Government for any person or for any service rendered in relation to any such contract, or receipt of any salary or supplement to salary in connection with his government services from any source other than the Government of the United States. Thus these sections manifest a legislative intention to bar a government agent from receiving pay from a third party for assisting that third party to secure a government contract.

Here the pay was for services rendered to the Government. In form the vendors agreed to pay the compensation but actually the United States was the payor. As stated above it was merely a convenient way in which the Government's promise to pay its agent could be met.

---

[16] Cf. *Chicago, St. L. & N. O. R. Co.* v. *Pullman Car Co.*, 139 U. S. 79, 89; *Baltimore & Ohio S. W. R. Co.* v. *Voigt*, 176 U. S. 498, 513–520. As examples of contracts which have been held invalid as acts or contracts against public policy, see *Sprott* v. *United States*, 20 Wall. 459; *McMullen* v. *Hoffman*, 174 U. S. 639; *Burt* v. *Union Central Life Ins. Co.*, 187 U. S. 362.

[17] See also Executive Order 9001, Title I, § 1, Title II, §§ 5, 6, 6 Fed. Reg. 6787; 50 U. S. C. § 611, n. (appendix).

It is quite clear that these prohibitions against receipt of compensation from third parties for securing contracts were directed at the crime of bribery in its open or subtle form. We do not see that these statutes manifest a public policy against the use of a commission system for public purchases. The change after experience, from the commission system of land purchases to the solicitation of options by salaried employees of the Government or fixed fee contractors, indicates administrative judgment of desirability, not administrative condemnation of the legality of the method.[18]

Since it is Congressional enactments which determine public policy, any doubt which might exist as to the legality of such an arrangement as was adopted by the War Department for this and a few other projects is dissipated by the action of Congress on the Military Establishment Appropriation Bill for 1942. Apparently a limitation of commissions on land purchases was omitted from the bill in accordance with suggestions of the War Department.[19] The commission type of contract was recognized as appropriate in certain circumstances by the Naval Appropriation Act of 1942, 55 Stat. 151, 177.[20] A similar provision appears in the Military Appropriation Act of 1944, § 12, 57 Stat. 347, 369.[21]

---

[18] See the testimony of Under Secretary Patterson, Hearings before the subcommittee of the Committee on Appropriations, House of Representatives, on the Military Establishment Appropriation Bill for 1942, 77th Cong., 1st Sess., p. 106.

[19] Hearings, *supra*, n. 18, p. 106; Hearings before the subcommittee of the Committee on Appropriations, United States Senate, 77th Cong., 1st Sess., on H. R. 4965, pp. 47–48.

[20] 55 Stat. 177: "SEC. 7. No part of any money appropriated herein or included under any contract authority herein granted shall be expended for the payment of any commission on any land purchase contract in excess of 2 per centum of the purchase price."

[21] See also Executive Order No. 9001, Title I, 6 Fed. Reg. 6787, 50 U. S. C. § 611, n. (appendix).

We have considered the Government's contention that the two per cent limitation means that not more than two per cent of the estimated price may be paid as a fixed fee.[22] There is nothing that indicates to us that the provision is not intended to apply to the contracts for commission on the purchase price of land. This was the system which the witnesses considered dangerous.

Reversed.

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

MR. JUSTICE BLACK, dissenting.

The Constitution provides that the government shall not take private property for a public purpose without payment of just compensation. The problem here is whether the arrangements now before us give rise to enforcible agreements or whether the rights of the parties are to be governed by the constitutional requirement for "just compensation" for the land needed by the government. More specifically, the question is whether in the situation revealed by this record the law demands that certain property holders shall receive in payment for their properties amounts which, even in the absence of a finding of fraud, may well be far in excess of what is "just compensation," thereby imposing an unjust burden on the public. The Court says "Yes"; I say "No."

The agreements were executed under the following circumstances. A War Department representative agreed that one McDowell should undertake to secure options to buy 18,000 acres of land at Weldon Springs, Missouri,

[22] See Hearings before the subcommittee of the Committee on Appropriations, House of Representatives, 77th Cong., 1st Sess., on the Navy Department Appropriation Bill for 1942, pp. 502–504, 505–509; Hearings before the subcommittee of the Committee on Appropriations, U. S. Senate, 77th Cong., 1st Sess., on the Military Establishment Appropriation Bill for 1942, pp. 46–50, 53.

where the government was about to build a war munitions plant. Under the original agreement, McDowell was to receive from the government a commission of 5% of the gross sale price of each parcel of land. Later, McDowell, presumably with the acquiescence of the contracting officer, adopted a plan under which the landowners executed options for a price which included the 5% commission. Thus, the less the cost of the lands the less McDowell would make; the greater the cost, the greater his commission.

The ensuing results were, if not inevitable, at least not surprising. With phenomenal speed McDowell obtained 270 separate options and promptly recommended their purchase to the Department at the stipulated prices. On what appears to have been no more than an inescapably formal examination of these recommendations,[1] 129 options were accepted and contracts of purchase were executed at an expense of approximately a million dollars to the government. After an investigation of the whole affair by the Department of Justice the remaining 149 contracts were repudiated by the government, condemnation pro-

[1] At the time of these purchases, the Real Estate Section of the Quartermaster Corps was in charge of land procurement. Because of intensive National Defense activity, this section had under way purchase of lands for one hundred and eight separate projects, involving between twelve and fifteen thousand individual parcels, with an estimated value of about fifty million dollars. The Colonel in charge of the section had at his disposal a staff of three commissioned officers and about forty-one civilian employees. This Army office, in charge of nation-wide land purchases, was therefore compelled to rely chiefly upon McDowell's valuations.

The Muschany transaction is a typical one. November 29, 1940, McDowell sent the option agreement to the Washington purchasing office recommending its "acceptance as a fair value to the United States." Four days later, December 3, without separate appraisal of any kind, the Washington contracting officer marked it "accepted." This was the only contract executed with the landowner by the government, if such an action can be called a contract at all.

ceedings were filed, and immediate possession of the land was awarded the government. See 46 Stat. 1421. In the condemnation proceedings the government sought, as to the uncompleted McDowell transactions, to pay no more than just compensation for the properties.

This Court now holds that the government is irrevocably bound by the contracting officer's "acceptance" of the McDowell options. And while the immediate judgment directly affects only the two pieces of property here involved, the principles announced uphold the validity of all the McDowell-procured agreements, even though the agreed cost stipulated in those agreements might in condemnation proceedings be judicially determined to exceed just compensation. The District Court in these two cases did not determine what would be just compensation. It found no more than that the option agreed price of these particular lands was not "unreasonably excessive." The District Court did not find that the agreed prices represent a fair market value; the opinion of the Circuit Court of Appeals makes it clear beyond doubt that it was impossible to make such a finding. The record shows that the government will now be required to pay the petitioners in No. 31 a value, as of 1940, of $4,500.00, or $165.00 per acre, for land which petitioners bought in 1939 for $1,000.00, or $33.33 per acre. The other petitioners are to be the beneficiaries of a similar "contract" bounty. For lands and improvements which cost them $2,250.00 in 1934, or about $24.00 per acre, the government must pay $12,000.00, or $127.00 per acre.[2]

[2] In referring to the District Court's finding that $12,000.00 was "not an unreasonably excessive valuation of the land in question," the Circuit Court of Appeals made this comment:

"The latter finding is perhaps a bit strained, since the substance of the evidence on behalf of the landowners was simply that the land had a farm value of only $50 an acre (a total of $4,725), but, as the landowners' only value-witness put it, 'I think someone from

The details of the negotiations between McDowell and the landowners are set out in the opinion of the Circuit Court of Appeals and need not be repeated at length here. Reference is there made to successive recommendations by McDowell on the same parcel of land for purchase at $4,500.00, $10,000.00 and $4,900.00. In another instance a landowner refused the request of one of McDowell's representatives to up the price of his property $50.00 per acre. Still other illustrative items included in agreed prices, such as those which the Court today holds invulnerable, are "one year's loss in salary of each partner" and $6,500.00 for "loss of business."

Nothing but the clearest and most unequivocal Congressional enactment could in my judgment bind the government to such arrangements. There is no such enactment. And even if Congress had not itself condemned such contracts as these, conceivably, they are within the ban of principles previously enunciated by this Court.[3] For the terms of McDowell's contract, which was an integral part of the purchasing system here involved, were such that the harder he worked to reduce the price of the land he bought, the less he made. He could not possibly serve most profitably his own interest and that of the government at the same time. Only by acting to the financial disadvantage of the government could he act for the financial advantage of himself.

It was to protect the public from the dangerous tendency of the excesses of just such contracts that Congress

---

St. Louis that wants a site would pay as high as $125 an acre [a total of $11,800] for that ground.'"

[3] *Marsh* v. *Whitmore,* 21 Wall. 178; *Michoud* v. *Girod,* 4 How. 503; *Providence Tool Co.* v. *Norris,* 2 Wall. 45; *Hume* v. *United States,* 132 U. S. 406; *United States* v. *Carter,* 217 U. S. 286; *Crocker* v. *United States,* 240 U. S. 74; see also the opinion of District Judge Collet in 45 F. Supp. 1016.

has repeatedly prohibited [4] the War Department from using "the cost-plus-a-percentage-of-cost system of contracting." Congress had in 1936 received a report from a special Senate Committee investigating the munitions industry pointing out the evils of that contracting system. That report said: "It is generally admitted that exorbitant profits were made under cost plus a percentage of cost contracts in the World War. . . . The profiteering under cost plus a percentage of cost contracts in the last war was so flagrant that Congress has expressly disapproved of their use for Government procurement." [5]

The same Senator who made this report, initiated a Senate discussion which led to the immediate adoption of the prohibition of "cost-plus-a-percentage-of-cost" contracting in the Act here involved. He excoriated the cost-plus-a-percentage system as a "vicious" one.[6] It was this

[4] "As a result of experiences with cost-plus-a-percentage-of-cost contracts during the first World War and the early part of this war, use of this type of contract is now almost without exception prohibited by statute." C. C. H., War Law Service, Government Contracts, Par. 1015. See Act of June 28, 1940, § 2 (a), 54 Stat. 676, 677; Act of May 2, 1941, § 2 (c), 55 Stat. 148; Act of December 18, 1941, Title II, § 201, 55 Stat. 839. See also Act of June 30, 1941, § 9, 55 Stat. 393, and Act of June 5, 1942, § 13, 56 Stat. 317. The regulations issued by the President under the First War Powers Act of 1941, applicable to the War Department, the Navy Department, and the United States Maritime Commission, likewise expressly prohibit cost-plus-a-percentage-of-cost contracting. Executive Order No. 9001, December 27, 1941, as amended, Title II, § 6.

[5] Senate Report No. 944, 74th Cong., 2d Sess., Special Committee Investigating the Munitions Industry, Part 4, at page 22.

[6] "So there is nothing to hinder the present Secretary of War, or any other Secretary of War, if he desires to do so, from going back to the old, vicious cost-plus system which we had during the World War, when, in one instance which fell under my observation—not in the War Department, but in the Navy Department—in the construction of naval vessels on a cost-plus 10-percent basis, in making up the cost base on which the people of the United States were re-

"system of contracting" which Congress forbade, a system which from its very nature keeps constantly dangling before the eyes of the government's contractual agent hope of a progressively increasing reward for himself for every added dollar of cost he can get the government to pay. This system of contracting was not deemed "vicious" for lack of "certainty" as to costs, but because of the "certainty" of its inexorable tendency to elevate those costs to heights which would impose unfair burdens on the public treasury.

That this was the moving purpose in prohibiting such a contract system is further shown by the fact that Congress at the same time permitted a "cost-plus-a-fixed-fee form of contract." Certainly Congress could not thereby have intended to reduce the scope of its sweeping condemnation of "cost-plus-a-percentage-of-cost system." On the contrary, permission to use the fixed fee contract but underlines the Congressional intent absolutely to prohibit any War Department agent from using a system of contracting which would impose upon the government inflated costs by providing an incentive to pad costs or to take too rosy a view of value. Whatever other disadvantages the cost-plus-a-fixed-fee system may have, no

---

quired not only to pay cost but to pay 10 percent additional, one great shipbuilding company in this country added in the cost of wines, liquors, and cigars used on the trial trip, and the cost of the prize given to the lady who christened the ship. They even added in the cost of representatives maintained by the company in China and in Japan for the purpose of promoting other business of the company on the theory that if they secured any outside business it would reduce the overhead chargeable to the Government." Cong. Record, Vol. 86, Part 7, p. 7839, 76th Cong., 3d Sess. Another Senator, in the same discussion, said with reference to this system of contracting, "A man will say, 'I have a return of 10 percent of the contract price, and I will get what I can under it, pile up expenses, and so forth.'" Cong. Record, Vol. 86, Part 7, p. 7841, 76th Cong., 3d Sess.

incentive to raise the cost arises from the fixed fee. But when a percentage fee or compensation is provided for, which diminishes or increases in proportion to costs, there is ample motive or at least tendency to increase such costs.[7]

That incentive looms large in the contracts here involved.[8] It matters not into what form the arrangement is cast. It is conceded that had this contract required McDowell himself to buy and take title to the lands, the arrangement with him would have been within the Congressional prohibition as a "cost-plus-a-percentage-of-cost" contract. But the fact that he did not take title himself did not lessen the tendency of the contractual arrangement to invite him to increase his reward by inducing the government to pay a high price for the land. The difference created by this slight deviation in the structure of the arrangements did not alter their effect. The "vicious" tendency at which Congress hit was still present. The government was still obligated to pay the

[7] "There are two general classes of 'cost-plus' contracts. One class is generally known as 'cost-plus-a-percentage' contracts and the other as 'cost-plus-a-fixed-fee' contracts. They are materially different. Under those in the first class the fee or profit of the contractor is made dependent on the cost of the work with the idea that the amount of the fee will automatically adjust itself to the variations in the cost of the work resulting from changing conditions and requirements during the life of the job. It is self-evident that under this class of contract it is to the financial interest of the contractor to have the cost of work run high. Under the second class, the fee is not affected by variations in costs, but only by changes in the scope of the work. From this it follows that it is to the advantage of the contractor to accomplish the work at as low costs as possible." The Law of Government Contracts, Graske (1941) pp. 122–3.

[8] The Circuit Court of Appeals in discussing the general tendency of this system of contracting to increase costs to the government said: "The probability of that general result in the Weldon Springs transactions is, as we have indicated, quite cogently suggested (and indeed demonstrated) by the record."

landowner's price—the land's cost plus a percentage to McDowell of that cost. Furthermore, the effect, if any, of McDowell's not taking title himself, was to aggravate the government's peril, for McDowell did not take any risks of purchase. To hold that these arrangements are legal is to leave unchecked a system of government purchasing which Congress has declared to be incompatible with the public interest.

It is said that statutes providing for the renegotiation of war contracts indicate that in "certain instances the government seeks to recover abnormally high contract profits." These efforts of Congress to safeguard the public interest against unjust exactions provide no excuse for the narrow construction the Court today gives the "cost-plus-a-percentage-of-cost" prohibition. They but emphasize the intention of Congress to devise many safeguards against unfair procurement prices which might unjustly enrich some few people at the expense of the many. I should think that if these statutes could be given any effect, under the circumstances of these cases, they would but provide an added reason why the government should not be required to pay these landowners more than "just compensation." Certainly, in the light of the legislative policy articulated in the renegotiation statutes, I can see no reason why this Court should work overtime to shrink the scope of the cost-plus-a-percentage-of-cost statutory prohibition.

The Court's judgment in effect upholds McDowell's percentage agreement with the government and the option agreements with the landowners made pursuant thereto. It requires full payment not only of the stipulated land prices but of McDowell's commissions as well. This is so because the $4,500.00 and $12,000.00 included the cost of the land plus the percentage of that cost which was McDowell's commission. Thus, affirmance of the District Court judgments necessarily must imply that

McDowell's commission agreements with the government are valid.

The landowners' rights are indissolubly intertwined with McDowell's.[9] Both must stand or fall together on the validity of McDowell's and the landowners' arrangements with the government. And under those arrangements the government was to pay cost of the lands for which McDowell negotiated plus five percent of that cost. This was a "cost-plus-a-percentage of cost system of contracting." Such an integrated scheme of illegal arrangements should not be permitted to support these judgments. The government should be required to pay no more than just compensation for the lands it has condemned.[10]

---

[9] The difficulty of an attempt to segregate McDowell's commissions from the land costs is indicated by the manner in which the Circuit Court of Appeals found he computed his commissions. It said that the option agreements included "commissions upon his own commissions, commissions upon the commissions of the Kansas City Title Insurance Company for closing the transactions, and commissions upon the amounts included in the contracts for revenue stamps and recording fees. . . . What particular elements McDowell had fused into the real estate values recommended by him in any specific transaction were apparently not known to the Quartermaster Department at the time the contracts were approved." The Muschanys' option agreement, in Case No. 31, which the government contracting officer marked "accepted," did not show the amount of McDowell's commission; it showed only that the purchase price was $4,500.00. There is neither finding nor evidence from which it can be determined what part of this purchase price, if any, represents McDowell's commission. In fact, petitioners strangely enough contend that there is no evidence to show that McDowell is to get any part of the $4,500.00 as a commission. The same situation exists in No. 32.

[10] Were this contract not invalid as violating the Congressional prohibition against the cost-plus-a-percentage-of-cost system, there would still remain the question as to whether the government was compelled to pay more than "just compensation" in these condemnation proceedings. We have never decided that there may not be circumstances short of those necessary to hold private contracts illegal, under which

Finally, I cannot agree to the Court's statement that this case comes to us "without any suggestion of fraud or unfairness such as would justify holding the contract invalid." The Court's opinion states that those who deal with the government must do so "with absolute honesty," and that "the doctrines of fraud, unconscionable dealing and unjust enrichment are to be strictly applied to insure fair and honest dealing between the government and its citizens." In my judgment, we are squarely confronted with the issues of fraud, unconscionable dealing, and unjust enrichment. I think we should remand the case to the Circuit Court so that it can pass upon those questions.

We are not faced here with a situation in which findings, upon "ample evidence," have been clearly made by a master and unequivocally and jointly affirmed by both a District Court and Circuit Court of Appeals—as in *United States* v. *Bethlehem Steel Co.*, 315 U. S. 289, 297–9.[11] The District Court and the Circuit Court of Appeals did not,

---

the government may, in condemnation proceedings, obtain judicial ascertainment of just compensation, despite a single contracting officer's agreement to pay more, and despite his attempted waiver of the Constitutional provision that the government need only pay "just compensation" for land it takes for public use. *Danforth* v. *United States*, 308 U. S. 271, actually decided quite different questions under a different statute, different pleadings, and quite different circumstances. In condemnation proceedings, Danforth filed a counterclaim seeking judgment against the government for a price stipulated in an agreement. The government attacked the counterclaim and it was stricken in District Court on two grounds only: (1) the government had not consented to the suit; (2) the District Court was without jurisdiction because more than $10,000 was involved.

[11] Even if the Circuit Court of Appeals and the District Court had both passed upon these questions,—and I do not think they did—it does not necessarily follow that we would not review them. See *City Bank Farmers Trust Co.* v. *McGowan*, 323 U. S. 594, 600; cf. *City Bank Farmers Trust Co.* v. *McGowan*, 142 F. 2d 599, 601, and 43 F. Supp. 790, 795–6.

in the instant case, both concurrently find an absence of fraud, unconscionableness and unjust enrichment.

The District Court did state in its opinion that there was "no fraud," and that the option prices were "not unconscionable." This finding of the absence of fraud was, however, unsupported by the primary findings of fact made by it, and that court's conclusion rested upon legal assumptions which I think contrary to many decisions of this Court. The same is true of the finding of unconscionability. As to "unjust enrichment," the District Court made no finding at all, and I believe that its primary findings of fact are inconsistent with any holding that these landholders would not be "unjustly enriched" if the government is forced to pay the option prices.

The Circuit Court of Appeals found it unnecessary to pass upon either of these questions. It refused to indulge in what it termed a "judicial paring" of the cost-plus-a-percentage-of-cost statutory prohibition, and held the contracts void under that statute.

The District Court considered that the government's argument required it affirmatively to find the following three facts in order to hold that there was fraud: "(1) The agent's commission was added to the purchase price, (2) the price did not represent the reasonable market value of the land, and (3) McDowell misrepresented the value of the land to Col. Valliant."

As to the latter point, the District Court, in its opinion, stated that there was no misrepresentation by McDowell. The Circuit Court of Appeals did not affirm this finding. It did say that the record and findings of the trial court left no question "as to the actual good faith of the Quartermaster Department in the matter." But after narrating certain activities of McDowell, it observed that "These inconsistencies and disguisings can hardly be commended as desirable methods of handling expenditures of public funds. The excuse made by the Quartermaster Depart-

ment on the trial was its desire to get the job done as speedily as possible and 'because in one single voucher we could provide for the payment of a number of different services.' The result reached in the opinion requires no further pursuit here of these particular matters." The Circuit Court's opinion, taken in its entirety, shows beyond doubt that it did not approve the District Court's findings as to McDowell's dealings.

The District Court further based its conclusion that there was no fraud on a finding that the agent's commission was not added to the purchase price. This finding the Circuit Court of Appeals expressly rejected. This Court has done likewise.

The third and last element which the District Court had posed concerning the presence of fraud was whether "the price did not represent the reasonable market value of the land." Neither the District Court nor the Circuit Court of Appeals found that the price did represent such a value. If such a holding has been made at all, it is by this Court, and I cannot agree to it. The District Court escaped the necessity of making a finding as to market value by holding that market value was immaterial since "The circumstances of this case show that other considerations were in the minds of the parties when the option was taken. The necessity of national defense had flashed upon the country. The imminence of the peril was impressive. The land must be acquired at once, without the delay incident to condemnation. . . . The land was sought, but more was demanded; immediate possession was essential to its undertaking."

I can accept neither the court's conclusion, nor its reasoning. In the first place, this Court has long held "market value" to be the proper standard of value in eminent domain proceedings, and in considering market value it has consistently been held that landowners are not entitled

to increased amounts because the government announces that it needs property in a vicinity. *United States* v. *Miller*, 317 U. S. 369, 374, 376–377. Secondly, it is novel doctrine that when national peril requires the government to acquire property, the owners are as a matter of law entitled to get more than market value because more is "demanded." Furthermore, the court's assumption that the government was without power to get immediate possession of the land by condemnation proceedings was wholly erroneous. Declaration of Taking Act, 46 Stat. 1421.

Having thus put aside consideration of the fair or market value of the property, the court limited itself to finding that the option prices did not represent an "unreasonably excessive value." What line marks the distinction between reasonable excess and unreasonable excess does not appear from the District Court's opinion nor from this Court's opinion today. An examination of the particular facts in No. 31 suggests the difficulty of ever ascertaining what would be an unreasonably excessive value. In 1939, $800 back taxes had accumulated on 33 acres of land. The Muschanys bought it, paying the $800 taxes, $100 to the owners, and approximately $100 was allegedly expended for attorney's fee, abstract of title, etc. In 1940, the "necessity of national defense had flashed upon the country." The finding of the District Court, which was not approved by the Circuit Court of Appeals, is apparently approved by this Court today to the effect that 350% profit on this purchase of land is not "unreasonably excessive," even though the purchaser has held it for only one year. The only subsidiary finding of fact which the District Court made to support this phenomenal rise in value was that in 1937 a road had been built which shortened the distance to St. Louis by about 15 miles. But this road had been built two years before the Muschanys paid

off the back taxes and took the property into their possession. The Court today, however, refers to certain other events which had occurred, and which are evidently relied upon as justifying this increase in value from $1,000 to $4,500 in the short span of a single year. It is clear that there was one reason, and one reason only, for the $4,500 price. That reason was that the government needed the land to help win the war and McDowell had a cost-plus-a-percentage-of-cost contract.

The Circuit Court of Appeals in discussing this question of value said, "There is, however, no occasion for us here to review either the government's or the landowners' evidence as to the value in the two cases. If the value of the land were the issue to be determined, we might hesitate to reject the trial court's findings in either case, under Rule 52 (a), Federal Rules of Civil Procedure, 28 U. S. C. A. following § 723c. But the findings referred to are not determinative of the issue here being considered." The Circuit Court of Appeals then went on to decide the only question that it did decide, which was whether McDowell's contract with the government violated the cost-plus-a-percentage-of-cost statute.

At the very least, I think the government is entitled to have the Circuit Court of Appeals pass on the questions of fraud, unconscionability, and unjust enrichment which this Court says "are available whenever and wherever transgressions take place."

MR. JUSTICE FRANKFURTER and MR. JUSTICE RUTLEDGE join in this dissent.

Syllabus.

BARR *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CUSTOMS AND PATENT APPEALS.

No. 287. Argued December 15, 1944.—Decided February 5, 1945.

1. The proper rate at which the currency of the invoice of the imported goods here involved should have been converted into United States dollars under § 522 (c) of the Tariff Act of 1930 was the "free" rate and not the "official" rate. Pp. 84, 94.
2. Section 522 (c) is not to be construed as authorizing certification by the Federal Reserve Bank of New York or proclamation by the Secretary of the Treasury of only one buying rate for a specified foreign currency. P. 89.
3. Where under § 522 (c) dual buying rates have been certified, that rate should be used which is in fact applicable to the particular transaction, and the use of a rate by which the cost of the goods will be distorted and an inflated value for customs purposes placed upon them should be avoided. P. 90.
4. The result here reached is not inconsistent with provisions of § 402 of the Act which require that the value of imported merchandise shall be the "foreign value or the export value, whichever is higher." P. 92.
5. The general authority of the Secretary of the Treasury over the collection of duties on imports and over collectors of customs, and his authority under § 624 of the Tariff Act of 1930 to make rules and regulations for carrying out the provisions of the Act, can not detract from the express authority of the Federal Reserve Bank of New York under § 522 (c) to determine and certify the buying rate. P. 92.
6. The function of the Secretary of the Treasury under § 522 (c) in respect of the publishing of the rates certified by the Bank is purely ministerial. P. 94.
7. The action of the Secretary of the Treasury in publishing only one of the rates certified by the Bank, and the decision of the collector pursuant thereto, were subject to judicial review. P. 94.
8. As to the contention that confusion and complexity in administration of the Tariff Act will result if more than one buying rate may be made applicable to imports from one country, the showing would have to be far more clear than it is here and the meaning

of the Act much more dubious in order that those administrative considerations should be given weight in the interpretative process. P. 94.

143 F. 2d 132, reversed.

CERTIORARI, 323 U. S. 689, to review the reversal of a judgment of the Customs Court which sustained a protest of a decision of the collector of customs.

Mr. J. Bradley Colburn, with whom *Messrs. Albert MacC. Barnes* and *Samuel M. Richardson* were on the brief, for petitioner.

Mr. Ralph F. Fuchs, with whom *Solicitor General Fahy, Assistant Attorney General Rao* and *Mr. John R. Benney* were on the brief, for the United States.

Mr. Walter S. Logan filed a brief on behalf of the Federal Reserve Bank of New York, as *amicus curiae.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question in this case is the proper rate at which the currency of the invoice of imported goods should be converted into United States dollars under § 522 (c) of the Tariff Act of 1930. 46 Stat. 739, 31 U. S. C. § 372 (c).

On May 13, 1940, petitioner imported into the United States at the port of New York certain woolen fabrics which had been exported from England on May 3, 1940. Payment for the merchandise was made with pounds sterling purchased through the Guaranty Trust Co. of New York in the New York market for cable transfer. The Collector of Customs converted the pounds sterling of the invoice into dollars at the "official" rate of exchange of $4.035. Petitioner claimed that the currency of his invoice should have been converted at the "free" rate of exchange of $3.475138. He paid the higher rate and filed his protest against the Collector's action under § 514

of the Tariff Act of 1930. The Customs Court sustained the protest. 79 Treas. Dec., No. 7, 14. The Court of Customs and Patent Appeals reversed. 143 F. 2d 132. The case is here on a petition for a writ of certiorari which we granted because of the importance of the questions presented.

The "free" rate and the "official" rate have the following origin.

Sec. 522 (a) of the Tariff Act provides that the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value, and that it shall be estimated quarterly by the Director of the Mint and proclaimed by the Secretary of the Treasury. The value of the pound sterling at all times relevant here was proclaimed to be $8.2397. Sec. 522 (b) provides that, for the purpose of assessment and collection of duties upon merchandise imported into the United States, foreign currency shall be converted, wherever necessary, into currency of the United States at the values proclaimed by the Secretary under § 522 (a) for the quarter in which the merchandise was exported. Sec. 522 (b) provides, however, for an exception. That exception is contained in § 522 (c) which reads as follows:

"If no such value has been proclaimed, or if the value so proclaimed varies by 5 per centum or more from a value measured by the buying rate in the New York market at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. If the date of exportation falls upon a Sunday or holiday, then the buying rate at noon on the last preceding business day shall be used. For the purposes of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who

shall make it public at such times and to such extent as he deems necessary. In ascertaining such buying rate such federal reserve bank may in its discretion (1) take into consideration the last ascertainable transactions and quotations, whether direct or through exchange of other currencies, and (2) if there is no market buying rate for such cable transfers, calculate such rate from actual transactions and quotations in demand or time bills of exchange."

At all times prior to March 25, 1940, the Federal Reserve Bank of New York pursuant to its authority under § 522 (c) certified daily to the Secretary of the Treasury one buying rate for the pound sterling. When the present war between Great Britain and Germany was declared, the British Government inaugurated a detailed system for controlling foreign exchange. It required among other things that all persons resident in the United Kingdom sell to the British Treasury at prices fixed by it all foreign currency which they were entitled to sell, and prohibited, with certain exceptions, exportation of foreign currency from the United Kingdom and the purchase and sale of foreign currency in the United Kingdom from or to any person other than an authorized dealer and at prices fixed by the British Treasury. On March 7, 1940, an Order in Council, effective March 25, 1940, was issued by the British Government which provided that certain classes of merchandise [1] (whiskey, furs, tin, rubber and jute) might not be exported from the United Kingdom to the United States and certain other countries except when payment had been or would be made to persons resident in the United Kingdom in specified currencies. These currencies included United States dollars or English pounds pur-

[1] Subsequent to the exportation of the merchandise involved in the present case this Order was amended, effective June 10, 1940, to include goods of any class or description.

chased in the United Kingdom after September 3, 1939, from an authorized dealer in foreign currency. Authorized dealers sold English pounds only at the rate of $4.035, prescribed by the British Treasury, from January 8, 1940, to September 30, 1942, when the present case was tried.

On March 19, 1940, the Federal Reserve Bank of New York notified the Secretary that because of the order of the British Government of March 7, 1940, it would certify, beginning March 25, 1940, two rates for the pound sterling—one to be designated as the "free" rate, the other as the "official" rate. The latter was the rate fixed by the British Treasury. On April 15, 1940, the Secretary of the Treasury notified the collectors of customs that until further notice he would publish only the "official" rate; and he directed them to use that rate for assessing and collecting duties on imported merchandise whenever it varied by more than 5 per cent from the value of the pound proclaimed by the Secretary under § 522 (a) of the Act.[2] T. D. 50134, 75 Treas. Dec. 370, 371, 5 Fed. Reg. 1447.

On the date petitioner exported his merchandise from England, the Federal Reserve Bank of New York certified to the Secretary of the Treasury that at noon on that day the "free" rate for the English pound was $3.475138 and the "official" rate was $4.035. The Secretary, in accordance with his notification of April 15, 1940, to the collectors of customs published only the "official" rate. T. D. 50146, 75 Treas. Dec. 388. Since the "official" rate varied by more than 5 per cent from the proclaimed value of the pound for that quarter, the collector used the "official" rate in converting pounds into dollars for the purpose of assessing and collecting duties upon the value of the

[2] As we have noted, the value of the pound sterling at all times pertinent to this case was proclaimed to be $8.2397.

woolen fabrics. The pounds sterling which petitioner used in the purchase of the woolens were not obtained from an authorized dealer as defined in the British order of March 7, 1940, but, as we have noted, through the Guaranty Trust Co. of New York in the New York market for cable transfer. Petitioner claims that the invoice currency should have been converted at the "free" rate of $3.475138 as determined and certified by the Federal Reserve Bank of New York for the date of this exportation.

It was noted in *United States* v. *Whitridge,* 197 U. S. 135, 142, that the assessment of an *ad valorem* tax on imports involved an ascertainment of the true value of the article taxed as of the date of the tax and that the invoice price was an approximate measurement of that value. As pointed out in that case, the history of the statutes shows a closer approximation to that value as the legislation has evolved. And the enactments made subsequent to the decision in the *Whitridge* case are consistent with that trend. In the beginning Congress prescribed specific dollar values of specified coins. Act of July 31, 1789, § 18, 1 Stat. 29, 41. Not long after, the President was given authority to prescribe regulations for computing duties on imports where the original cost was exhibited in a depreciated currency of a foreign government. Act of March 2, 1799, § 61, 1 Stat. 627, 673. In 1873 Congress provided for an annual estimate by the Director of the Mint of the full metal value of standard coins of the various nations and a proclamation of the value by the Secretary of the Treasury. Act of March 3, 1873, 17 Stat. 602. That estimate was required to be made quarterly rather than annually by the Act of October 1, 1890, § 52, 26 Stat. 567, 624. Then came the Act of August 27, 1894, § 25, 28 Stat. 509, 552, which retained the provision for the estimate and proclamation of metallic values and gave the Secretary of the Treasury power to order a reliquidation at a different value on a showing that the value of the

invoice currency in United States currency was 10 per cent more or less than the proclaimed value. *United States* v. *Whitridge, supra.* The procedure under the latter provision depended on a consular certificate to establish the percentage of depreciation of the currency. T. D. No. 23725, 5 Treas. Dec. 396. There was thus no single source (and none at all in the United States) to which customs officials could look to determine the extent to which foreign currency had depreciated. Moreover, violent fluctuations in foreign exchange rates had occurred after the first World War. It was for those reasons that § 403 (c) was added to the Emergency Tariff Act of 1921, 42 Stat. 9, 17. See S. Rep. No. 16, 67th Cong., 1st Sess., p. 16; H. Rep. No. 79, 67th Cong., 1st Sess., p. 12; *Fry & Friedsam* v. *United States,* 12 Cust. App. 486, 489. And § 403 (c) of the 1921 Act now appears as § 522 (c) of the 1930 Act on whose meaning the present decision turns.

This history makes clear the search which has been made for a measure of the true dollar values of imported merchandise for customs purposes which was accurate (see *Cramer* v. *Arthur,* 102 U. S. 612, 617) and at the same time administratively feasible and efficient. The formula finally selected is dependent on the actual value of the foreign currency in our own money. The rate for the foreign exchange with which the imported goods are purchased is recognized as the measure of value of the foreign currency; the use of that rate reflects values in United States currency which are deemed sufficiently accurate to serve as the measure of the valuation of the goods for purposes of the *ad valorem* tax. As noted in *United States* v. *Whitridge, supra,* p. 144, the actual "unit of cost" conforms with the truth and the meaning of the invoice.

We would depart from that scheme if we read § 522 (c) as saying that on a given date only one buying rate for a specified foreign currency could be certified by the Fed-

eral Reserve Bank of New York or proclaimed by the Secretary of the Treasury. Dual or multiple exchange rates have resulted in recent years from measures for the control and restriction of foreign exchange and export transactions.[3] In the present case the British Government fixed the "official" rate for the purchase of specified commodities for export. One who purchased woolens for export need not acquire pounds at that rate. A lower rate was available and was indeed taken advantage of by petitioner when he purchased pounds to pay for the woolens. If the higher "official" rate is used in the valuation of the woolens, the cost of the goods will be distorted and an inflated value for customs purposes will be placed upon them. Such a result would be quite out of harmony with the history of these statutes and should be avoided unless the result is plainly required by the language of § 522 (c). We do not think it is.

We may assume that the dual or multiple exchange rates which have emerged were not in contemplation when the 1930 Act was passed. As we have noted, they are parts of rather recent measures for the control and restriction of foreign exchange and export transactions. But if Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators. *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 257; *Browder* v. *United States*, 312 U. S. 335, 339, and cases cited. Sec. 522 (c) contains no language indicating that the Secretary of the Treasury has any function to perform except the publication of any buying

[3] See United States Tariff Commission, Regulation of Tariffs in Foreign Countries by Administrative Action (1934); Twenty-second Annual Report of the United States Tariff Commission (1938) p. 1; Southard, Foreign Exchange Practice and Policy (1940) pp. 185 *et seq.*

rate which is certified. The determination of the rate is left exclusively to the Federal Reserve Bank of New York. It alone is given discretion in computing it. The duty of the Secretary to publish the certified rate is as clear as the duty of the Federal Reserve Bank of New York to determine and certify it. It is true that § 522 (c) speaks only of the "buying rate." And that use of the singular rather than the plural is stressed by respondent. We may note, however, in passing that § 1 of the Revised Statutes, 1 U. S. C. § 1, provides that "words importing the singular number may extend and be applied to several persons or things." Beyond that is the fact that we are construing a provision of a tariff act designed, as we have said, to value imports for customs purposes by means of the buying rate of the invoice currency. The use of the singular is not inappropriate since there is a buying rate for the foreign exchange used to purchase each separate import. We assume that the "official" rate was the all-inclusive rate and could have been used in payment of exported goods of all kinds. But § 522 (c) means to us that that buying rate is to be used which is in fact applicable to the particular transaction. To look to other transactions for the buying rate is to make a valuation of a wholly hypothetical import, not a valuation of the actual one before the collector of customs. Congress could, of course, choose any standard of valuation, for the purposes of the assessment and collection of duties. But Congress in this situation endeavored to provide a flexible and realistic, not an arbitrary, standard. We can indeed see no difference in principle between the use of one of several rates for the currency of a single country and the use of one of several rates each of which is for the currency of a different country. In each different rates are used to ascertain the value of specific imports. The language of § 522 (c) read against the background of these statutes indicates to us that Congress undertook to provide in each case the rate which

gives the closest approximation to the value in dollars of the imported merchandise. That purpose would be thwarted if in the circumstances of this case only one buying rate could be used in making the valuation of the goods. The application of the "official" rate to this particular transaction would assume that petitioner imported whiskey, furs, tin, rubber, or jute rather than woolens. The valuation of the woolens would be inflated and a higher duty would be paid than a fair reading of § 522 (c) necessitates.

It is said that this result runs counter to the provisions of § 402 of the Act which require that the value of imported merchandise shall be the "foreign value or the export value, whichever is higher." But it is not apparent how that policy need in any way be defeated or impaired by the use of the "free" rate of exchange where it is in fact applicable.

Reliance for the other conclusion is also placed on the general authority given the Secretary over the collection of duties on imports [4] and over collectors of customs.[5] It is also pointed out that § 624 of the Tariff Act of 1930 provides that "In addition to the specific powers conferred by this Act, the Secretary of the Treasury is authorized to make such rules and regulations as may be necessary to carry out the provisions of this Act." [6] But these

[4] "The Secretary of the Treasury shall direct the superintendence of the collection of the duties on imports as he shall judge best." Rev. Stat. § 249, 19 U. S. C. § 3. And see Rev. Stat. § 248, 5 U. S. C. § 242.

[5] "The Secretary of the Treasury shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations not inconsistent with law, to be used in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports, or to warehousing, and shall give such directions to collectors and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law." Rev. Stat. § 251, 19 U. S. C., Supp. III, § 66. And see Rev. Stat. § 161, 5 U. S. C. § 22.

[6] Sec. 502 (c) of the Act provides that "It shall be the duty of all officers of the customs to execute and carry into effect all instructions

provisions merely implement authority which is granted the Secretary and make clear the existence of authority which otherwise might be only implied. They may not be used to detract from the express authority given the Federal Reserve Bank of New York under § 522 (c). But this result is criticized on the ground that it interferes with the control of foreign exchange, which fiscal function has been entrusted to the Secretary, not to the Federal Reserve Bank of New York. It hardly need be pointed out in reply, however, that our decision, like § 522 (c), is concerned only with the assessment and collection of duties upon imports through the use of a formula which Congress designed. If the use of that formula under the changed conditions of these war years is disadvantageous or undesirable, Congress, of course, can change it. But we cannot assume that Congress did not mean what it said when it selected the Federal Reserve Bank of New York rather than the Secretary to perform a restricted function on this single phase of the complicated foreign exchange problem.

Nor is there substance in the argument that the Secretary's action in publishing only one of the rates certified by the Bank is non-reviewable. Sec. 522 (c) plainly gives discretion to the Bank to determine the buying rate. And for the reasons stated we cannot say that only one buying rate must be determined and certified.[7] The exercise of

---

of the Secretary of the Treasury relative to the execution of the revenue laws; and in case any difficulty arises as to the true construction or meaning of any part of the revenue laws, the decision of the Secretary shall be binding upon all officers of the customs."

[7] The case is therefore different from *Collector* v. *Richards*, 23 Wall. 246. In that case the Director of the Mint certified two values of the franc—one under the provisions of the Act of March 3, 1873, 17 Stat. 602, the other under the Act of May 22, 1846, 9 Stat. 14. The Director of the Mint was uncertain whether the latter act had been repealed by the former. The Secretary proclaimed the rate estimated by the Director under the 1873 Act. This Court sustained a collection

the Bank's discretionary power under § 522 (c) is in the category of administrative or executive action which this Court held non-reviewable in *Cramer* v. *Arthur, supra,* and in *Hadden* v. *Merritt,* 115 U. S. 25, 27–28. And see *United States* v. *Bush & Co.,* 310 U. S. 371, 380. But the function of the Secretary in this regard is purely ministerial and is to be contrasted to other situations in which the Secretary is exercising discretionary authority. Cf. *Boske* v. *Comingore,* 177 U. S. 459. The power to publish the certified rate may not be exercised in such a way as to defeat the method of assessment which Congress has provided. Cf. *Campbell* v. *United States,* 107 U. S. 407. Congress has granted judicial review of the decisions of the collector including the legality of the orders and findings entering into the protested decision. §§ 514–517. If the decision of the collector contravenes the statutory scheme and disregards rights which Congress has bestowed, the fact that he acts pursuant to the directions of the Secretary does not save his decision from review. *Campbell* v. *United States, supra.* We think that the use of the "official" rate of exchange in assessing and collecting duties upon these imports transcended the authority of the collector and of the Secretary and that the "free" rate of exchange certified by the Federal Reserve Bank of New York should have been used.

It is finally said that if more than one buying rate may be made applicable to imports from one country,[8] confu-

---

of duties on that basis, holding that the provisions of the 1873 Act controlled. Thus the decision was that only one value of the franc controlled, not that the power of the Secretary to proclaim the value included the power to choose between two available ones.

[8] It should be noted that where two or more currencies of different character circulate in a foreign country the Treasury has provided for the use of the foreign exchange rate for each, the rate used being the rate for the currency in which the same or similar merchandise is usually bought and sold in the ordinary course of trade. See Customs Regulations of 1937, Art. 776 (a) and (e), as amended by Treas. Dec. 50251 (i) and (j), October 10, 1940.

sion and complexity in administration of the Tariff Act will result. But that showing would have to be far more clear and the meaning of the Act much more dubious for us to give those administrative considerations weight in the interpretative process.

Reversed.

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

MR. JUSTICE FRANKFURTER, dissenting.

As part of the effective financial conduct of the war, the United Kingdom brought sterling under control by fixing its exchange value. A limited supply of sterling in foreign countries presented a special problem. But though that supply was out of its bounds, Great Britain by various mechanisms could bring it under control. Apparently it moved to do so as quickly as economic and political considerations permitted. See the statement of the Chancellor of the Exchequer on April 9, 1940, in reply to various questions in the House of Commons, 359 H. C. Deb. (5th ser. 1940) 461–463. Thus, while "the vast bulk of transactions between sterling and other currencies" was conducted at the exchange rate fixed by the Government, the supply and demand of sterling abroad created a market. By virtue of various British restrictions this free sterling market became increasingly thin. See 26 Fed. Res. Bull. (July, 1940) 638; The Commercial and Financial Chronicle, April 20, 1940, Vol. 150, Pt. 2, pp. 2478–79. Nevertheless, until the British Government completely clamped down on the use of this free sterling in payment of exports, it was possible to pay for such exports in sterling purchased at a lower rate than that which the British Government believed to be a reflection of the true value of the pound and officially fixed as such.

Plainly enough, a single currency having multiple values has important bearings upon the flow of goods and

upon international economic relations. In the case of Great Britain, the situation may have not been serious because, as we noted, free sterling played a relatively small share in the economic interchange between the two countries. The "free" rate was employed only in limited transactions and evidently represented on the part of Great Britain merely a transitory compromise with circumstances. In short, the official rate was not an unreality. But in the case of some countries, a dual system of rates of exchange may have decisive economic effects through highly organized manipulation of exchange, with all the evils that result from confusion and from depreciated currencies.

To dispose of the case on the assumption that it merely involves enforcement of a Congressional policy for assuring approximate accuracy in determining the true dollar value of a particular importation is to throw the significance of the case out of focus. The problem, as I see it, is whether Congress by § 522 (c) of the Tariff Act of 1930, 46 Stat. 590, 739, 31 U. S. C. § 372 (c), prohibited the Secretary of the Treasury from safeguarding the public interest as he did, in relation to dislocations in the money markets following the outbreak of the war and to their repercussions both upon our domestic economy and our international relations. That the Treasury's instruction to the collectors of customs to assess tariff duties on the basis of the sterling rate fixed by the British Government was not an ordinary Treasury order affecting the collection of revenue is attested by the fact that the instruction was the result of a conference of the Secretary of State, the Secretary of the Treasury, the Attorney General and the Secretary of Agriculture. See New York Times, April 17, 1940, p. 4, col. 5; The Commercial and Financial Chronicle, April 20, 1940, Vol. 150, Pt. 2, pp. 2478–79.

It is not suggested that apart from § 522 (c) this Government could not protect its interests in relation to the

abnormal currency situations precipitated by the war through such action as the Secretary of the Treasury here took. The wide duties of financial supervision possessed by the Secretary by virtue of his office and the broad powers implied in various provisions of law, see for instance: 5 U. S. C. § 242, 19 U. S. C. § 3; § 624 of the Tariff Act of 1930, 46 Stat. 590, 759, 19 U. S. C. § 1624, and *Boske* v. *Comingore,* 177 U. S. 459, would give him ample warrant to fix a rate for dollar conversions of foreign currencies on a uniform basis reflecting the dominant value among multiple values of a foreign currency and one not subject to manipulations or influences adverse to our interests.

Withdrawal of this power of the Secretary of the Treasury implies a radical curtailment of his historic and appropriate authority to protect the nation's fiscal interests. If it chose, of course Congress could so curtail the Secretary's powers. But such an important change in the executive responsibility for our fiscal affairs ought to be disclosed through some unequivocal Congressional expression. To find such destructive force in § 522 (c) is to attribute to it a potency not designed by Congress. It is conceded that in the legislation which is now § 522 (c) Congress was concerned solely with fluctuations in a single exchange rate, a problem thrown up after the First World War. And so Congress designated the Federal Reserve Bank as a fact-finding agency to ascertain the most durable among fluctuating quotations. But multiple rates for a single currency—with their effects upon the flow of goods and upon international economic relations and the opportunities they afford for highly organized manipulations of exchange—present a totally different problem. That problem, as is admitted by the Federal Reserve Bank appearing before us as *amicus curiae,* was not at all in the contemplation of Congress. That problem was not dealt with by Congress because it did not con-

front Congress. As a problem it did not emerge until, in 1940, the present war confronted the Federal Reserve Bank and the Secretary of the Treasury with it.

The Federal Reserve Bank and the Secretary of the Treasury, having different functions, naturally dealt with it differently. Although, to be sure, § 522 (c) charged the Federal Reserve Bank with the ascertainment of a single exchange rate, the Bank naturally enough solved the dilemma which confronted it when there were two rates for sterling by reporting both, although the significance of the two rates and the range of their functions varied greatly. It was not for the Bank to pick only one rate, for the Bank is merely a reporting agency and not a policy-making agency. But the determination whether one of the two rates is *the* rate, and if so which should have that fiscal function, is a policy problem, and the Secretary of the Treasury is the agency vested with responsibility for fiscal policies.

For the selection by the Secretary of the Treasury of an exchange rate in a situation like the one before us has implications far beyond translating into dollars the value at which a particular importer actually settled for the foreign price of his goods. The selection of the governing rate of exchange in the case of multiple rates affects at least three very important phases of our international economic relations. By § 402 of the Tariff Act of 1930, 46 Stat. 590, 708, 19 U. S. C. § 1402, in the assessment of *ad valorem* duties it is necessary to ascertain the foreign market value, which normally means the foreign home value. Commodities subject to the "official" rate and commodities available through "free" sterling may well have an identical home value and yet, according to the contention of the importer, one valuation would have to be reached according to § 522 (c) and another according to § 402. Again, the Secretary of the Treasury may impose countervailing duties whenever he finds that imported

goods enjoy a bounty, direct or indirect. Section 303 of the Tariff Act of 1930, 46 Stat. 590, 687, 19 U. S. C. § 1303. Such bounties may readily take the form of favorable exchange rates. An unwarrantably rigid denial to the Secretary of the determination of an exchange rate which in substance corresponds to the realities of international exchange may force him to exercise the penalizing power of imposing countervailing duties. Finally, foreign exchange rates affect the fruitful use of foreign trade agreements. Section 350 of the Tariff Act of 1930 as amended by 48 Stat. 943, 19 U. S. C. § 1351 *et seq.*

All these dangerous potentialities would of course be irrelevant if Congress had dealt with the problem of multiple rates in a rigid way and put the responsibility upon the Federal Reserve Bank to select one of such multiple rates. But the hand of the Government ought not to be tied too closely where, to put it mildly, the Congressional purpose has been ambiguously expressed. We cannot find such purpose from a reading of what Congress has written. We are hardly justified in assuming that if Congress had addressed itself to this problem it would have tied the hands of the Secretary of the Treasury and brought into play all the difficulties that have been indicated in the ascertainment of foreign home value, in the imposition of countervailing duties, and in embarrassing the policy of trade agreements. The power of Congress to pass new legislation is hardly a reason for giving old legislation a construction that disregards its history and its context and the unhappy consequences of such disregard.

Of course, general condemnation of a practice covers any specific manifestation of it, even though the latter was "unforeseen" by Congress, *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, just as a general outlawry of the use of a false document hits also a use to which the document was not "ordinarily" put when the legislation was passed. *Brow-*

der v. *United States,* 312 U. S. 335. But these are instances of proper statutory construction quite irrelevant to the present case. It is one thing for judges not to excise a particular situation from language appropriately describing a general problem. Judicial interpolation into a statute of a wholly unrelated problem not envisaged by Congress is quite another matter. In this case we have not an unforeseen situation fitting into a general context. Here we have an unforeseen problem with which Congress did not deal and yet, by not dealing with it, is said to have taken away authority theretofore belonging to the Secretary of the Treasury. If the problem itself was not in the contemplation of Congress, as this problem was not, how can it be said that Congress legislated concerning that problem?

The judgment should be affirmed.

MR. JUSTICE BLACK joins in this dissent.

PRICE, TRUSTEE, ET AL. *v.* GURNEY ET AL.

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

No. 410. Argued January 12, 1945.—Decided February 5, 1945.

1. The bankruptcy court is without jurisdiction to entertain a Chapter X petition filed on behalf of a corporation (organized under state law) by stockholders who under the local law are without authority to institute such proceedings, even though that authority might have been obtainable under the local law by proceedings in another forum. P. 106.
2. Under the Bankruptcy Act, the power of the bankruptcy court over the debtor and its property prior to the approval of the petition does not extend to this situation. P. 106.

142 F. 2d 404, reversed.

CERTIORARI, 323 U. S. 696, to review the reversal of an order of the bankruptcy court dismissing a petition under Chapter X of the Bankruptcy Act.

Mr. Wm. W. Keifer, with whom *Mr. George W. Tehan* was on the brief, for petitioners.

Mr. Charles W. Stiefel, Jr., with whom *Mr. I. E. Ferguson* was on the brief, for respondent.

Solicitor General Fahy, Messrs. Roger S. Foster, Milton V. Freeman and *Theodore L. Thau* filed a brief on behalf of the Securities & Exchange Commission, as *amicus curiae.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Western Tool & Manufacturing Co. is an Ohio corporation. It has outstanding some 1,100 shares of stock and also bonds which total in principal amount $73,000 with large arrearages of interest. Some twenty years ago, following a default in payment of interest on the bonds, more than 50 per cent of the shares of stock were placed in a voting trust, the voting trustees being designated by the bondholders. The bonds were deposited with a bondholders' committee. The voting trustees were members of the bondholders' committee; and some of the voting trustees were also directors and officers of the company. Since the voting trust was formed the bondholders have been in control of the company. Directors have been elected by the voting trustees. In 1942 the trustee under the mortgage deed of trust filed a petition to foreclose the lien of the bondholders in an Ohio court. The court appointed one of the voting trustees receiver; and he has operated the company as a going concern since that time. The company filed its answer in the foreclosure proceeding, admitting the allegations of the bill and consenting to the appointment of a receiver. Thereafter a judgment was entered on the mortgage for some $134,000. Respondent acting on behalf of himself and other holders of shares or of voting trust receipts moved to set the judgment of

the state court aside. We are told that that motion was denied. It does not appear whether there was an appeal from that denial or whether respondent sought to intervene in the foreclosure proceedings. Respondent as owner of 7 shares of stock and as agent for owners of some 675 shares (including certain shares deposited under the voting trust) also filed a petition in the name of Western Tool & Manufacturing Co. in the District Court asking that the company be given relief under Chapter X of the Bankruptcy Act. 52 Stat. 883, 11 U. S. C. § 501. The petition stated, among other things, that the value of the assets of the company was greatly in excess of the indebtedness and that that value would be lost to the stockholders in the foreclosure action. Respondent accompanied the petition with an affidavit which stated that an unsuccessful attempt had been made to have the corporation file the petition. The affidavit set forth rather serious charges against the management of the company. It alleged that the directors were unlawfully elected and that the corporation was without a *de jure* board. It alleged that certain of the directors were occupying conflicting and inconsistent fiduciary positions, i. e. as members of the committee their fiduciary responsibility was to the bondholders, as voting trustees their fiduciary duties were to the depositing stockholders, as directors and officers their fiduciary obligation was to all the stockholders, depositing and non-depositing. It charged them with acts of mismanagement, with dissipation of the assets of the company, and with management of the company solely for the benefit of the bondholders and against the interests of the stockholders. It alleged that the voting trust was illegal and void and was no longer in effect since it had by its terms expired. And it asserted that the only way in which the value of the stockholders' equity in the company could be preserved was by reorganization in bankruptcy.

The District Court first approved the petition as properly filed. Later the bondholders' committee and the corporation filed motions to dismiss the petition on the grounds, among others, that the board of directors of the company had not authorized it. A hearing was held, following which the District Court dismissed the petition. The Circuit Court of Appeals reversed, one judge dissenting. 142 F. 2d 404. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problem in the administration of the Bankruptcy Act.

Chapter X provides in § 126 that

"A corporation, or three or more creditors who have claims against a corporation or its property amounting in the aggregate to $5,000 or over, liquidated as to amount and not contingent as to liability, or an indenture trustee where the securities outstanding under the indenture are liquidated as to amount and not contingent as to liability, may, if no other petition by or against such corporation is pending under this chapter, file a petition under this chapter."

A creditor is defined in § 106 (4) as the holder of any "claim." A claim is defined in § 106 (1) so as to exclude stock. And a petition is defined as one filed under Chapter X by a debtor, creditors, or indenture trustee. § 106 (9). It is therefore apparent that Congress has not given to stockholders the right to file petitions under Chapter X. The absence of that right is emphasized when we turn to other provisions of the chapter which define the rights of stockholders in these reorganization proceedings. When a debtor is continued in possession, a plan may be filed "by any stockholder, if the debtor is not found to be insolvent." § 170 (3). Any stockholder has the right to be heard "on all matters arising in a proceeding under this chapter." § 206. And detailed provisions are included for the protection of such equity as the stockholders may

have in the business. See for example § 179, § 180, § 196, § 197, § 216, § 221. Thus the rights which the stockholders are granted by the Act arise after the proceedings have been instituted. Thereafter they need not be represented solely by the debtor corporation. They may appear in their own right. Indeed, the Act contemplates their participation in the proceedings for the protection of such equity as they may have. But the initiation of the proceedings, like the run of corporate activities, is left to the corporation itself, i. e. to those who have the power of management.

These principles are not seriously questioned. And respondents make no pretense of saying that they in fact have the power of management over this Ohio corporation or that § 8623–55 of Ohio's General Corporation Act which vests the management of Ohio corporations in the board of directors[1] is inapplicable here. Their theory rather is that the directors have breached their trust and have caused the corporation to commit acts which are confiscatory of the stockholders' interests, that the corporation has a defense against or a remedy in alleviation of the foreclosure action which the directors refuse to invoke, and that therefore the stockholders under the familiar rules governing derivative actions (*Dodge* v. *Woolsey,* 18 How. 331; *Davenport* v. *Dows,* 18 Wall. 626; *Hawes* v. *Oakland,* 104 U. S. 450) may proceed on behalf of the corporation. That was the view which prevailed in the Circuit Court of Appeals. But we do not think it stands analysis.

---

[1] That section reads in part as follows:

"All the capacity of a corporation shall be vested in and all its authority, except as otherwise provided in this act or in the articles in regard to action required to be taken, authorized or approved by shareholders, shall be exercised by a board of directors of not less than three persons, which shall manage and conduct the business of the corporation."

There is a misconception running through the presentation of this case which should be noted at the outset. It is a misnomer to speak of the filing of the petition on behalf of the corporation as a derivative action. A derivative action is a suit by a shareholder to enforce a corporate cause of action. The corporation is a necessary party to the suit. And the relief which is granted is a judgment against a third person in favor of the corporation. That is the rule in Ohio as well as elsewhere. 10 Ohio Juris. §§ 244 *et seq.; Dodge* v. *Woolsey, supra; Davenport* v. *Dows, supra; Hill* v. *Murphy,* 212 Mass. 1, 98 N. E. 781; *Groel* v. *United Electric Co.,* 70 N. J. Eq. 616, 61 A. 1061; *Continental Securities Co.* v. *Belmont,* 206 N. Y. 7, 99 N. E. 138. Similarly if a corporation has a defense to an action against it and is not asserting it, a stockholder may intervene and defend on behalf of the corporation. 10 Ohio Juris. § 257; *Eggers* v. *National Radio Co.,* 208 Cal. 308, 281 P. 58; *Fitzwater* v. *National Bank,* 62 Kan. 163, 61 P. 684. Moreover, equity has evolved numerous remedies to protect not only the rights of the corporation but the interests of the stockholders as such against various acts of mismanagement. See 10 Ohio Juris. §§ 260 *et seq.;* Berle, Studies in the Law of Corporation Finance (1928). But respondents have not pursued either course. The petition which they have filed with the bankruptcy court is not a suit to enforce or protect a corporate right. Nor is it a suit to protect the interests of respondents as stockholders. Yet if it were either one, the federal District Court could not entertain it. No diversity of citizenship is shown and no other basis of federal jurisdiction is apparent. The question therefore is whether the bankruptcy court as an incident of its bankruptcy powers can give respondents the relief which, if their charges are taken as true, they might obtain in another forum. We do not think it can.

The District Court in passing on petitions filed by corporations under Chapter X must of course determine whether they are filed by those who have authority so to act. In absence of federal incorporation, that authority finds its source in local law. If the District Court finds that those who purport to act on behalf of the corporation have not been granted authority by local law to institute the proceedings, it has no alternative but to dismiss the petition. It is not enough that those who seek to speak for the corporation may have the right to obtain that authority. The jurisdiction which Congress has given the bankruptcy court over the debtor and its property prior to the approval of the petition (see § 111, § 112, and § 113) does not extend to this situation. The District Court in the exercise of its diversity jurisdiction would of course have the power to enforce derivative actions,[2] to make faithless directors account, and the like, where local law permits. But under the Bankruptcy Act the power of the court to shift the management of a corporation from one group to another, to settle intracorporate disputes, and to adjust intracorporate claims is strictly limited to those situations where a petition has been approved. Thus § 156 provides for the displacement of the management and the appointment of a disinterested trustee[3] in case of certain companies after approval of the petition. In other situations the court may continue the debtor in possession. § 156. The plan must include provisions "which are equitable, compatible with the interests of creditors and stockholders, and consistent with public policy" with respect to the manner of selection of directors, officers and the like. § 216 (11). And the plan must likewise provide for the retention and enforcement of claims, not settled or adjusted in the plan, which the corporation

[2] See Rule 23 (b), Rules of Civil Procedure.

[3] As defined in § 158.

may have against officers, directors, and others. § 216 (13). But nowhere is there any indication that Congress bestowed on the bankruptcy court jurisdiction to determine that those who in fact do not have the authority to speak for the corporation as a matter of local law are entitled to be given such authority and therefore should be empowered to file a petition on behalf of the corporation. Respondents may have a meritorious case for relief. On that we intimate no opinion. But if they are to be allowed to put their corporation into bankruptcy, they must present credentials to the bankruptcy court showing their authority.

It is argued that circuity of action will be avoided and the adequacy of stockholders' remedies will be enhanced if the bankruptcy court is authorized to entertain petitions like the present one. That may well be true. But any such enlargement of the jurisdiction of the bankruptcy courts is for Congress. It has chosen to withhold from stockholders the right to institute these bankruptcy proceedings. In absence of federal incorporation, intracorporate disputes of the character presented here are, as we have said, governed by state law. The creation of a new basis of federal jurisdiction to hear them, pass on their merits, and adjudicate them is a legislative act.

A different question is presented where stockholders appear in opposition to a petition filed by the corporation. See § 206. Cf. *In re Beaver Cotton Mills,* 275 F. 498; *Whittaker* v. *Brictson Mfg. Co.,* 43 F. 2d 485.

Reversed.

FIDELITY-PHILADELPHIA TRUST CO. ET AL., EXECUTORS, *v.* ROTHENSIES, COLLECTOR OF INTERNAL REVENUE.

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

No. 263. Argued January 4, 5, 1945.—Decided February 5, 1945.

Decedent made a transfer of property in trust to pay the income to herself for life, thence to her two daughters, with remainders to the daughters' surviving descendants; but if both daughters should die without descendants surviving, the corpus was to go to such persons as the decedent should appoint by will. Decedent exercised the power of appointment by will and predeceased the daughters. *Held:*

1. The transfer was "intended to take effect in possession or enjoyment at or after (decedent's) death," within the meaning of § 302 (c) of the Revenue Act of 1926. P. 110.

2. The value at the date of the death of the decedent of the entire corpus of the trust was includible in the gross estate of the decedent for the purpose of the estate tax under the 1926 Act. P. 111.

Under § 302 (c) the taxable gross estate must include those property interests the ultimate possession and enjoyment of which is held in suspense until the moment of the grantor's death or thereafter.

3. There was no basis for deduction from the decedent's gross estate of the values of the estates of the daughters or their descendants. P. 112.

142 F. 2d 838, affirmed.

CERTIORARI, 323 U. S. 693, to review the affirmance of a judgment denying recovery in a suit for refund of federal estate taxes.

Mr. C. Russell Phillips for petitioners.

Mr. L. W. Post, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *J. Louis Monarch* were on the brief, for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Our attention here is directed toward the proper valuation for federal estate tax purposes of the corpus of an *inter vivos* trust where the transfer was intended to take effect in possession or enjoyment at or after death and where the settlor retained a life estate in the trust income and a reversionary interest in the corpus.

On March 26, 1928, the decedent, Anna C. Stinson of Bryn Mawr, Pa., transferred certain property in trust, the value of which at the time of her death was $84,443.49. The income of the trust was to be paid to the settlor during her life and at her death to her daughters (aged 12 and 10 at the time of the creation of the trust) during their respective lives. At the death of each daughter, the corpus supporting her share of the income was to be paid to her descendants. If either daughter died without leaving surviving descendants, the corpus of her share was to be added to the share of the other daughter or of the surviving descendants of the other daughter. But if both daughters died without leaving surviving descendants, the corpus was to be paid to such persons as the settlor might appoint by will. In default of such appointment, the corpus was to go to certain named charities.

The decedent exercised the power of appointment in a will made in 1930. She died in 1934 at the age of 51, leaving two unmarried daughters. The latter have subsequently married and both have children.

The Commissioner determined that this arrangement was a transfer in trust intended to take effect in possession or enjoyment at or after death within the meaning of § 302 (c) of the Revenue Act of 1926, 44 Stat. 9, 70, and that the net value of all the property comprising the corpus of the trust should be included in the decedent's gross estate for estate tax purposes. The executors, however, denied that the transfer fell within the meaning of

§ 302 (c); they further claimed that even if § 302 (c) did apply the value of the life estates of the settlor's daughters and the value of the remainders to their surviving descendants should be deducted from the value of the trust assets for tax purposes.

The executors paid a tax on the full value of the trust assets and filed this claim for refund of the tax. The District Court denied recovery and the court below affirmed. 142 F. 2d 838. Conflict with *Field's Estate* v. *Commissioner,* 144 F. 2d 62, led us to grant certiorari limited to the question of whether the entire value of the corpus of the trust at the time of decedent's death should have been included in the decedent's gross estate.

The courts below, utilizing the principles set forth in *Klein* v. *United States,* 283 U. S. 231, and *Helvering* v. *Hallock,* 309 U. S. 106, correctly held that the decedent's transfer in trust in 1928 was one intended to take effect in possession or enjoyment at or after death within the meaning of § 302 (c) of the Revenue Act of 1926, prior to the amendments of 1931 and 1932. While the matter of valuation was not argued and was not directly in issue in those cases, the inescapable consequence of the principles enunciated there and in the dissenting opinion in *Helvering* v. *St. Louis Union Trust Co.,* 296 U. S. 39, 46, is to include the entire trust corpus in the gross estate of the decedent under these circumstances.

Section 302 (c) itself provides for the inclusion within the gross estate of property "to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death." As we said in *Helvering* v. *Hallock, supra,* 110, 111, this provision "deals with property not technically passing at death but with interests theretofore created. The taxable event is a transfer *inter vivos.* But

the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment." Cf. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 347. The taxable gross estate, in other words, must include those property interests the ultimate possession or enjoyment of which is held in suspense until the moment of the grantor's death or thereafter.

Tested by that standard, the entire corpus of the trust should have been included in the decedent's gross estate and an estate tax levied on its net value at the date of decedent's death. The ultimate disposition of all the trust property was suspended during the life of the decedent. Only at or after her death was it certain whether the property would be distributed under the power of appointment or as provided in the trust instrument. The life estates of the daughters were contingent upon their surviving their mother and took effect in enjoyment only at the death of the latter. The remainder interests of the descendants of the daughters were contingent upon their surviving both the decedent and the daughters and took effect in possession only after the death of the decedent. Thus until the moment of her death or until an undetermined time thereafter the decedent held a string or contingent power of appointment over the total corpus of the trust. The retention of such a string, which might have resulted in altering completely the plan contemplated by the trust instrument for the transmission of decedent's property, subjected the value of the entire corpus to estate tax liability.

It is fruitless to speculate on the probabilities of the property being distributed under the contingent power of appointment. Indeed, such speculation is irrelevant to the measurement of estate tax liability. The application of this tax does not depend upon "elusive and subtle casuistries." *Helvering* v. *Hallock, supra,* 118. No more

should the measure of the tax depend upon conjectures as to the propinquity or certainty of the decedent's reversionary interests. It is enough if he retains some contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the beneficiaries. The value of the property subject to the contingency, rather than the actuarial or theoretical value of the possibility of the occurrence of the contingency, is the measure of the tax. That value is demonstrated by the consequences that would flow in this instance from the decedent's survival of her daughters and any of the latter's surviving descendants.

We are not concerned here with determining whether the values of any property interests or intervening estates not affected by the decedent's death and not subject to the contingent power of appointment should be deducted from the value of the corpus. The value of the life estate retained by the decedent obviously cannot be deducted. And the life estates of the daughters and the remainder interests of their surviving descendants were all subject to divestment by the contingent power of appointment and were freed from this contingency only at or after the decedent's death. There is thus no basis for deducting their values as suggested by petitioners.

Affirmed.

MR. JUSTICE DOUGLAS, concurring.

The District Court found that this trust was "intended to take effect in possession or enjoyment at or after" the death of the decedent. The Circuit Court of Appeals agreed. Certiorari was not granted on that question but only on the question whether the entire value of the corpus of the trust at the time of decedent's death should be included in her gross estate. So in this case, as in *Commissioner* v. *Estate of Field, post,* p. 113, we are

not faced with the question whether *May* v. *Heiner,* 281 U. S. 238, should survive *Helvering* v. *Hallock,* 309 U. S. 106. On the findings of the District Court, it is plain that the entire corpus must be included in decedent's gross estate by virtue of § 302 (c) of the 1926 Act unless the value of the life estate must be deducted. The value of the life estate deducted in the *Hallock* case was the life estate in the settlor's wife. It was excluded because it took effect in possession or enjoyment when the trust was created. The life estate which the decedent reserved to herself is obviously in a different category. It is not an "outstanding life estate" within the meaning of Treasury Regulations 80, Art. 17.

I would rest the decision there and reserve judgment on the other questions adverted to in the opinion of the Court.

COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF FIELD.

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

No. 578. Argued January 5, 1945.—Decided February 5, 1945.

1. Decedent made a transfer of property in trust limited in duration to the lives of two nieces. If decedent survived both nieces the corpus was to go to the decedent rather than to the beneficiaries named in the trust instrument. The nieces survived the decedent. *Held* that, under § 302 (c) of the Revenue Act of 1926, the value of the entire corpus of the trust property at the death of the decedent was includible in the gross estate for the purpose of the federal estate tax. *Fidelity-Philadelphia Trust Co.* v. *Rothensies, ante,* p. 108. P. 115.
2. Since the corpus of the trust did not shed the possibility of reversion until the decedent's death, the value of the entire corpus on the date of death was taxable under § 302 (c). P. 116.

144 F. 2d 62, reversed.

CERTIORARI, 323 U. S. 704, to review the reversal of a decision of the Tax Court, 2 T. C. 21, which sustained the Commissioner's determination of a deficiency in estate taxes.

Mr. L. W. Post, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *J. Louis Monarch* were on the brief, for petitioner.

Mr. Edgar J. Bernheimer, with whom *Mr. Harry T. Zucker* was on the brief, for respondent.

Mr. Charles Angulo, as *amicus curiae,* filed a brief on behalf of the estate of John C. Duncan.

MR. JUSTICE MURPHY delivered the opinion of the Court.

This is a companion case to *Fidelity-Philadelphia Trust Co.* v. *Rothensies, ante,* p. 108. It too presents a question as to the proper valuation of the corpus of an *inter vivos* trust under § 302 (c) of the Revenue Act of 1926, 44 Stat. 9, 70.

On June 8, 1922, the decedent transferred to a trustee certain assets valued at the date of his death at the sum of $157,452.82. The material portions of the trust provided:

1. The trust was to continue for the joint lives of two nieces and the life of the survivor of them unless terminated earlier under 4, *infra.*

2. The income was to be paid to the decedent for his life unless the trust terminated before his death.

3. If the decedent died prior to the termination of the trust leaving issue, the trust property was to be held in trust for the children or their issue, subject to decedent's right to reduce or cancel the amounts of the gifts by will or written instrument. Provisions were also made for a

$150,000 trust for the widow which is not in issue in this case.

4. During the continuance of the trusts the income was to be paid to the beneficiary named and upon the death of the beneficiary during the continuance of the trust the corpus was to be paid to the beneficiary's issue surviving, but if there be none, to the issue of the decedent surviving; if none, then to decedent's brother or sister or their issue.

5. Upon termination of the trust before the death of the decedent the corpus was to be paid over to decedent.

6. Upon termination of the trust after the death of the decedent but during the existence of any trust the corpus was to be paid to the life beneficiary.

The decedent at no time had any issue. At his death in 1937 at the age of 52, he was survived by the two nieces whose lives were to measure the maximum life of the trust. These nieces were then aged 18 and 25 respectively. He was also survived by his widow, a sister and issue of a deceased brother.

The Tax Court held that the entire amount of $157,452.82 was includable in the gross estate for purposes of the estate tax. 2 T. C. 21. But the court below reversed and remanded the case to the Tax Court with directions to include in the gross estate only $24,930.76—the value at the time of decedent's death of a remainder in the sum of $157,452.82 payable at all events upon the death of the survivor of two females, aged 18 and 25 respectively. 144 F. 2d 62.

The error of the court below is self-evident from our discussion in the *Fidelity-Philadelphia Trust Co.* case. The trust here was limited in duration to the lives of the decedent's two nieces. But if both nieces died before the decedent, the corpus would have been paid to the decedent rather than to the beneficiaries named in the trust instrument (in this instance the decedent's sister and the

issue of his deceased brother). Thus until decedent's death it was uncertain whether any of the corpus would pass to the beneficiaries or whether it would revert to the decedent. Decedent retaining a string attached to all the property until death severed it, the entire corpus was swept into the gross estate and was taxable accordingly.

There is no basis evident for deducting the value of the corpus for the period of the life expectancies of the two measuring lives, as was done by the court below. The estate tax is not based on the value of the reversionary interest of the decedent at the time of his death but on the value at the time of his death of the property to which that reversionary interest relates. It makes no difference how vested may be the remainder interests in the corpus or how remote or uncertain may be the decedent's reversionary interest. If the corpus does not shed the possibility of reversion until at or after the decedent's death, the value of the entire corpus on the date of death is taxable.

Reversed.

MR. JUSTICE DOUGLAS, concurring.

If the trust gave a life estate to the decedent and the remainder to his children, § 302 (c) of the 1926 Act would not require the payment of a tax under the rule of *May* v. *Heiner*, 281 U. S. 238; *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *McCormick* v. *Burnet*, 283 U. S. 784; and *Hassett* v. *Welch*, 303 U. S. 303. The theory of *May* v. *Heiner* was that under those circumstances no interest in the property passed from the grantor to the remainderman on the grantor's death, since the title of the remainderman had been definitely fixed by the trust deed. We need not determine whether the rule of *May* v. *Heiner* should survive *Helvering* v. *Hallock*, 309 U. S. 106. See Paul, Federal Estate & Gift Taxation (1942) § 7.15. For

in this case the grantor retained the right to reduce or cancel by will or written instrument the interests of the children; and the corpus would have been returned to the grantor if he survived his nieces. Hence it seems plain that the gifts over would take effect in possession or enjoyment only at or after the death of the grantor.

HERB *v.* PITCAIRN ET AL., RECEIVERS FOR WABASH RAILWAY CO.

NO. 24. CERTIORARI TO THE SUPREME COURT OF ILLINOIS.*

Argued October 17, 18, 1944.—Decided February 5, 1945.

The records in these cases under the Federal Employers' Liability Act being ambiguous as to whether the state court judgments of dismissal rest on a federal ground or on an adequate state ground, it is appropriate in the circumstances that the causes be continued for such period as will enable counsel for petitioners with all convenient speed to apply to the state court for amendment, or certificate, which will show whether that court intended to rest the judgments on an adequate and independent state ground or whether decision of the federal question was necessary to the judgments rendered. P. 128.
384 Ill. 237, 281, 51 N. E. 2d 277, 282, considered.

CERTIORARI, 321 U. S. 759, to review judgments affirming dismissals of two suits under the Federal Employers' Liability Act.

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

Mr. Bruce A. Campbell, with whom *Messrs. Carleton S. Hadley, Geo. D. Burroughs, James A. Farmer* and *Walton Whitwell* were on the brief, for respondents.

*Together with No. 25, *Belcher* v. *Louisville & Nashville Railroad Co.*, also on certiorari to the Supreme Court of Illinois.

637582°—46——12

MR. JUSTICE JACKSON delivered the opinion of the Court.

Each of these petitioners has made an abortive attempt to maintain an action in a City Court of Illinois on a cause of action alleged under the Federal Employers' Liability Act. As their calls upon us for relief present the same questions, in granting certiorari we consolidated the cases for argument. 321 U. S. 759.

Herb alleged injury while employed as a switchman on the Wabash Railroad at or near the City of Decatur, Mason County, Illinois, on November 23, 1936. He filed complaint under the Federal Act in the City Court of Granite City, Madison County, Illinois, in December of 1937. A verdict of $30,000 was returned, which the trial court set aside. Further proceedings in the Appellate Court and the Supreme Court resulted in remand to the City Court. 377 Ill. 405, 36 N. E. 2d 555. On March 16, 1942, in other cases, the Supreme Court of Illinois decided that, under the Illinois Constitution, a city court is without jurisdiction in any case where the cause of action arose outside the city where the court is located. *Werner* v. *Illinois Central R. Co.*, 379 Ill. 559, 42 N. E. 2d 82; *Mitchell* v. *L. & N. R. Co.*, 379 Ill. 522, 42 N. E. 2d 86. When these decisions were rendered, plaintiff moved in the City Court for a change of venue, under the Illinois Venue Statute, to the Circuit Court of Madison County, a court of general jurisdiction. Meanwhile the two-year period within which an action could be instituted under the Employers' Liability Act had long expired. The motion for change of venue was granted and the papers certified and transferred accordingly. The defendant, limiting appearance for the sole and only purpose of the motion, moved, in the Circuit Court, to dismiss on the grounds that the City Court had no jurisdiction either to entertain or to transfer the case; that, since all proceedings theretofore were ut-

terly void, no action was pending or properly commenced by the City Court process, nor by the transfer; that, since no action had been commenced in a court of competent jurisdiction, any right under the federal Act had expired by its limitation, which provided that "No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued." 35 Stat. 66, 45 U. S. C. § 56.[1] The Circuit Court granted the motion to dismiss and the Supreme Court of Illinois affirmed. 384 Ill. 237, 51 N. E. 2d 277. Its affirmance is here claimed to involve a federal question, erroneously decided.

Belcher alleged that he was a switchman on the Louisville & Nashville Railroad in its yards at Nashville, Tennessee, where he was injured on February 15, 1939. He filed his complaint on June 22, 1940, in the City Court of East St. Louis, Illinois. The answer joined issue generally and pleaded a release and satisfaction. Reply admitted execution in Nashville, Tennessee, of the document which defendant pleaded, but set up facts in avoidance. On trial a verdict of $20,000 was returned. The trial court set it aside, holding that the evidence did not warrant the verdict. This was on September 18, 1941, and at this stage of the litigation the Supreme Court of Illinois handed down its decisions of March 16, 1942 holding city courts without jurisdiction of causes arising outside their territorial jurisdiction. The plaintiff moved in City Court that venue be changed to Circuit Court of St. Clair County, Illinois, and the motion was granted. The statute of limitations on the commencement of the action at this

[1] An amendment adopted after the present causes of action accrued extended the limitation period to three years, 53 Stat. 1404, but no question of its applicability is raised and, in any event, in each case the transfer to the circuit court was made more than three years after the cause of action accrued.

time had run. Defendant made appearance limited to the purpose of moving to dismiss. The case was dismissed by the Circuit Court, and the dismissal was sustained by the Supreme Court of Illinois, in an opinion which adopted the opinion in the companion case. 384 Ill. 281, 51 N. E. 2d 282.

First. Whether any case is pending in the Illinois courts is a question to be determined by Illinois law, as interpreted by the Illinois Supreme Court. For as we have said of the Federal Employers' Liability Act, "we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure." *Mondou* v. *New York, N. H. & H. R. Co.*, 223 U. S. 1, 56–57. "As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned. . . . But there is nothing in the Act of Congress that purports to force a duty upon such courts as against an otherwise valid excuse." *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377, 387–88. And see *Chambers* v. *Baltimore & Ohio R. Co.*, 207 U. S. 142, 148–49; *St. Louis, I. M. & S. R. Co.* v. *Taylor*, 210 U. S. 281; *John* v. *Paullin*, 231 U. S. 583.

The plight of petitioners is not due to any failure of the State of Illinois to provide forums adequate for the hearing of their cases under the federal statute. The state provides a system of circuit courts sitting in each of its

counties which have general and unlimited original jurisdiction at law and in equity. These were open to the petitioners, but they chose instead to file their complaints in city courts. It would not be open for us to say that the state in setting up a local court could not limit its jurisdiction to actions arising within the city for which it is established.

When the Supreme Court held these courts without jurisdiction, plaintiffs moved in City Court under the Illinois Venue Act (Illinois Revised Statutes, 1941, ch. 146, § 36) to change venue to the Circuit Court. The City Courts granted the motion and transferred the papers to the Circuit Court. The defendants were served with no process issuing from the Circuit Court, entered no general appearance in Circuit Court. Instead, appearing specially, they moved to dismiss. In each case the motion was grounded in a complete absence of jurisdiction in the City Courts to begin, hear, or transfer the case. Each defendant denied that the Venue Act gave any power to the City Court to transfer, and each claimed that if it did, it would be unconstitutional under the State Constitution. Both also asserted that the federal statute of limitations had run at the time of purported change of venue because no suit had been "commenced" in City Court within its meaning.

The Supreme Court of Illinois did not decide whether under the State Constitution the Venue Act was unconstitutional, apparently because it held the Act not to apply. It pointed out that "both the subject matter and the parties must be before the court, and jurisdiction of the one without the other will not suffice; the two must concur or the judgment will be void in any case in which the court assumes to act." The Circuit Court had served no summons on defendants, and they made no general appearance therein. On the other hand, the City Court admittedly had no jurisdiction of the subject matter. The

Supreme Court used language which can mean that no valid proceeding was pending in either court as a matter of state law.[2] We think that the Supreme Court probably has decided that as matter of Illinois law no action is pending against these defendants in any court and that all of the proceedings have been of no effect whatever.

---

[2] "The question involved relates to the effect of the proceedings had in a court wholly incompetent to render a valid judgment, because if the judgment to be rendered would be void it necessarily follows the preliminary proceedings of the court, necessary to rendition of judgment, must likewise be void. If the court has no jurisdiction of the subject matter for judgment there can be no jurisdiction giving effect to process or pleadings.

. . . . . .

"The fallacy of [plaintiff's] argument rests in the fact that it becomes necessary to give validity to proceedings in a court, the judgment of which, if rendered upon such proceedings, would be wholly void. If the ultimate object to be obtained in a suit at law, viz., a judgment, is utterly void, it is difficult to understand how any of the preliminaries to such a judgment, such as summons, pleadings, interlocutory orders and the like have any effect, when the result, had such proceeding been concluded in the first court, would have been a nullity.

. . . . . .

". . . if appellant's contention is sustained, a valid judgment could be obtained by transferring the cause to the proper court upon a summons or notice that defendants could safely disregard when served upon them. This would give the order of transfer by the city court the effect of vitalizing process that was void and considering a case commenced and pending in a proper court during a period when, in legal contemplation, no judicial control of defendants had yet been exercised.

. . . . . .

"It is clear a suit was not commenced by filing the present suit in the city court of Granite City, or by issuing summons or filing a complaint. Lacking requisite jurisdiction because of the provisions of the constitution limiting it to cases arising within the limits of the city, such court was wholly incompetent to render any judgment or to authorize any proceedings which would result in a judgment."

The freedom of the state courts so to decide is, of course, subject to the qualification that the cause of action must not be discriminated against because it is a federal one. *McKnett* v. *St. Louis & S. F. R. Co.*, 292 U. S. 230. But we cannot say that the court below, in so far as it did hold the city courts without power, construed the state jurisdiction and venue laws in a discriminatory fashion. In *Central Illinois Public Service Co.* v. *Industrial Commission*, 293 Ill. 62, 127 N. E. 80, and *Gill* v. *Lynch*, 367 Ill. 203, 10 N. E. 2d 812, which are cited to us by petitioners, the Illinois court did uphold the power of one court to transfer a cause to another court for certain purposes. One case, however, involved a proceeding begun in a circuit court, a court of general and unlimited jurisdiction. It issued a writ of certiorari to review a decision of the state compensation commission; transfer was made under the venue statute to another circuit court because the review statute required the proceeding to be in a county where the defendant resided or could be found. In the other case a receivership proceeding was transferred from county court to the circuit court because the county court was without equitable jurisdiction. Thus neither case involved the jurisdiction of a city court nor the application of the venue statutes to a city court. Therefore, the cases are too dissimilar in their facts to make this one appear to be a discrimination against a federal right whether or not they are wholly consistent with some of the language in the present case. And there is no other basis, in the opinion of the court or elsewhere, for the intimation that if petitioners' cases had been brought under state statutes or common law they would not have been dismissed under the same circumstances as those here present.

Had the Supreme Court rested upon its observations about the jurisdiction of Illinois courts and the adequacy of their procedures to bring an action into existence,

we should be without power to direct these courts to try cases which as matter of local law are not pending. But the Court did not stop at that.

Second. The case went to the Supreme Court of Illinois with a certification by the Circuit Court that a federal question was involved. The federal question, whether the action was barred by the federal statute of limitations, was raised by respondents in their motion to dismiss in the Circuit Court. In the course of its opinion the Illinois Supreme Court used language from which it seems reasonably clear that the question was decided,[3] either

[3] "The material point for consideration is whether the plaintiff has commenced an action within two years of the date of his injury in a court having jurisdiction to hear and determine the same, as required by section 6 of the Federal Employers' Liability Act . . .

. . . . . .

". . . we observe recovery under the Federal Employers' Liability Act is conditioned upon two things: (1) commencing an action within two years from the date of the injury; and (2) commencing such action in a court having jurisdiction to hear and determine the same. . . . The plaintiff having predicated his case upon the Federal Employers' Liability Act must comply with its provisions, both with respect to the time of commencing the suit and of bringing it in a court having jurisdiction to hear and determine it.

. . . . . .

"Conceding, but not deciding, that in proper cases a court without jurisdiction of the subject matter could by statute be authorized to transfer its proceedings . . . still the condition that the action be commenced within two years is not met . . . such statutes cannot recreate a right given under a Federal statute that has ceased to exist by the terms of the (Federal) statute.

. . . . . .

"In this case jurisdiction of the suit was wholly lacking *until* July 31, 1942 (if we consider the change-of-venue act valid), and at this time the condition imposed upon the plaintiff with respect to bringing his suit had expired by lapse of time. This determination *makes it*

necessarily, because the Court had not disposed of the case on state law grounds, or hypothetically. For purposes of passing on this question the Court seems to have assumed that an action is pending under state law; for only if one is pending is there occasion to consider whether the cause of action is barred.

Petitioners contend therefore that the judgment below does not rest upon a state ground but upon an erroneously decided federal ground—namely, that even though the City Court had power to transfer the case, the action is barred because not "commenced" until it arrived in Circuit Court.

Third. This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Murdock* v. *Memphis,* 20 Wall. 590, 636; *Berea College* v. *Kentucky,* 211 U. S. 45, 53; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.,* 243 U. S. 157, 164; *Fox Film Corp.* v. *Muller,* 296 U. S. 207. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power

---

unnecessary to pass upon either the constitutional question involved or the validity of the change-of-venue statute." (Italics supplied.)

In the Belcher case the court said:

"Upon parallel facts, *Herb* v. *Pitcairn,* . . . decided this day, holds that an action is not commenced within two years of the date of injury in a court of competent jurisdiction, as prescribed by section 6 of the Federal Employers' Liability Act, by transferring the cause from a city court having no jurisdiction of the subject matter at a date when the action, if instituted originally on such date in the circuit court, could not be maintained because not commenced within the statutory time. Our disposition of the identical issue in *Herb* v. *Pitcairn* is decisive here."

over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion. If the Illinois court means to hold that the city courts could not adjudge, transfer, or begin these cases and that no case is pending in its courts at the present time, it is manifest that no view we might express of the federal Act would require its courts to proceed to the trial of these actions.

But what to do with cases in which the record is ambiguous but presents reasonable grounds to believe that the judgment may rest on decision of a federal question has long vexed the Court. In many cases the answer has been a strict adherence to the rule that it must affirmatively appear that the federal question was decided and that its decision was essential to disposition of the case; and that where it is not clear whether the judgment rests on a federal ground or an adequate state one, this Court will not review. *Klinger* v. *Missouri,* 13 Wall. 257, 263; *De Saussure* v. *Gaillard,* 127 U. S. 216, 234; *Johnson* v. *Risk,* 137 U. S. 300, 307; *Wood Mowing Machine Co.* v. *Skinner,* 139 U. S. 293; *Adams* v. *Russell,* 229 U. S. 353, 358–61; *Lynch* v. *New York,* 293 U. S. 52.

In other cases where justice seemed to require it, for example because of supervening events, the Court has said that to set aside the judgment and remand the case to the state court for further consideration is not to review, in any proper sense of the term, the decision of the state court. *Patterson* v. *Alabama,* 294 U. S. 600, 607; *State Tax Comm'n* v. *Van Cott,* 306 U. S. 511, 515. And in *Minnesota* v. *National Tea Co.,* 309 U. S. 551, uncer-

tainty as to the grounds of the decision below led the Court to vacate and remand for further consideration. *National Tea Co.* v. *State,* 205 Minn. 443, 286 N. W. 360; 208 Minn. 607, 294 N. W. 230. In *Lynch* v. *New York,* 293 U. S. 52, the Court strongly intimated that had petitioners requested a continuance in this Court to permit an application to the state court for amendment or clarification of its remittitur, there would be power and willingness to grant it. Later, in *International Steel & Iron Co.* v. *National Surety Co.,* 297 U. S. 657, 662, the record failed to disclose that a federal question had been presented or decided. Counsel requested at the bar continuance to apply for amplification, and it was granted. Reargument was had in the state court upon the federal question, the court did pass on it, the further proceedings were certified, and this Court asserted jurisdiction and proceeded to decision. The practice has become common by which some state courts, such as the New York Court of Appeals, provide counsel on motion with a certificate of the court or of the Chief Judge that a stated federal question was presented and necessarily passed upon if such was the case. See, *e. g.,* cases cited in Robertson and Kirkham, Jurisdiction of the Supreme Court, § 75.

It is no criticism of a state court that we are unable to say in a case where both state and federal questions are presented, discussed, and perhaps decided, that the judgment would have been the same had only one of the grounds been present. Those courts may adjudicate both kinds of questions and because it is not necessary to their functions to make a sharp separation of the two their discussion is often interlaced. But we cannot perform our duty to refrain from interfering in state law questions and also to review federal ones without making a determination whether the one or the other controls the judgment. And in cases where the answer is not clear to us,

it seems consistent with the respect due the highest courts of states of the Union that they be asked rather than told what they have intended. If this imposes an unwelcome burden it should be mitigated by the knowledge that it is to protect their jurisdiction from unwitting interference as well as to protect our own from unwitting renunciation.

It is our purpose scrupulously to observe the long standing rule that we will not review a judgment of a state court that rests on an adequate and independent ground in state law. Nor will we review one until the fact that it does not do so appears of record. But because we will not proceed with a review while our jurisdiction is conjectural it does not follow that we should not take steps to protect our jurisdiction when we are given reasonable grounds to believe it exists. We think the simplest procedure to do so, where the record is deficient, is to hold the case pending application to the state court for clarification or amendment. It need not be elaborate or formal if it is clear and decisive in stating whether a federal question, and if so, what federal question, was decided as a necessary ground for reaching the judgment under review. In proper cases we may grant counsel's request for continuance for the purpose. In proper cases we will impose the duty of applying for it upon petitioner or appellants upon our own motion.

These causes are continued for such period as will enable counsel for petitioners with all convenient speed to apply to the Supreme Court of Illinois for amendment, or certificate, which will show whether it intended to rest the judgments herein on an adequate and independent state ground or whether decision of the federal question was necessary to the judgment rendered.

MR. JUSTICE BLACK, dissenting.

Far-reaching implications of the Court's action in both these cases impel me to state the reasons for my disagreement.

In November, 1936, Herb (the petitioner in No. 24) lost a leg and suffered other severe injuries. He commenced an action against the railroad in an Illinois City Court, was awarded a verdict, the trial judge entered judgment for the railroad notwithstanding the verdict, and an Illinois intermediate appellate court reversed and directed that judgment be entered for Herb. 306 Ill. App. 583, 29 N. E. 2d 543. The Illinois Supreme Court reversed the Appellate Court's judgment insofar as it had directed that a judgment be entered for Herb, and remanded the case to the City Court for the trial judge to pass upon a motion for new trial should one be made. 377 Ill. 405, 36 N. E. 2d 555. Although five years had already elapsed since Herb's injuries, his efforts to secure a judicial determination of his rights under federal law had just begun.

Apparently, as the lengthy history of Herb's case shows, it had long been assumed by the courts as well as by the legal profession, that Illinois City Courts had jurisdiction to try railroad employees' cases arising under federal law. But after remand of his case to the City Court, the state Supreme Court handed down opinions in two other cases holding that City Courts did not have jurisdiction to hear and determine actions for injuries which occurred outside their territorial limits.[1] In view of this new obstacle to his action, the petitioner then moved for a change of venue to the Circuit Court, under an Illinois statute authorizing transfer from a "wrong court or county" to a "proper court or county." Ch. 146, Ill. Rev. Stat. 1941, Par. 36. The motion was granted, and in the Circuit Court the railroad moved to dismiss the cause on the ground that (1) all of the orders of the City Court, including the change of venue, were invalid; (2) the statute authorizing transfer was unconstitutional; (3) the suit had not been "commenced" within two years after the date

[1] *Werner* v. *Illinois Central R. Co.*, 379 Ill. 559, 42 N. E. 2d 82; *Mitchell* v. *Louisville & Nashville R. Co.*, 379 Ill. 522, 42 N. E. 2d 86.

of the injury as required by § 6 of the Federal Employers' Liability Act.

The motion to dismiss was sustained and Herb appealed. The Circuit Court Judge's certification to the Illinois Supreme Court recited that the judgment involved construction of the Illinois and United States Constitutions, the validity of an Illinois statute, and the validity and construction of § 6 of the Federal Employers' Liability Act.

The court below in the very first sentence after reciting the facts, stated that "the material point for consideration" was whether the requirements of § 6 of the Federal Employers' Liability Act had been met. Throughout its entire opinion, the Court construed § 6 and the City Court's jurisdiction as related to its construction of that section, in order to determine whether or not its requirements had been met. Then, having decided that the action was not "commenced" within the federal statutory period, it summarily disposed of the state questions raised with this one sentence: "This determination makes it unnecessary to pass upon either the [Illinois] constitutional question involved or the validity of the [Illinois] change-of-venue statute."

It is true that the court below held that "proceedings in the City Court were of no effect." In so holding, it did not decide that this fact alone authorized dismissal of the cases from the Circuit Court, which admittedly had jurisdiction to try cases arising under the federal Act. Consequently, it cannot be said that this holding provides an independent state ground for the Circuit Court's dismissal. The only reason why the Circuit Court could dismiss under the State Court's view was because § 6 of the federal Act required a suit to be "commenced" in two years. This made it necessary for the court to interpret the meaning and scope of "commenced." It construed the word as meaning not only that a suit should be filed

within two years of an injury, but that such suit must be filed in a court having jurisdiction to hear and determine the cause. Having thus by construction superimposed this condition on the federal Act, it proceeded to determine whether the City Court had such power. It held that the City Court did not have such power (a state question). Then applying its construction of the federal statute, it decided that the action had not been "commenced" within two years from the date of the injuries (a federal question). All of this shows a determination of federal questions which we should decide.

But this Court says that other language in the state court's opinion indicates that its judgment might really have been rested on a state procedural ground, adequate to support the dismissals. So now, more than eight years after Herb was injured, both cases are to be held here to give counsel an opportunity to ask the state Supreme Court if it "intended to rest the judgments herein on an adequate and independent state ground or whether decision of the federal question was necessary to the judgment rendered." I would not thus lightly abdicate our ultimate responsibility to protect federally created rights. To "admit that the authority to review the action of a state court where it has decided a federal question can be rendered unavailing by a suggestion 'that the court below may have rested its judgment' on a non-federal ground, would simply amount to depriving this Court of all power to review federal questions if only a party chose to make such a suggestion." *St. Louis, I. M. & S. R. Co.* v. *McWhirter,* 229 U. S. 265, 275, 276.

Furthermore, even a final determination that there was an adequate state procedural ground for dismissal of these particular suits would not end the controversies, although it might protract litigation for five more years. This is true, because it is beyond belief that dismissals on these procedural grounds would bar new actions based on the

injuries. And the federal question so clearly presented here and now, could hardly be escaped in new actions. That question is, "Are these suits barred by Section 6 of the Federal Employers' Liability Act?" This question presents a twofold problem: (1) Does § 6 have any application to these actions; (2) If so, should the word "commenced" be construed so as to make the beginning of the suit in the City Court such a commencement?

As to (1), it is to be noted that both complainants claim damages for violation of the Federal Safety Appliance Act. 27 Stat. 531 *et seq.;* 45 U. S. C. § 1 *et seq.* Violation of the Safety Appliance Act, even without the Federal Employers' Liability Act, gives rise to a cause of action on the part of an employee injured as the proximate result of that violation. *Louisville & Nashville R. Co.* v. *Layton,* 243 U. S. 617, 620; *Texas & Pacific R. Co.* v. *Rigsby,* 241 U. S. 33, 39. That Act contains no statute of limitations. No authority has been cited to support the proposition that the condition of liability imposed by § 6 of the Federal Employers' Liability Act applies to actions for damages for violation of the Safety Appliance Act. The rule of this Court has been to give the Safety Appliance Act, under which these claims were filed, a liberal construction, and one which will promote, not defeat, its purpose. *Swinson* v. *Chicago, St. P., M. & O. R. Co.,* 294 U. S. 529, 531.

Assuming that petitioners here are to be required to file new suits, and that the two year limitation of § 6 of the Federal Employers' Liability Act applies to injuries resulting from violation of the Safety Appliance Act, it still must be determined whether filing these suits in the City Courts "commenced" actions within the meaning of that word as used in § 6.

Certainly the railroads had notice of the suits. They evidently thought they had been "commenced" when they contested them in all the courts of Illinois. The lawyers for all the litigants undoubtedly felt sure that they were

trying law suits in proper forums. Neither the Illinois Court of Appeals nor the State Supreme Court which remanded Herb's case to the City Court had any doubt at that time that suits had been "commenced."

The plainest principles of justice demand that these employees be afforded a trial. No reason that can be conceived for erecting a statutory bar of two years justifies an inference that Congress intended that employees who made bona fide efforts to prosecute their claims in a court should be barred because of unanticipated decisions as to jurisdiction. The words of the statute justify the construction that these actions were "commenced" when they were filed in the City Courts. Any other construction results in a frustration of the broad objectives of the Act.

Finally, I can find no warrant whatever for saying that the state Supreme Court may have sustained dismissal on the ground that no suits at all were "pending" in the state Circuit Court. That court had jurisdiction to try them. The complaints were there. True, they might have been brought there by a City Court Clerk, although so far as the record shows, petitioner's attorneys may have taken them to the Circuit Court. But the state Supreme Court's opinions do not indicate that Illinois law requires that a complaint be physically filed by the hands of no one except an injured person. I shall not believe the state court would make such a holding until it does so.

For special reasons, in addition to those above stated, I think that this Court's action in requiring Belcher (petitioner in No. 25) to obtain some kind of certificate of "intention" from the Illinois Supreme Court is without any conceivable justification. The argument of parties before us and the Court's opinion have treated the *Belcher* case as though the Supreme Court of Illinois had sustained its dismissal and the Herb dismissal, in No. 24, on identical grounds. This treatment of the two cases is not justified unless the State Court's opinion in *Belcher's* case is given

a strained interpretation. The *Belcher* opinion did cite the *Herb* opinion as presenting "parallel facts" to those of the *Belcher* case. But the "parallel facts" in the two cases upon which the *Belcher* dismissal was premised, were carefully limited by the *Belcher* opinion's statement of the issue to this effect:

"Defendant, appearing specially, made a motion to quash the summons issued by the city court and to dismiss the cause for the reason, among others, that the cause having been ordered transferred to the circuit court on July 17, 1942, more than two years after the date plaintiff suffered his injuries, namely, February 15, 1939, he could neither institute nor maintain his action in the circuit court since it had not been commenced within two years from the day the cause of action accrued, conformably to section 6 of the Federal Employers' Liability Act." *Belcher* v. *L. & N. R. Co.*, 384 Ill. 281, 282.

After stating the issue in this limited fashion, the *Belcher* opinion then went on to say:

"Upon parallel facts, *Herb* v. *Pitcairn*, . . . decided this day, holds that an action is not commenced within two years of the date of injury in a court of competent jurisdiction, as prescribed by section 6 of the Federal Employers' Liability Act, by transferring the cause from a city court having no jurisdiction of the subject matter at a date when the action, if instituted originally on such date in the circuit court, could not be maintained because not commenced within the statutory time. Our disposition of the identical issue in *Herb* v. *Pitcairn* is decisive here." *Belcher* v. *L. & N. R. Co.*, *supra*, 282–283.

It thus appears that the *Belcher* opinion sustaining dismissal rested squarely and exclusively on the state court's conclusion that the cause of action was barred by § 6 of the Federal Employers' Liability Act. Notwithstanding this, the Court now, six years after Belcher's injuries, delays a final decision on the applicability of the federal Act,

to await a statement from the state court as to whether it would have decided it on a hypothetical state ground had that ground been considered by it in the first instance.

MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY join in this dissent.

MR. JUSTICE RUTLEDGE, dissenting.

I concur with MR. JUSTICE BLACK'S opinion in so far as it relates to the failure of the Illinois Supreme Court to take account of petitioners' claims based on the Federal Safety Appliance Act. Clearly § 6 of the Federal Employers' Liability Act does not apply to causes arising under the former Act and, on this ground alone, the judgments should be reversed.

I agree also that the Illinois court has determined the causes under the Employers' Liability Act solely by its view of federal law and that it has done so erroneously. It has held that neither action was "commenced" in time within the meaning of § 6 and in doing so has interpreted "commenced" to mean begun in a court competent to hear and determine the cause. Under this decision, the causes would not have been commenced, even if similar causes arising under state law were held sufficiently begun, for similar purposes, in identical circumstances. We do not know and cannot know whether local actions so filed and transferred would be barred. We do not know this because, as MR. JUSTICE BLACK points out, the Illinois Supreme Court expressly disavowed that it had applied or determined the validity of the Illinois venue statutes, which on their face purport to authorize just such transfers as occurred in these causes.[1] Consequently until the

[1] The pertinent provisions of the Illinois venue statutes are as follows: "That wherever any suit or proceeding shall hereafter *be commenced, in any court of record* in this state, *and it shall appear* to the court where the same is pending, *that the same has been commenced in the wrong court* or county, *then upon motion* of either or any of the

validity and effect of those statutes are determined, the Illinois court's decision in these cases must be taken to rest wholly upon its view of the meaning of § 6, entirely independently of the meaning of the state venue statutes, and to be founded solely upon a federal ground.

That ground as the Illinois court decided it is, in my opinion, clearly wrong. It was, apparently, that "commenced" in § 6 always means "commenced in a court competent to hear and determine the cause," regardless of whether local causes may be sufficiently commenced, for similar purposes, in a court of limited jurisdiction capable of transferring but not of hearing and deciding them. Nothing in § 6 or the Act so states. On the contrary, when the suit is in a state court, it is to be taken, by fair implication, that whatever is sufficient generally to constitute be-

---

parties to such suit or proceeding, *the court shall change the venue* of such suit or proceeding *to the proper court* or county, *and the same* when the venue shall be so changed, *shall be then pending and triable in such court* or county to which the same shall be so changed *the same as in other cases of change of venue:* Provided, that where either party to such suit or proceeding shall procure the change of venue as herein provided for, that the court shall require the plaintiff in said suit to pay all costs in such suit or proceeding, up to and including the costs of the change of venue except such costs, if any there are, as shall have been made or occasioned by answer to the merits and a trial thereon, if any such shall have been had or made, and such costs, if any, caused by answer to the merits and trial thereon shall abide the final result of such suit or proceeding the same as in other cases of change of venue." Ill. Rev. Stat., 1943, c. 146, § 36.

"Change of venue *from city courts,* for the same causes and in the same manner, *may be taken as from circuit courts, and the cases sent to* any other city court, or to *any circuit court, or to any other court of competent jurisdiction* where the cause complained of does not exist: . . ." Ill. Rev. Stat., 1943, c. 37, § 346.

"The clerk of the court to which the change of venue is granted shall file the transcript and papers transmitted to him and docket the cause, *and such cause shall be proceeded in and determined* in all things, as well before as after judgment, *as if it had originated in such court.*" Ill. Rev. Stat., 1943, c. 146, § 16. (Emphasis added.)

ginning of suit for other actions is beginning of suit for these. If for instance it should be the state law that local causes are sufficiently commenced from the time of filing the complaint, though in the wrong court for reasons of jurisdiction relating to trial and decision, if nevertheless upon discovery of the error the cause is transferred to another court having complete jurisdiction, nothing in § 6 or the Federal Employers' Liability Act requires or permits suits brought under that Act to be treated differently. A state may confer upon its courts of limited jurisdiction limited powers over causes they are not competent to hear and decide. A salutary instance would be to safeguard litigants against unwitting loss of their rights of action through stumbling into jurisdictional pitfalls, by providing that actions filed in the wrong court should not be defeated through lapse of time merely because the plaintiff had mistaken his court, if upon discovery of the error, though after the period, the cause were transferred promptly to a fully competent court. Such a provision would merely create either an exception to the statute of limitations or a means of suspending the time of its running. On their face, that is what the Illinois venue statutes purport to do, though whether this is their effect is of course for the state courts to decide.

In any event, such a statute would not be contrary to or inconsistent with § 6 or any other provision of the Federal Employers' Liability Act. On the contrary, litigants in the state courts under that Act would be entitled to the benefit of such a provision if this were given to litigants having causes arising under state law.

Accordingly, since the Illinois court has held that § 6 by its own terms requires that the commencing event take place in a court having jurisdiction not only to begin and transfer, but also to hear and to decide, the judgments should be reversed and remanded.

CENTRAL STATES ELECTRIC CO. *v.* CITY OF MUSCATINE ET AL.

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

No. 85. Argued December 8, 1944.—Decided February 12, 1945.

1. The Circuit Court of Appeals, which, upon review of a valid rate order of the Federal Power Commission under the Natural Gas Act, had impounded *pendente lite* amounts paid to the natural gas company by the petitioner (a local distributor) in excess of lawful rates, was without jurisdiction to adjudicate the rights of consumers in the fund or to order payment of the fund to officers of municipalities for the benefit of those ultimately found entitled. P. 145.
2. In this situation, the most that the court below should do, in view of the apparent controversy as to the consumers' right to a refund of rates paid to the petitioner, is to order that the fund be held for a reasonable time to permit interested persons to litigate the issue in a tribunal having jurisdiction, the order to be conditioned that if such litigation is not instituted within a reasonable time, and prosecuted to final adjudication, the fund shall be paid over to the petitioner, and that, if it be adjudged as a result of such litigation that the petitioner is indebted to its consumers because of the reduction of wholesale rates in this proceeding, further application may be made to the court as to disposition of the fund. P. 145.
3. *United States* v. *Morgan*, 307 U. S. 183, and *Inland Steel Co.* v. *United States*, 306 U. S. 153, distinguished. P. 145.

Reversed.

CERTIORARI, 322 U. S. 724, to review orders of the court below which directed payment to certain municipal officers of impounded funds claimed by the petitioner.

Mr. Perry M. Chadwick, with whom *Mr. Bert L. Klooster* was on the brief, for petitioner.

Mr. Charles V. Shannon, with whom *Solicitor General Fahy, Assistant Attorney General Shea, Messrs. Robert*

L. Stern, Jerome H. Simonds and *Stanley M. Morley* were on the brief, for the Federal Power Commission; and the cause was submitted by *Mr. Matthew Westrate* for the City of Muscatine and by *Elmer E. Johnson, pro se,*— respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

We are concerned in this case with the nature and extent of the powers of a federal court sitting to review an order of the Federal Power Commission.

The decision of the court below denied the petitioner's application for payment to it of a fund of some $25,000 deposited in court, and directed its payment to persons not privies to the transaction which created the fund. A detailed recitation of events is required to show how the question arises.

The Federal Power Commission (hereinafter called Commission), proceeding under the Natural Gas Act,[1] entered an order against the Natural Gas Pipeline Company of America (hereinafter called Pipeline) requiring it to cut its rates on natural gas to effect an annual reduction in revenue of not less than $3,750,000, effective September 1, 1940.

The petitioner, Central States Electric Company (hereinafter sometimes called Central), an Iowa corporation doing a public utility business in that State and elsewhere, purchased gas at wholesale from Pipeline and distributed it in Iowa.

Pipeline sought a review of the Commission's action by the Circuit Court of Appeals. The court set aside the order but, on certiorari, we reversed and sustained it.[2] At the inception of the case Pipeline had petitioned for a

[1] 52 Stat. 821; 15 U. S. C. § 717.

[2] *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575.

temporary stay and the court below had granted a stay on condition that a bond be filed to secure the refund to purchasers at wholesale of the amounts respectively due them if the court should sustain the reduction of rates ordered by the Commission. On the dissolution of the temporary stay another was entered to continue until the further order of the court, conditioned that Pipeline should enter a second bond in the same terms. This was done.

When this court rendered its judgment sustaining the rate order, Pipeline became liable to make refunds in accordance with the bond. The court below, prior to the payment of the amount due under the bond, filed an opinion holding that it was its duty to take exclusive control over the refund when made and to determine the rights of all claimants in the fund, and made an order enjoining claimants to the fund from further proceeding in any other court. This action was pursuant to a petition of Pipeline showing that suits were being filed against it in other courts by the ultimate consumers of the gas sold by Pipeline to the local distributing companies and alleging that unless the court retained jurisdiction of the fund Pipeline would be subjected to numerous similar suits. Illinois Commerce Commission, in an answer, stated that the rates charged by distributing companies in Illinois were fixed by it and reflected the prices paid by distributors to Pipeline and that the refund, representing excessive rates paid by distributors, had been collected from the ultimate consumers and was equitably due them. The Illinois local distributors then before the court agreed that the refund should be ratably paid to the ultimate consumers.

Central was not a party to the proceeding in the Circuit Court of Appeals, but, on June 29, 1942, it sent a letter to the Clerk, in response to one from him, asserting that the portion of the refund representing excessive rates paid by Central during the refund period should be repaid to

it and not to the ultimate consumers. June 30, 1942, the court rendered an opinion in which it discussed the relative rights and interests of local distributors and ultimate consumers. The court found that, since the rates charged to local consumers included the excess charges paid by distributors to Pipeline, the ultimate consumers were in equity entitled to receive the refund. July 1, 1942, Pipeline paid into court a sum representing that portion of the rates paid to it in excess of the rate permitted by the Commission's order. The court thereupon entered an order to show cause, which specified the refund period, determined that the amount paid into court was the property of the ultimate consumers, and allocated the fund to the customers of the local distributors, including Central's customers (to whom there was allocated $25,708.54), reserved jurisdiction of the fund for the protection of all persons having rights therein, and directed all claimants to the fund to show cause why the order should not be binding on them. Later the court entered an order in which it found that Central had raised an issue concerning the relative rights of itself and its customers to the amount in question. Central, which, as we have said, had not become a party to the proceedings, then filed a petition in intervention praying that the sum be paid to it, and leave to intervene was granted. Central's petition set forth that it purchased natural gas from Pipeline during the refund period, pursuant to a contract; that the sum in question represented amounts paid by Central during the refund period in excess of the rates fixed by the Commission's order; that Central sold more than 81% of the gas in question without profit to Iowa Electric Company, which resold the same to some 2,400 consumers in Muscatine, Iowa, and that Central sold the balance directly to some 320 consumers in Greenfield, Iowa, 597 in Knoxville, Iowa, and 366 in Pella, Iowa; that less than 12½% of the gas sold in Knoxville and Pella was natural

gas; that Iowa Electric Company had transferred all its rights in and to the fund to Central for the purpose of these proceedings; that, by the law of Iowa, the power to fix rates for gas service is vested in its municipalities, and the utility rates in that State are not regulated by any State agency or commission; that rates to consumers had been voluntarily reduced to meet competitive conditions and that such rates had been approved by resolution of the Council of Muscatine; and that, due to conditions in the communities serviced, the rates charged consumers were insufficient to produce a fair return.

Thereafter the court entered an order directing that the Attorney General of Iowa and the purchasers of gas from Central, and their respective municipal representatives in Muscatine and Greenfield, be notified of Central's claim to the fund and that they show cause why the relief sought by Central should not be granted. No such order was made with respect to consumers in Knoxville and Pella nor to any officials of those cities. The City of Muscatine and the Mayor of Greenfield, purporting to represent the consumers in those cities, filed separate pleadings in which they asserted that the fund in question belonged to the consumers.

The court, without hearing evidence, denied the relief prayed by Central by an order which was stated to be "without prejudice" to Central's "making claim of adjustment with the cities of Muscatine, Greenfield, Knoxville and Pella . . . or with the consumers of gas furnished by it in said cities." The reason stated for making the order was that the court was without jurisdiction to hear Central's claim since it involved a determination of "the reasonableness of petitioner's rates" and further since the court had previously ruled that the refund belonged to the ultimate consumers. In a separate order entered the same day, the court directed payment of the sum in question to the treasurers of the several cities in specified

amounts. It fixed the amount allocated to Muscatine at 81% of the fund, apparently relying upon the allegation of the petition that more than 81% of the gas purchased from Pipeline was delivered to consumers in that city. It apparently failed to give consideration to the allegation that less than 12½% of the gas sold in Knoxville and Pella was natural gas. The order recited that the fund belonged to the ultimate consumers and that the court desired to pay it at the earliest possible time to "such parties as are entitled to the same, and to permit of a determination of said rights by a court or body having jurisdiction thereof." Thereafter Central filed a supplemental petition setting forth that, except for the stay order, Central would have retained the sum in question; that Central was the only party in privity with Pipeline and was, therefore, entitled to the benefit of the rate reduction, and that the bond filed pursuant to the court's order called for payment of the refund to purchasers at wholesale, one of whom was Central. It further attacked the jurisdiction of the court to award the sum to Central's ultimate consumers since such an award amounted to a retroactive reduction of local rates to which the Natural Gas Act, by express terms, did not apply, and, finally, asserted that the court ought not to make the award based on a conclusion of fact unsupported by any evidence that the burden of the excessive rates had been passed on to the consumers whereas the court, at the same time, disclaimed jurisdiction to determine the reasonableness of local rates and, therefore, refused to hear evidence of Central's equitable right to the fund. Muscatine and the Mayor of Greenfield responded. The court denied the petition without hearing or argument.

The court below was right in its view that as a federal court it had no power, at least in the absence of federal legislation purporting to confer such power upon it, to fix or adjust Central's rates, that being a legislative function

of the State of Iowa. This would be so where the fund in dispute came into its possession in a proceeding to enjoin the operation of an order affecting state rates,[3] and must be equally true where the proceeding was one to enjoin collection of a rate for interstate service. This, because the court below had no power as a court of equity to fix rates, and as a federal court had no power to adjudicate a matter within the legislative competence of Iowa. The court below so held in this case, and has dealt with the matter more fully and to the same effect in another.[4]

The Natural Gas Act clearly discloses that, though its purpose may have been to protect the ultimate consumer at retail, the means adopted was limited to the regulation of sales in interstate commerce at wholesale, leaving to the states the function of regulating the intrastate distribution and sale of the commodity. That Congress intended to leave intrastate transactions to state regulation is clear, not only from the language of the Act,[5] but from the exceptionally explicit legislative record,[6] and from this Court's decisions.[7]

The showing made by the petitioner's pleadings, and not denied, is that in Iowa rates are set by municipal ordinance; that the rates collected from consumers during the refund period were the lawful rates, so fixed; and that the sums impounded were deducted from the payments to Pipeline by Central out of its own funds. The only reply

---

[3] *Central Kentucky Natural Gas Co.* v. *Railroad Commission,* 290 U. S. 264, 271, 272.

[4] *Natural Gas Pipeline Co.* v. *Federal Power Commission,* 141 F. 2d 27.

[5] See, e. g., § 2 (8), 15 U. S. C. § 717 (a) (8); § 5 (a), 15 U. S. C. § 717d (a); § 13, 15 U. S. C. § 717*l*; § 14a, 15 U. S. C. § 717m (a); § 15a, 15 U. S. C. § 717n (a); § 17 (a), 15 U. S. C. § 717 (p).

[6] H. R. No. 709, 75th Cong., 1st Sess., pp. 1–3.

[7] *Public Utilities Comm'n* v. *United Fuel Gas Co.,* 317 U. S. 456, 467; *Federal Power Comm'n* v. *Hope Natural Gas Co.,* 320 U. S. 591, 609–610.

made by the municipal authorities is that the fund belongs to the ultimate consumers. Whether this is so, whether under Iowa law reparation may be demanded for sums paid by consumers under a standing rate, we do not know. Nor do we know who are proper parties under Iowa law to any proceeding to determine the relative rights of petitioner and its customers. Certainly these are questions of Iowa, not of federal, law.

We are of opinion that the court below lacked jurisdiction to adjudicate the question of the consumers' rights in the fund in dispute. *United States* v. *Morgan,* 307 U. S. 183, on which the respondents rely, is obviously distinguishable. There the fund impounded was part of the charges paid to the stockyard merchants by persons who had been charged the rates found by the Secretary of Agriculture to be excessive. Here, since the fund represents a portion of sums paid by Central to Pipeline out of Central's funds and pursuant to contract with Pipeline, the *Morgan* case would be authority for repayment to Central. This is true also of *Inland Steel Co.* v. *United States,* 306 U. S. 153. Moreover, if Central had paid Pipeline the excessive rates, the latter could not have defended a suit by Central to recover the excess on the ground that Central had passed on the burden to its customers.[8]

The ultimate consumers' rights being such as the law of Iowa affords, there is no reason for the payment of the fund to municipalities or municipal officers under a quasi trust for those found ultimately entitled, thus placing the burden on Central to pursue the cities or their officers for its recovery. An order to this effect is certainly not within the court's jurisdiction as a federal court of equity. The most the court below should do, in view of the apparent controversy as to the consumers' right to a refund of

[8] *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.,* 245 U. S. 531.

rates heretofore paid to Central, is to order that the fund be held for a reasonable time to permit interested persons to litigate the issue in a tribunal having jurisdiction, the order to be conditioned that if such litigation is not instituted within a reasonable time, and prosecuted to final adjudication, the fund shall be paid over to Central, and that if it be adjudged as a result of such litigation that Central is indebted to its consumers because of the reduction of wholesale rates in this proceeding, further application may be made to the court as to its disposition.

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

So ordered.

MR. JUSTICE BLACK, dissenting.

The primary purpose of Congress in passing the Natural Gas Act was to protect ultimate consumers of gas from excessive prices. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610, 612. The Court's decision today defeats that Congressional purpose, for under its interpretation of the Act the petitioner, a retail gas distributor, is awarded a windfall,[1] at the expense of the very consumers the Act was designed to protect.

On September 23, 1938, a petition praying for reduction of the wholesale gas rates of the Natural Gas Pipeline Company was filed with the Federal Power Commission. July 23, 1940, the Commission ordered the Company to make reductions in its future rates. The Circuit Court of Appeals, upon the Company's petition, then granted a stay pending litigation. Later, it stayed enforcement of the order. 120 F. 2d 625. As a condition of its stay, the Circuit Court of Appeals required the Company to execute a million dollar bond running to the Federal Power

[1] The court below refused to construe the Natural Gas Act so as to make this petitioner "the beneficiary of a windfall, to which it intends to hold on, once it can get possession of it."

Commission and the Illinois Commerce Commission. On March 16, 1942, this Court reversed the cause and sustained the Commission's order. 315 U. S. 575.

Subsequently, $6,377,913.57 was paid into the court by the Pipeline Company, this being the amount it had collected, pending the litigation, from Illinois, Nebraska, and Iowa gas distributing companies, in excess of the rates fixed by the Commission.

The Pipeline Company, and all of the distributing companies except petitioner here and one small company in Nebraska,[2] acquiesced in the holding of the court below that the funds thus impounded properly belonged to the ultimate consumers, and should be refunded to them. All of this amount, $6,377,913.57, except for the $25,708.54 now ordered by this Court to be paid to the petitioner, has been distributed to the ultimate consumers.[3]

The Court holds that the disposition of such funds must be made in accordance with state law and that the Circuit Court of Appeals was without jurisdiction to dispose of

---

[2] This company subsequently settled with its consumers by turning over to them approximately 70% of the funds allocable to its purchases.

[3] June 30, 1942, after a notice had been issued to petitioner Central, the Court held that all refunds "belong to the consumers, for whose benefit these proceedings were instituted." Central did not actually intervene until fourteen months later. With reference to this delay of Central's the court below said in its June 30, 1942 order that "Nebraska City and all other utilities stood by and accepted the situation as it was tendered by the pleadings and the parties. Now one or two of these utilities located where no State Supervisory Commission exists, are endeavoring to seize the fruits of the litigation brought for the consumers and retain the money for their own individual gain. It would be a gross travesty upon the proceedings, the outcome, if they were to succeed. With their efforts in this respect, we have no sympathy." Without going into a narration of what later occurred, I am of opinion that the court rightfully denied Central's intervention on the ground that it had long since decided the question. The importance of the rule announced by the court, however, prompts me to discuss it.

them as it did. Until today, this Court seems never to have doubted that "it is a power 'inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process'." *United States* v. *Morgan*, 307 U. S. 183, 197. Here, consumers of gas have been injured by a federal court order staying the Federal Power Commission's 1940 rate cut. In 1942, this Court sustained the Commission's order. 315 U. S. 575. At that time, the Pipeline Company contended before this Court that if the Commission's rate order should be sustained, the fund accumulated as a result of the stay should be retained by it, and should not be turned over to the distributing companies because "the purpose of the rate regulation is the protection of consumers and . . . will not be effectuated by refunds to wholesalers" of their "profits for past business." Upon our remand of the cause for further proceedings, the Pipeline Company petitioned the court below to take jurisdiction of the excess funds. That court held, in impounding the fund here involved, that since it was authorized by §§ 19 (b) and (c) of the Act to issue a stay pending review of the Commission's rate order, it had a mandatory obligation as a court of equity "to determine to whom and in what amounts the distribution shall be made." This holding was in accord with "the governing principle that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interests the injunction may affect." *Inland Steel Co.* v. *United States*, 306 U. S. 153, 157.

The injury to the consumers here did not stem from state law or the action of a state court; it was the direct result of stay orders made by a federal court. These orders, which permitted the Pipeline Company to continue to charge rates which the Commission had determined to be excessive, to the detriment of ultimate consumers, were

issued under the provisions of the Natural Gas Act. The injuries here were therefore occasioned by the application of federal law in a federal court, and raised federal, and not state law questions. For a federal court to remedy this injury by affording that protection to consumers which the act contemplated, cannot, in my judgment, be said to amount to a regulation of local gas rates.

The Natural Gas Act contemplates that federal reduction of wholesale gas rates to distributors will be reflected in reduction of retail rates to the ultimate consumers. Information before the Congress when it passed the Natural Gas Act showed that a large percentage of the retail cost of gas was attributable to the wholesale cost.[4] Thus the wholesale cost is a critical element in a state proceeding to regulate retail cost. An effective order of the Federal Power Commission reducing wholesale costs affords local consumers a basis for a corresponding retail reduction. But a federal rate reduction order cannot be utilized before state regulatory agencies where the federal reduction order has been stayed by a federal court. Thus, during the three years that the Power Commission's rate reduction was held in abeyance pursuant to the stay orders, the Iowa consumers were deprived of the opportunity to obtain a reduction of their rates from the local regulatory agencies. The City of Muscatine, Iowa, promptly passed an ordinance reducing local gas rates *after* vacation of the orders staying enforcement of the Power Commission's rate reduction.

Ultimate consumers can secure benefits from a federal rate reduction in two ways: (1) by using the order to get

[4] See Final Report of the Federal Trade Commission to the Senate, Sen. Doc. 92, Part 84–A, 70th Cong., 1st Sess., pp. 611, 612; Cong. Record, 75th Cong., 1st Sess., vol. 81, pp. 6723, 6725, 6728; Hearings Before the House Committee on Interstate & Foreign Commerce, 75th Cong., 1st Sess., on H. R. 4008, pp. 27, 38–39, 56–57; Hearing on H. R. 11662, House Subcommittee on Interstate & Foreign Commerce, 74th Cong., 2d Sess., pp. 25, 34–35, 81.

637582°—46——14

reduced rates before their local regulatory bodies; (2) by the impounding of funds for their benefit if a judicial stay of the federal reduction order is granted. The stay deprived these local consumers of a chance to use the Commission's order to obtain a local rate reduction. The holding of this Court partially, if not completely, deprives them of the benefits of the impounded funds. Cf. *First National Bank* v. *Flershem,* 290 U. S. 504, 520.

To deny petitioner distributing company a refund of the impounded monies would impose no deprivation upon it. Petitioner's local rates were fixed by a Muscatine city ordinance, to which rates the petitioner alleges it voluntarily agreed. That schedule of rates, petitioner argues, was "presumptively reasonable." [5] Petitioner admits that Iowa law requires the wholesale cost of gas to be one of the factors considered in determining the reasonableness of rates.[6] The petitioner's rates must therefore be considered reasonable on the basis of the old wholesale price of gas, and any increment above those rates is a "windfall."

Furthermore, the petitioner says it was free under Iowa law to attack the rates at any time as too low. This it never did. Instead, it refrained from doing so until this Court had sustained the Commission's order reducing wholesale rates, and until the Circuit Court of Appeals had adjudged that the monies belonged to the consumers. Not until then did it file its intervention claim for the impounded funds. The reason for this delay is not difficult to find. Petitioner, in arguing here that it should get

---

[5] Petitioner cites in support of its argument, *Iowa Railway & Light Co.* v. *Jones Auto Co.,* 182 Iowa 982, 164 N. W. 780; *Town of Williams* v. *Iowa Falls Electric Co.,* 185 Iowa 493, 170 N. W. 815; *Knotts* v. *Nollen,* 206 Iowa 261, 218 N. W. 563; *Mapleton* v. *Iowa Public Service Co.,* 209 Iowa 400, 223 N. W. 476.

[6] See *Cedar Rapids Gas Co.* v. *Cedar Rapids,* 144 Iowa 426, 120 N. W. 966, aff'd 223 U. S. 655.

this impounded fund, asserts that under Iowa law "municipalities may only fix rates prospectively." Iowa cases cited by the petitioner [7] seem to give some support to this contention, especially when considered with decisions of this Court dealing with analogous statutory situations.[8] I am therefore unable to see much likelihood of these consumers obtaining relief in the Iowa state courts for the injury they have suffered as a result of the federal court's action in granting a stay of the Federal Power Commission's order.

If my previous analysis is correct, the rule announced by the Court today means simply this: So long as litigation can be kept pending in the courts as to the validity of a Federal Power Commission rate reduction order, the benefits of the Natural Gas Act will be suspended as to ultimate consumers, and will be largely, if not exclusively, restricted to retail distributors.[9] Thus, by a strange quirk of statutory construction, the effort of Congress to protect consumers from excessive rates is transformed, where litigation is pending, into an Act which exploits consumers and unjustly enriches distributing companies. This Company has already received a reasonable compensation for

---

[7] See note 5, *supra.*

[8] Cf. *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U. S. 456; *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 389.

[9] When a rate schedule embodying a proposed increase in wholesale rates becomes effective, pending a determination by the Commission of the reasonableness of such increase, the Commission is authorized to require appropriate guarantees by § 4 (e) of the Act. The Commission may require the natural gas companies ". . . to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid . . ." This would appear to be broad enough to protect consumers where the amounts were paid in their behalf. Surely the Act gives no less power to a court.

its services. It is entitled to no more under Iowa or federal law.

MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE concur in this dissent.

MR. JUSTICE DOUGLAS, dissenting.

I think that the claims to the fund in possession of the court below are to be determined by state law. The Federal Power Commission has no authority to determine the rates which petitioner may charge in these Iowa cities. Under the Natural Gas Act that is for Iowa and Iowa alone to determine. *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U. S. 456, 467; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610. In that respect this case differs markedly from *United States* v. *Morgan*, 307 U. S. 183. If there had been no stay order entered and the interstate rate from the Pipeline company to petitioner had been reduced when the Federal Power Commission entered its order, it still would have taken action by the local authorities to reduce the rates in these Iowa cities.

But the federal court which has this fund has considerable discretion in its management. *United States* v. *Morgan, supra.* I fail to see how it abused its discretion in handing the fund over to the local officials. It is only fair to assume that a reduction in the interstate rate would have been followed by a reduction in local rates.[1] That indeed was the primary objective of the Natural Gas Act. *Federal Power Commission* v. *Hope Natural Gas Co., supra.* We are pointed to no provision of local law which raises any substantial question concerning the power of the local authorities to make a readjustment of rates

[1] The City of Muscatine did in fact reduce the rates after the stay order had been vacated.

through the distribution of funds impounded under a stay order.[2] And the claim of petitioner that the local law would prevent a reduction in its rates for the period while the stay order was in effect is far too vague to acquire the dignity of a substantial question.[3] He who maintains that position has the distinct burden of overcoming the presumption that as a matter of local law the consumers were entitled to the benefits of this rate reduction. Petitioner fails to carry that burden. The record is void of any credible evidence that a reduction in the interstate rate would not have warranted a reduction in local rates.

Petitioner is adequately protected by the decree entered by the court below. That court did not undertake finally to determine the rights of the parties in the fund. It has turned the fund over to respondents without prejudice to petitioner's rights in it. Those rights are determinable under Iowa law. That procedure does not preclude petitioner from its day in an Iowa court if its claim to the fund turns out to be less frivolous and more substantial than it appears to be. I think the court below selected the most equitable and just method of rectifying the injury done by its stay order.

---

[2] Petitioner asserts, and I assume, that under the Iowa law rates can be made only prospectively. But it appears from *Town of Williams* v. *Iowa Falls Electric Co.*, 185 Iowa 493, 500, 170 N. W. 815, that the Iowa courts under their "balance of convenience" rule will impound alleged excessive amounts collected by a utility company pending the outcome of rate litigation so as to protect the rights both of the utility and the consumers. If the rate increase is ultimately disallowed, the impounded funds will be returned to the customers; otherwise they will be turned over to the company. We are pointed to no authority which suggests that Iowa would not sanction the use of such a method of readjustment under the circumstances of this case.

[3] So far as appears the rates which petitioner was charging during the period of the stay order had been voluntarily proposed by it.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. *v.* DUEL, COMMISSIONER OF INSURANCE.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 115. Argued January 12, 1945.—Decided February 12, 1945.

A statute of Wisconsin requires that the unearned premium reserve of every insurance company doing business within the State shall be computed by a specified percentage of premiums received and shall be shown as a liability in the annual statement required to be filed. As applied to the appellant—a foreign insurance company which operated in some States on a membership fee plan (unlawful in Wisconsin)—the statute as construed requires that in computing the reserve there be included membership fees as well as premiums received in all States. For failure to comply with the statute, appellant was denied a license to do business within the State. *Held:*

1. The statute does not violate the due process clause of the Fourteenth Amendment. P. 157.

(a) The reserve requirement was relevant to the financial stability of insurance companies doing business within the State, and was therefore within the power of the State for the protection of its citizens. P. 158.

(b) The due process clause does not demand uniformity in the requirements of the States with respect to financial statements of companies doing a multi-state business. P. 159.

(c) The statute does not regulate out-of-state activities. P. 159.

2. The statute does not violate the full faith and credit clause of the Constitution. P. 159.

(a) That the State of incorporation does not treat membership fees as premiums does not preclude Wisconsin's doing so. P. 159.

(b) The full faith and credit clause does not bar a State from imposing stricter financial standards for corporations doing business within its borders than are imposed by the State of incorporation. P. 159.

(c) The appellant, challenging the power of Wisconsin to enforce its own statutes in its own courts, did not meet the burden

of showing that the interests of the State of incorporation were superior. P. 160.

3. As to the appellant's contention that the statute as construed and applied violates the commerce clause of the Constitution—which question was not raised or passed upon below, but emerged after this Court's decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533—it appears that the appellant is not foreclosed under Wisconsin procedure from obtaining a determination of that question in the Wisconsin courts, either in the present suits or in another pending proceeding, so it is not necessary to vacate the judgment below in order that the appellant may have an opportunity to obtain the ruling. Pp. 160, 163.

244 Wis. 429, 12 N. W. 2d 696, affirmed.

APPEAL from a judgment sustaining the constitutionality of a state statute as construed and applied.

Messrs. R. M. Rieser and *Barnabas F. Sears,* with whom *Mr. Herbert H. Naujoks* was on the brief, for appellant.

Mr. Harold H. Persons, Assistant Attorney General of Wisconsin, with whom *Mr. John E. Martin,* Attorney General, was on the brief, for appellee.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is an appeal under § 237 (a) of the Judicial Code, 28 U. S. C. § 344 (a) from the judgment of the Wisconsin Supreme Court which sustained the constitutionality as construed and applied to appellant of § 201.18 of the Wisconsin Statutes, 1943. 244 Wis. 429, 12 N. W. 2d 696.

Sec. 201.18 reads as follows:

"Reserves, basis for. (1) The unearned premium or reinsurance reserve for every insurance company when no other statutory provision is made therefor, shall be computed by the commissioner by setting up fifty per cent of the premiums received on all risks that have one year or less to run, and pro rata of all premiums on risks that have

more than one year to run. In the case of perpetual risks or policies, the whole amount of premium paid shall be set up as a reserve. Every such company shall show its reserve, computed upon this basis, as a liability in the annual statement required by section 201.50.

"(2) Where no other provision is made therefor by law, the reserves of any insurance company shall be calculated upon such basis, method and plan as shall fully provide for all liabilities, and any basis, method and plan fixed by the order of the commissioner shall be prima facie just, reasonable and proper."

The insurance commissioner of Wisconsin refused appellant a license in 1942 and also in 1943 for failure to comply with that provision. Appellant accordingly brought suits to enjoin the commissioner from interfering with its business and to require him to issue it a license to do business in the State for the years in question. The facts may be briefly stated.

Appellant is an Illinois corporation doing business in many States. It started doing business in Wisconsin in 1939. It writes various forms of automobile insurance on the mutual plan. When it writes a policy for a new customer, it charges him a membership fee in addition to a premium. The membership fee is not returnable but entitles the insured to insure one automobile so long as he remains a desirable risk and so long as the company continues to write such coverage. It is said that the membership fee gives a life option to the insured to purchase insurance at a saving of from twenty to thirty-five per cent of the usual cost. Appellant has contended that the membership fees are no part of the premiums, furnish no insurance protection, and merely reimburse it for the expense of obtaining the new business. Wisconsin took a different view. The commissioner refused renewal of appellant's license for the years ending May 1, 1940, and

May 1, 1941. Litigation followed which resulted in the decision of *Duel* v. *State Farm Mutual Automobile Ins. Co.*, 240 Wis. 161, 1 N. W. 2d 887. The Wisconsin Supreme Court held as a matter of law that the membership fees were part of appellant's premiums and that 50 per cent of them must be included in the reserve required by § 201.18. Thereupon appellant adopted and submitted to the commissioner a new scheme for doing business in Wisconsin. The plan was to abandon the membership fee in Wisconsin, to require none of its Wisconsin policyholders, and to do business in Wisconsin on a level premium basis. The result was that the premiums required to be paid in Wisconsin were 27 per cent higher than those required in States which construed premiums as not including membership fees. The commissioner refused to grant appellant the licenses for these later years because its reserve required by § 201.18 did not include 50 per cent of the membership fees obtained on business written in other States. The present litigation ensued. The Wisconsin Supreme Court sustained the commissioner, holding (1) that § 201.18 required a reserve which covered the over-all liability of the appellant and (2) that § 201.18 as construed and applied did not contravene appellant's constitutional rights.

Of the three constitutional questions argued here two were raised below. They are that the statute violates (1) the due process clause of the Fourteenth Amendment and (2) the full faith and credit provision of Art. IV, § 1. We think neither of the two has merit.

I. So far as due process of law is concerned, this case is governed by the principles announced in *Osborn* v. *Ozlin*, 310 U. S. 53, and *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313. In *Osborn* v. *Ozlin, supra*, p. 62, we stated that "The mere fact that state action may have repercussions beyond state lines is of no judicial significance

so long as the action is not within that domain which the Constitution forbids." We sustained in that case Virginia legislation which forbade a licensed company to write insurance in Virginia except through a resident agent and which provided that the resident agent could not retain less than one-half of the customary commission even though the business originated with an out-of-state broker, the resident agent rendering only a perfunctory service. We held that by such measures Virginia was seeking to protect the interests of her citizens, not to prohibit the making of contracts beyond her borders. In *Hoopeston Canning Co.* v. *Cullen, supra,* we sustained provisions of the New York Insurance Law as applied to reciprocal insurance associations licensed to do business in New York but with headquarters in Illinois. The regulations which New York had imposed included stipulated operating reserves for payment of losses, a contingent liability of subscribers of not less than one nor more than ten times the amount of the annual premium expressed in the contract, and a requirement for the maintenance of an unimpaired surplus. We said, "Neither New York nor Illinois loses the power to protect the interests of its citizens because these associations carry on activities in both places. . . . We think the regulations themselves, since they are aimed at the protection of the solvency of the reciprocals or at promoting the convenience with which New York residents may do their insurance business, are all within the scope of state power." 318 U. S. p. 321.

Wisconsin has a legitimate concern with the financial soundness of companies writing insurance contracts with its citizens. The reserve which it requires under § 201.18 is designed to measure the entire future contingent liability on unexpired risks. That contingent liability is obviously relevant in any appraisal of the financial soundness and stability of the company. It is, to be

sure, a bookkeeping requirement. But it is more than that: It is one of Wisconsin's measuring rods of financial stability and strength. Any financial statement required by Wisconsin or any other State would need reflect all assets and liabilities of the company in the interests of truth. Their inclusion does not mean that out-of-state activities are being regulated by Wisconsin. It only means that solvency of a multi-state business can hardly be determined on a single state basis. Accounting is no exact science. The due process clause certainly does not require uniformity in requirements for financial statements of companies doing a multi-state business. Each State must necessarily have leeway in providing its own accounting standards for companies doing business within its borders. If a state undertook to regulate out-of-state activities through such a requirement, different questions would be posed. But we fail to see that Wisconsin has done that here. We cannot say that the reserve required by Wisconsin has any purpose but the protection of its own citizens. Its adequacy or appropriateness as a standard for qualification to do business in Wisconsin is therefore a question for Wisconsin to determine.

II. Little need be said in reply to the contention that the Wisconsin statute as construed and applied violates the full faith and credit provision of the Constitution. Appellant's argument comes down to this: Illinois, the State of incorporation, does not treat the membership fees as a part of the premiums. Therefore, Wisconsin may not do so. The result would be that no State could impose stricter financial standards for foreign corporations doing business within its borders than were imposed by the State of incorporation. The full faith and credit provision requires no such result. This Court has recognized that "In the case of statutes, the extra-state effect of which Congress has not prescribed, where the policy of one

state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states" is imperative. *Alaska Packers Assn.* v. *Industrial Accident Commission,* 294 U. S. 532, 547. The full faith and credit provision may not be used to compel one State "to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Employers Ins. Co.* v. *Industrial Accident Commission,* 306 U. S. 493, 501. He who challenges the power of one State to enforce in its own courts its own statutes on such grounds carries the burden of showing that "of the conflicting interests involved those of the foreign state are superior to those of the forum." *Alaska Packers Assn.* v. *Industrial Accident Commission, supra,* p. 548. That burden has not been carried here. Wisconsin obviously has a considerable interest in the financial soundness and stability of foreign as well as domestic companies doing business in Wisconsin. It is not apparent how Illinois has a superior interest. As among the several States it is Wisconsin's prerogative to select the appropriate means of protecting its own citizens by establishing financial standards for companies which exploit the opportunities which Wisconsin affords.

III. Appellant's remaining contention is that this Wisconsin statute as construed and applied violates the Commerce Clause of the Constitution. Art. I, § 8. This question was not raised below. It emerged after the jurisdictional statement was filed here on June 1, 1944. For on June 5, 1944, we decided *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533, holding that the fire insurance business was commerce within the meaning of the Commerce Clause and the Sherman Act. 26 Stat. 209, 15 U. S. C. § 1 and § 2. Since the Wisconsin Supreme Court did not pass on the question, we may not do so. *McGold-*

rick v. *Compagnie Generale Transatlantique,* 309 U. S. 430, 434. But our decision in the *South-Eastern Underwriters* case was a supervening event arising in the course of this litigation. We do not think appellant should be prejudiced by the fact that the decision came too late for it to obtain a ruling by the Wisconsin court. The question is what disposition we should make of this appeal so that in the interests of justice appellant may have a hearing on the commerce point.

A customary procedure has been for the Court to vacate the judgment of the state court where there has been a supervening event since its rendition which alters the basis upon which the judgment rests, and to remand the case so that the court from which it came might reconsider the question in light of the changed circumstances. *Gulf, C. & S. F. R. Co.* v. *Dennis,* 224 U. S. 503; *Missouri* v. *Public Service Commission,* 273 U. S. 126; *Pagel* v. *MacLean,* 283 U. S. 266; *Patterson* v. *Alabama,* 294 U. S. 600, 607; *Ashcraft* v. *Tennessee,* 322 U. S. 143, 156. See *Dorchy* v. *Kansas,* 264 U. S. 286, 291. In those cases the supervening event had raised questions of state law which might have warranted a reversal of the judgment. If they were adequate, it would be unnecessary to reach the federal questions which were presented. Moreover, it appeared in some of those cases that unless the judgment of the state court were vacated, the opportunity to raise the new questions which had emerged might be lost. See *Gulf, C. & S. F. R. Co.* v. *Dennis, supra; Pagel* v. *MacLean, supra.* It is suggested that that course should be followed here so that this additional federal question may be passed upon by the Wisconsin Supreme Court. We would not hesitate to adopt that procedure in the interests of justice if it appeared that otherwise appellant would be foreclosed from an adjudication of the issue. Appellant does not show that it would be. Respondent assumes in its brief that appellant will not be foreclosed.

And we think that assumption is warranted for the following reasons.

We are advised that appellant has pending in the Wisconsin courts another suit in respect to the license year commencing May 1, 1944. Wisconsin has the familiar rule that though the validity of the law in question might have been determined in an earlier suit, the prior judgment is not *res judicata* where the second suit is on a different cause of action in absence of evidence to show that the question was actually presented to the court and decided in the earlier litigation. *Wentworth* v. *Racine County,* 99 Wis. 26, 31, 74 N. W. 551; *Grunert* v. *Spalding,* 104 Wis. 193, 213–214, 79 N. W. 606, 80 N. W. 589; *Lindemann* v. *Rusk,* 125 Wis. 210, 237, 104 N. W. 119. But if that principle is inapplicable here it is nevertheless the general rule that *res judicata* is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation. 2 Freeman on Judgments (5th ed. 1925) § 713; *Blair* v. *Commissioner,* 300 U. S. 5, 9; *West Coast Life Ins. Co.* v. *Merced Irrigation Dist.,* 114 F. 2d 654, 662; *In re Pomeroy,* 51 Mont. 119, 151 P. 333; *Hurd* v. *Albert,* 214 Cal. 15, 26, 3 P. 2d 545. We cannot find that Wisconsin has a different rule.

The Wisconsin statute, moreover, gives the court power to allow an amendment "at any stage of any action or special proceeding before or after judgment, in furtherance of justice and upon such terms as may be just" provided that "the amended pleading states a cause of action arising out of the contract, transaction or occurrence or is connected with the subject of the action upon which the original pleading is based." Wis. Stat. 1943, § 269.44. That power has been construed very liberally. *Kennedy* v. *Waugh,* 23 Wis. 468; *Post* v. *Campbell,* 110 Wis. 378, 85 N. W. 1032; *Mallon* v. *Tonn,* 163 Wis. 366, 157 N. W.

1098; *Micek* v. *Wamka,* 165 Wis. 97, 161 N. W. 367; *Turner Mfg. Co.* v. *Gmeinder,* 183 Wis. 664, 198 N. W. 611; *Kaegi* v. *Industrial Commission,* 232 Wis. 16, 285 N. W. 845. And it exists after the case has been remanded to the trial court following an affirmance by the Wisconsin Supreme Court. See *Angers* v. *Sabatinelli,* 235 Wis. 422, 293 N. W. 173; 239 Wis. 364, 1 N. W. 2d 765.

We conclude that appellant is not foreclosed under Wisconsin procedure from obtaining a determination in the Wisconsin courts of the commerce clause question either in the present suits or in the other pending one. Accordingly we do not think it is necessary to vacate the judgment below in order that appellant may have an opportunity to obtain the ruling.

Affirmed.

MR. JUSTICE ROBERTS dissents.

MR. JUSTICE JACKSON.

I think that the judgment below should be vacated rather than affirmed and do not, therefore, reach the constitutional questions dealt with in the Court's opinion. I doubt that the Wisconsin Supreme Court can open and re-examine a judgment after it is affirmed by this Court. As the Court recognizes, to vacate is the procedure that has been followed when similar situations have been presented heretofore.

WEBRE STEIB CO., LTD. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 148. Argued December 13, 1944.—Decided February 12, 1945.

1. In a proceeding under Title VII of the Revenue Act of 1936 for a refund of processing taxes paid under the Agricultural Adjustment Act of 1933, the presumption from margin evidence that the claimant bore the burden of the tax requires, in the absence of opposing evidence, a refund *pro tanto*. P. 169.
2. The presumption arising from margin evidence favorable to the claimant places upon the Commissioner the burden of going forward with evidence sufficient to support a finding that the claimant did not bear the burden of the tax. P. 170.
3. The Commissioner's evidence in this case was sufficient to support a finding that the claimant had not borne the burden of any part of the tax, and the presumption from the claimant's margin evidence was thereby rendered inoperative. P. 171.
4. On review of administrative decisions, this Court must determine whether there is evidence legally sufficient for administrative action, but may not weigh it. *Dobson* v. *Commissioner*, 320 U. S. 489. P. 173.
5. Although the Commissioner's rebuttal evidence rendered the presumption inoperative, the record—the margin evidence being still in the case for whatever it might be worth apart from the presumption—is not devoid of rational support for a finding that the claimant absorbed some of the tax; and the cause must be remanded to the Tax Court for a weighing of the evidence, including such further evidence as that court may properly admit. P. 174.
6. Evidence as to margins in a period later than the base period, though irrelevant to the presumption created by § 907 (a), was admissible for whatever probative value it might have independently. P. 175.

140 F. 2d 768, modified.

CERTIORARI, 323 U. S. 686, to review a judgment which, reversing a decision of the Processing Tax Board of

Review, held that a claim for refund of processing taxes should have been disallowed in its entirety.

Messrs. C. J. Batter and *William A. Sutherland* argued the cause, and *Mr. Batter* was on the brief, for petitioner.

Miss Helen R. Carloss, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Mr. Sewall Key* and *Mrs. Maryhelen Wigle* were on the brief, for the respondent.

Messrs. Richard B. Barker and *John C. Reid* filed a brief as *amici curiae.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

This is a proceeding brought for recovery of sugar processing taxes paid under the Agricultural Adjustment Act of 1933. The Commissioner having denied in entirety the taxpayer's claim for $8,169.97, the total tax paid by it, taxpayer petitioned for review by the Processing Tax Board of Review, as provided by statute. 49 Stat. 1749. The Board awarded refund in the amount of $3,655.82, and motions for rehearing made by both parties were denied by the Tax Court, which had succeeded to the jurisdiction of the Processing Tax Board of Review. 56 Stat. 798. On appeal, the Court of Appeals for the Fifth Circuit reversed and held that the claim should be denied. 140 F. 2d 768. We took the case to review questions of application of the "prima facie evidence" and "presumption" sections of Title VII, Revenue Act of 1936, on which there was conflict in the circuits. *Commissioner* v. *Bain Peanut Co.,* 134 F. 2d 853, cert. granted, 320 U. S. 721, dismissed on motion of petitioner, 321 U. S. 800; *Helvering* v. *Insular Sugar Refining Corp.,* 141 F. 2d 713; cf. *E. Regensburg & Sons* v. *Helvering,* 130 F. 2d 507.

A new administrative procedure for recovery of taxes paid under the Agricultural Adjustment Act was provided

by Title VII of the Revenue Act of 1936, §§ 901–917, 49 Stat. 1747, 7 U. S. C. §§ 644–59, repealing §§ 21 (d), (e), and (g) of the 1935 amendments to the Agricultural Adjustment Act, 49 Stat. 771–73. The provisions were reviewed at length and their constitutionality upheld in *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337. In outline, so far as relevant to this case, they are as follows: The claimant is required to prove that he bore the burden of the tax. § 902. Average "margins" per unit of the commodity processed, consisting of the difference between cost of the commodity (plus tax paid, if any) and gross sales value of the articles resulting from the processing, are to be computed for the tax period and a base period; the base period is the period two years preceding imposition of the tax and the six months thereafter (February to July, 1936). §§ 907 (b), (c). If the margins for the tax period are lower than those for the base period, it is "prima facie evidence" that, to that extent, the claimant bore the burden of the tax; if they are not lower, it is "prima facie evidence" that none of the burden was borne by the claimant. § 907 (a). But this "presumption" may be rebutted either by the claimant or by the Commissioner, by proof of "the actual extent" to which the claimant shifted the tax to others. Such proof may include, but is not limited to, certain types of evidence described by the statute. § 907 (e).

For our purposes the material facts must be gleaned from the findings and memorandum of the Board of Review and a stipulation filed by the parties in the Court of Appeals.

Petitioner is a grower and purchaser of sugar cane, which it processes into direct-consumption sugar and edible molasses.[1] It operates during the months of October,

[1] This processing was subjected to tax by the Act of May 9, 1934, c. 263, 48 Stat. 670, amending the Agricultural Adjustment Act. See

November and December of each year. The tax went into effect on June 8, 1934 and petitioner paid taxes until November 8, 1935, so that it paid processing taxes—$7,067.12 on sugar and $1,102.85 on molasses—for the months of October, November and December 1934 and October and November 1935. Its average statutory margin for this period was $.01192, and the total number of units processed was 2,256,676 pounds of sugar. Petitioner's base period consisted only of the two years prior to the tax because it did no processing in the six months February to July 1936. Its average statutory margin per unit for the base period was $.01354. Thus the margin during the tax period was $.00162 per unit lower than that during the base period, creating "prima facie evidence" that petitioner had borne the tax to the extent of $3,655.82, the amount of refund allowed by the Board. Petitioner contends that this amount should have been increased by including in the margins its first processing after invalidation of the Agricultural Adjustment Act, which was its processing of the 1936 crop, October 1936 to January 1937. The average margin per unit for this period, computed as for the base period, was $.01582, or $.00228 more than the base-period margin.

Evidence that the tax was not borne by petitioner was as follows: Universal increases in the sale price of sugar were effected on the date of imposition of the processing tax in the amount of $.55 per hundred pounds, to cover the amount of the tax. All of the accounts stated between petitioner and its broker, E. A. Rainold, Inc., respecting sales of molasses made through that broker, including the processing tax as a separate item and as an addition to the sale price of the article. "An account sale, typical of all such accounts, respecting the sales of sugar, made through

---

especially § 9 (d) (6) (A) and (B) of the Act as amended, 7 U. S. C. §§ 609 (d) (6) (A), (B).

its said broker" bore the notation, "Golden Ridge, 100 Pkts. 10,000# @3.71¢ $371.00. F. O. B. Pltn. Tax Pd. Tax 0.526¢," $.526 being the prevailing rate of processing tax at the time the particular account was rendered. A letter from the broker Rainold to petitioner, dated January 17, 1936, contained the following: "According to memorandum you furnished us on processing tax you paid on 298,017 pounds of sugar, and we have accounted to you for there [three] cars of 800 pockets and part car of 300 pockets and when we get paid for the balance of this part car, or 500 pockets, it will total 3200 pockets or 320,000# on which the processing tax was included in the price. Therefore you have not paid any more tax than you collected and these sugars in warehouse here and elsewhere, that is Chicago, or [are] really tax free."

On the foregoing facts the Board of Review found that "The extent to which the processing tax [was] paid and borne by the petitioner and not shifted to others in any manner whatsoever is $3,655.82," and it awarded refund in that amount. This award was based, the Circuit Court of Appeals thought, "upon the theory that the claimant had established facts sufficient to invoke the statutory presumption that it had borne the burden of the tax" to that extent. In the view of the Court of Appeals, however, the evidence "clearly was sufficient to dissolve the presumption, and since there was no other proof to support any refund, the claim should have been disallowed in its entirety."

Our first question is whether the Board was entitled to base an award upon the statutory "prima facie evidence" or "presumption," or whether the Government's evidence removed the presumption from the case as a matter of law. For, although the Board did not state how it arrived at its award, it seems likely that it relied upon the prima facie evidence provisions and not upon a weighing of the

evidence; petitioner does not assign error to the contrary, although it contends that the evidence supports the Board's award.

The statute, unfortunately, is beset by the ambiguity and the imprecision of definition which are not uncommon with respect to presumptions. But the difficulties of the subject will not excuse us from the duty to apply as best we may a statute Congress has seen fit to enact. At one point it speaks only of "prima facie evidence" and at another it refers to the prior section as creating a "presumption." "Prima facie evidence" alone might be taken to signify only a permissive inference, indicating that the Commissioner or the courts might, if they saw fit, permit a recovery solely on the basis of the margin evidence. See *Crane* v. *Morris,* 6 Pet. 598, 621; *Bailey* v. *Alabama,* 219 U. S. 219, 234; 9 Wigmore on Evidence (3d ed. 1940) § 2494. But the statute's later use of the word "presumption" and the careful detail with which the margin evidence and rebuttal evidence are described argue against such an interpretation, as does the legislative background. A committee report on Title VII, explaining the necessity for amending the existing refund provisions, stated: "It has been contended that while that section [§ 21 (d) of the Agricultural Adjustment Act] states the conditions under which the Commissioner may deny a refund of taxes paid, it does not establish affirmatively any conditions, compliance with which will enable the claimant to secure a refund." Sen. Rep. 2156, 74th Cong., 2d Sess., p. 33. From this it seems clear that the new provision was meant to prescribe a minimum of proof which would require refund in the absence of opposing evidence. Therefore the inference arising from the margin evidence must be a compelled one.

The statute does not tell, however, on what event the existence of the presumed fact must cease to be assumed

by the trier. Does the presumption cease to operate as soon as the Commissioner has met the burden of going forward with evidence to show shifting of the tax, or does it place on him the burden of proof? The Government and the court below, taking the former view, support it with the contention that "It is never the function of a rebuttable presumption to shift the burden of proof." *Commissioner* v. *Bain Peanut Co.*, 134 F. 2d 853, 857. It is unnecessary for us to take so broad a ground, even if it is correct.[2] Dealing only with the particular presumption now before us, we find nothing to indicate that Congress attached exceptional probative value to the margin evidence, or that it desired for any other reason to tilt the scales sharply against the Commissioner rather than merely to even them somewhat in behalf of claimants. There is, for example, no reason to suppose that the Commissioner is better able than the processor to prove where the tax burden fell. On the other hand, the special problem here of preventing unjust enrichment, added to the usual strict examination of claims against the Government, convinces that Congress probably intended to leave the burden of proof on the claimant. Cf. *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386.

In the absence of any clearer statement in the statute, therefore, we think the presumption is given adequate effect if the burden is placed on the Commissioner of going

[2] But see, e. g., *Morrison* v. *California*, 291 U. S. 82, 88–91; *Page* v. *Phelps*, 108 Conn. 572, 143 A. 890; *Weber* v. *Chicago, R. I. & P. R. Co.*, 175 Iowa 358, 151 N. W. 852; *Bond* v. *St. Louis-San Francisco R. Co.*, 315 Mo. 987, 288 S. W. 777; *Holzheimer* v. *Lit Brothers*, 262 Pa. 150, 105 A. 73; Morgan, *Instructing the Jury upon Presumptions and Burden of Proof* (1933) 47 Harv. L. Rev. 59, 77–83, *Some Observations Concerning Presumptions* (1931) 44 Harv. L. Rev. 906; Bohlen, Studies in the Law of Torts (1926) 636, 637, 648–53; American Law Institute, Model Code of Evidence, Rule 703.

forward with evidence sufficient to support a finding that the claimant did not absorb the tax. Once such evidence is presented, the presumption becomes inoperative and the issue is to be determined as if there had never been a presumption. The statute declares, however, that the presumption may be rebutted by proof of "the actual extent" to which the burden of the tax was shifted. This language appears to mean that the presumption may be rebutted pro tanto, and not necessarily all at once or not at all. Thus it does not cease to operate on introduction of evidence merely sufficient to support a finding that some of the tax was shifted. It must be evidence sufficient to support a finding that the entire tax was shifted. Short of that, the presumption is not eliminated but only diminished to the extent that the rebuttal evidence will support a contradictory finding. See *Regensburg & Sons* v. *Helvering,* 130 F. 2d 507, 509. When the margins are unfavorable to the taxpayer and favorable to the Commissioner, it is unnecessary, of course, to place a burden of going forward with evidence on the claimant, for he has that burden anyway, as well as the burden of proof. Whether this means that the statute's language making the presumption operate in favor of the Commissioner is superfluous, or that in such a case the presumption must be given a different effect than when in favor of the claimant, we do not now decide. Cf. *Regensburg & Sons* v. *Helvering, supra.*

On the view we take of the statute, the proof introduced by the Commissioner made the presumption inoperative. We certainly could not say that, viewed by itself, the Commissioner's evidence would not permit a finding that petitioner shifted the entire burden of the tax. It tended to show that in all dealings with its broker the petitioner added the amount of the tax to the sale price and itemized it separately. That this was true as to all sales of molas-

ses seems to be conceded. It was also true, or so it might be found, as to a substantial part of the sugar sales and therefore inferentially as to all such sales. Petitioner raises some question as to the proper inference to be drawn from the sugar account and the broker's letter quoted above. But at least the broker's remarks that "the processing tax was included in the price" and "Therefore you have not paid any more tax than you collected" are unmistakable in their meaning. All of this evidence is among the kinds expressly mentioned by the statute as tending to rebut the presumption. More important, the statute appears specifically to provide that introduction of any evidence of this particular kind shall be sufficient to rebut the entire presumption. It states that the presumption may be rebutted by proof that the claimant modified sales contracts to reflect the initiation, termination, or change in amount of the tax, or "at any such time" changed the sale price of the article, or "at any time" billed the tax as a separate item, or indicated "by any writing" that the sale price included the amount of the tax. It then declares, "but the claimant may establish that such acts . . . do not represent his practice at other times." § 907 (e) (2). This seems clearly to mean that when any examples of the named practices are proved, it may be inferred that they represent the uniform practice of the claimant and the burden becomes his to prove that they do not. Since the Commissioner proved that not only in a few cases but in a great number the tax was indicated in writing to be included in the sale price, we think there is no doubt that he fully rebutted the presumption within the meaning of the statute.

The second question is whether, with the presumption out of the case, there is evidence from which the Tax Court would be entitled to award a refund to petitioner in any amount. The court below, although it remanded the

cause, apparently meant for it to be dismissed, for it said, "since there was no other proof to support any refund, the claim should have been disallowed in its entirety." Literally, of course, this cannot be true, for the margin evidence remained in the case for whatever it might be worth apart from the presumption. With this the Government agrees, and it concedes that, unless we can say that the evidence would not rationally support a finding in favor of petitioner, the case must go back to the Tax Court for decision on the evidence rather than on the presumption. We must determine whether there is evidence which is legally sufficient for administrative action, but we may not weigh it. *Dobson* v. *Commissioner,* 320 U. S. 489.

The fact that margins for the tax period are lower than those for the base period has some logical tendency to establish that the burden of the tax was borne by the processor. See *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 354. There are, to be sure, other and conflicting inferences which may also be drawn. As the margins are defined, the drop might be due to a decline in the demand for the processed goods, or to a decrease in the yield of the raw commodity, or to an increase in the price of the raw commodity. But we have no basis for saying that the margin thus defined does not tend to be comparatively stable and that a fall coincident with imposition of a tax would not more likely reflect the tax than a change in other factors. We suppose the taking of average margins over a base period has some tendency to produce that result. And the Tax Court's special experience might support such an inference. Cf. *Dobson* v. *Commissioner, supra.* Congress apparently believed that the rational connection was strong enough to justify basing a finding of absorption on the margin evidence alone. For, as we have seen, Congress intended that in a case where the margins were

favorable to the claimant and no other evidence was introduced the claimant should be entitled to a refund, and there appears no reason of convenience or policy which would lead to such a rule in the absence of rational connection. For all these reasons we think a finding of absorption which was based solely on the margin comparisons would not be irrational.

Nor is the Commissioner's evidence so conclusive as to deprive the margin evidence of all significance. It permits but does not require a finding that petitioner had a uniform practice of billing the tax as a separate item. Even though such a practice be inferred, there is no evidence to show how far petitioner succeeded in its effort to pass the tax on, except for the evidence that there was a general rise in the market on a date some months before petitioner's processing began. The margins are some evidence that the price may not have responded continuously to the effort to shift the tax. The fact may be that neither side's evidence goes very far toward demonstrating where the burden of the tax fell; [3] the inquiry is at best a difficult one. But we do not think it can be said that the record is devoid of rational support for a finding that petitioner absorbed some of the tax. Accordingly we must remand the case for a weighing of the evidence, including, of course, such further evidence as the Tax Court may think it proper to receive in view of the way in which the case has been tried. In doing so we intimate no opinion, of course, as to whether petitioner has sustained the burden of proof placed upon it by the statute.

Since the case must go back, it is necessary to pass upon a further question raised by petitioner. Petitioner, as we have noted, was not processing during the six months,

[3] See Johnson, *AAA Refunds: A Study in Tax Incidence* (1937) 37 Col. L. Rev. 910.

February to July 1936, designated by the statute for computing margins after the tax period. For such a case the statute provides: "If during any part of such period the claimant was not in business . . . the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations." § 907 (c). Contending that there were no similarly circumstanced concerns, petitioner sought to use the figures of a later period, that of its own 1936 production, in computing the base-period margins, which would have made those margins higher. We think the Board and the court below were correct in holding that the statutory method of making a prima facie case is exclusive and that the 1936 evidence might not be so used. The statute's restrictions, however, have reference only to the presumption; they do not exclude other evidence generally relevant on the issue of whether the tax burden was shifted. The 1936 experience, though it could not help petitioner to create a favorable presumption, was entitled to be given whatever probative value it might independently have had and, subject to the usual principles of admissibility, was therefore admissible. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 355–56.

The judgment below is modified and the cause is remanded to the Circuit Court of Appeals with directions to remand to the Tax Court for proceedings in conformity with this opinion.

MR. JUSTICE RUTLEDGE, dissenting.

I doubt that Congress intended to involve the award of refunds of processing taxes in the abstruse learning of "disappearing presumptions." In my opinion the terms "prima facie evidence" and "presumption" may be taken

to have been used interchangeably in the statute. I think no more was intended than to authorize a finding in accordance with the margin evidence, if no other were presented; and in case opposing evidence should be offered, to allow inference either way according to the weight of the proof, taking into account the margin evidence. Hence, in this aspect of the case, I would rest on the decision of the Processing Tax Board of Review, which on the record reasonably may be considered to have been reached in this manner.

I also think the statute forbids going outside the base periods prescribed for comparative data. To hold otherwise would nullify the base period provisions of the Act, which I think are valid. The cause of action here rests on a waiver of the sovereign immunity to suit which Congress may make upon such conditions as it chooses. *Nichols* v. *United States,* 7 Wall. 122; *Luckenbach S. S. Co.* v. *United States,* 272 U. S. 533, 536; *Minnesota* v. *United States,* 305 U. S. 382, 388. Allowing in the evidence concerning other periods, though not for the purpose of computing margins, accomplishes indirectly what the base period provisions were designed to prohibit.

Accordingly, I think the judgment of the Circuit Court of Appeals should be reversed, with directions to affirm the decision of the Processing Tax Board of Review.

MR. JUSTICE BLACK concurs in these views.

COMMISSIONER OF INTERNAL REVENUE *v.* SMITH.

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

No. 371. Argued January 30, 31, 1945.—Decided February 26, 1945.

An employer gave to its employee as compensation for his services an option to purchase shares of stock at a price not less than the then value of the stock. The option had no value at that time, and the compensation contemplated by the parties was the transfer to the employee of the shares of stock after their value had increased to more than the option price. *Held,* under § 22 (a) of the Revenue Act of 1938 and of the Internal Revenue Code, the employee received "compensation for personal service" and hence taxable income in each year in which stock was acquired, through effective exercise of the option in that year, in the amount of the difference between the option price and the then market value of the stock. P. 181.

142 F. 2d 818, reversed.

CERTIORARI, 323 U. S. 696, to review the reversal of a decision of the Tax Court which sustained the Commissioner's determination of a deficiency in income tax.

Mr. J. Louis Monarch, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Mr. Sewall Key* were on the brief, for petitioner.

Mr. Clarence D. Phillips, with whom *Messrs. Franklin T. Griffith* and *Earl S. Nelson* were on the brief, for respondent.

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

Respondent's employer gave to him, as compensation for his services, an option to purchase from the employer certain shares of stock of another corporation at a price not less than the then value of the stock. In two later

tax years, when the market value of the stock was greater than the option price, respondent exercised the option, purchasing large amounts of the stock in each year. The question for decision is whether the difference between the market value and the option price of the stock was compensation for personal services of the employee, taxable as income in the years when he received the stock, under § 22 (a) of the Revenue Act of 1938, c. 289, 52 Stat. 447, and § 22 (a) of the Internal Revenue Code, 26 U. S. C. § 22 (a).

Upon a petition to review the Commissioner's finding of a tax deficiency against respondent for those years, the Tax Court sustained the Commissioner. The Court of Appeals for the Ninth Circuit reversed, 142 F. 2d 818, holding that there was no finding and no evidence to support a finding, that the option was intended to enable respondent to make a "bargain purchase" or that the stock was issued to him as compensation for services. It concluded that the exercise of the option was a mere purchase of a capital investment which could result in taxable income only upon sale of the stock. We granted certiorari, 323 U. S. 696, on a petition which asserted conflict of the decision below with the decision of the Court of Appeals for the Sixth Circuit in *Connolly's Estate* v. *Commissioner*, 135 F. 2d 64.

The Tax Court found that for many years, and at all relevant times, respondent was employed by the Western Cooperage Company. In 1934 Western took over the management of the Hawley Pulp and Paper Co. pursuant to a plan for its reorganization. Hawley was then in financial difficulties, with an indebtedness amounting to $2,790,150. Under its contract with Hawley, Western was to retire annually a certain amount of Hawley's indebtedness. In the event of success in this undertaking, and when the amount of Hawley's indebtedness had been reduced by the sum of $1,400,000, Western was to receive

specified amounts of the Hawley Company's capital stock as compensation for the services thus rendered.

Respondent, in the course of his employment by Western, was active in the reorganization of the Hawley Company. As compensation for his services, the president of Western, in December 1934, gave respondent an oral option to purchase a part of the Hawley stock, to be acquired by Western under its contract. This action was confirmed by resolution of the Board of Directors of Western, pursuant to which Western, as of December 10, 1934, and "in consideration of services rendered" by respondent prior to that date, agreed in writing to sell to respondent at his option, at ten cents a share, a specified proportion of such shares of common stock as it might be entitled to receive under its contract with Hawley. On March 18, 1938, Western became entitled to the stipulated number of shares of the Hawley stock as provided by the contract with Hawley. In that and the following year respondent, by the exercise of his option, acquired from Western large amounts of the stock on payment of the option price.

The Tax Court found that at the date of the option the market price of the stock did not exceed the option price, but that in 1938 the market value of the stock then acquired by respondent exceeded its option price by $81,021, and the value of that acquired in 1939 exceeded the option price by $71,663. The court found from the option itself, the resolution of Western's Board of Directors, and from petitioner's own testimony, that "Western gave the option to petitioner [respondent here] as compensation for services rendered in effecting the reorganization plan of Hawley." It held that the excess of the market value of the shares over the option price in the years when the shares were received by respondent, was compensation for his services, taxable as income in those years.

Since the Tax Court found that the market price of the stock on the date of the option did not exceed the option

price, it is evident that its finding that the option was given as compensation for respondent's services, had reference to the compensation to be derived from exercise of the option after the anticipated advance in market price of the stock. Respondent testified that if the option could have been sold at the time he received it, it would have been for only a "negligible" or "nominal" amount. He has never contended that the option itself had value when given and there was no finding by the Tax Court that it then had value. The Tax Court, in stating the principle which it deemed applicable to the present case, quoted from *Estate of Edward J. Connolly,* 45 B. T. A. 374, as follows: "If the options had never been exercised the optionees would never have received any additional compensation." The option could be exercised only when Western's contract with Hawley had been successfully performed by the reduction of a large part of Hawley's indebtedness, which would result in an increase in the value of Hawley's capital stock to be received by Western subject to respondent's option. Moreover, the Tax Court concluded as a matter of law that the facts which it found, and which we have detailed, brought the case, for the tax year 1938, within the provisions of § 22 (a) of the Revenue Act of 1938, and of the interpretative Treasury Regulations 101, Art. 22 (a)–1; and for the tax year 1939, within the identical provisions of § 22 (a) of the Internal Revenue Code, and Treasury Regulations 103, Art. 19.22 (a)–1.

Section 22 (a) of the Revenue Act defines "gross income" subject to the Act as including "gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid. . . ." Treasury Regulations 101, Art. 22 (a)–1 provides: "If property is transferred . . . by an employer to an employee, for an amount substantially less than its fair market value, regardless of whether the transfer is in

the guise of a sale or exchange, such . . . employee shall include in gross income the difference between the amount paid for the property and the amount of its fair market value to the extent that such difference is in the nature of (1) compensation for services rendered . . ."

Section 22 (a) of the Revenue Act is broad enough to include in taxable income any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected. See *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 729. The regulation specifically includes in income, property "transferred . . . by an employer to an employee, for an amount substantially less than its fair market value," even though the transfer takes the form of a sale or exchange, to the extent that the employee receives compensation.

In certain aspects an option may be spoken of as "property" in the hands of the option holder. Cf. *Helvering* v. *San Joaquin Fruit Co.,* 297 U. S. 496, 498; *Shuster* v. *Helvering,* 121 F. 2d 643, 645. When the option price is less than the market price of the property for the purchase of which the option is given, it may have present value and may be found to be itself compensation for services rendered. But it is plain that in the circumstances of the present case, the option when given did not operate to transfer any of the shares of stock from the employer to the employee within the meaning of § 22 (a) and Art. 22 (a)–1. Cf. *Palmer* v. *Commissioner,* 302 U. S. 63, 71. And as the option was not found to have any market value when given, it could not itself operate to compensate respondent. It could do so only as it might be the means of securing the transfer of the shares of stock from the employer to the employee at a price less than their market value, or possibly, which we do not decide, as the option might be sold when that disparity in value existed. Hence the compensation for respondent's services, which the parties contemplated, plainly was not confined to the mere

delivery to respondent of an option of no present value, but included the compensation obtainable by the exercise of the option given for that purpose. It of course does not follow that in other circumstances not here present the option itself, rather than the proceeds of its exercise, could not be found to be the only intended compensation.

The Tax Court thus found that the option was given to respondent as compensation for services, and implicitly that the compensation referred to was the excess in value of the shares of stock over the option price whenever the option was exercised. From these facts it concluded that the compensation was taxable as such by the provisions of the applicable Revenue Acts and regulations. We find no basis for disturbing its findings, and we conclude it correctly applied the law to the facts found. Its decision is affirmed, and the judgment of the Court of Appeals below, reversing it, is

Reversed.

MR. JUSTICE ROBERTS is of the opinion that the judgment should be affirmed for the reasons stated by the Circuit Court of Appeals, 142 F. 2d 818.

CHARLESTON FEDERAL SAVINGS & LOAN ASSOCIATION ET AL. *v.* ALDERSON, STATE TAX COMMISSIONER.

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

No. 400. Argued February 7, 1945.—Decided February 26, 1945.

1. The validity of a state statute under the Federal Constitution does not appear to have been drawn in question in this suit in the state courts challenging tax assessments, and an appeal under § 237 (a) of the Judicial Code as amended is unauthorized; but under § 237 (c) certiorari is granted, since appellants properly raised the question of the validity of the assessments under the equal protection clause of the Federal Constitution. Pp. 184, 187.

2. Even where the federal question has been properly raised and decided in the state courts, an appeal under § 237 (a) may be dismissed where appellants fail to attack a statute explicitly in their assignments of error here. P. 187.
3. Since the equal protection clause of the Fourteenth Amendment does not operate to bar taxation which does not in fact bear unequally on persons or property of the same class, mere differences in modes of assessment not shown to produce such inequality are not forbidden. P. 190.
4. Nor does the equal protection clause prohibit inequality in taxation which results from mere mistake or error in judgment of tax officials, or which is not shown to be the result of intentional or systematic undervaluation of some but not all of the taxed property in a single class. P. 190.
5. The burden of establishing the unconstitutionality of assessments for taxation is upon the protestant. P. 191.
6. Appellant loan associations failed to sustain the burden of showing that state tax officials, who assessed appellants' property for state taxation at its full value, denied to appellants the equal protection of the laws, guaranteed by the Fourteenth Amendment, by their mode of valuation, for taxation, of property of the same class belonging to other taxpayers. P. 192.

126 W. Va. 506, 30 S. E. 2d 513, affirmed.

APPEAL from a judgment sustaining the validity of assessments for state taxation.

Mr. J. Campbell Palmer, III, with whom *Mr. W. Elliott Nefflen* was on the brief, for appellants.

Mr. Kenneth E. Hines, Assistant Attorney General of West Virginia, with whom *Mr. Ira J. Partlow,* Attorney General, was on the brief, for appellee.

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

The question is whether the tax officials of West Virginia, who have assessed appellants' property for state taxation at its full value, have denied to appellants the equal protection of the laws, guaranteed by the Four-

teenth Amendment, by their mode of valuation, for taxation, of property of the same class belonging to other taxpayers.

Appellants are three Federal Savings and Loan Associations, organized under federal laws, and one Building and Loan Association, organized under state laws. They filed petitions with the county court of Kanawha County, West Virginia, seeking a review and reduction of the 1941 assessment of their property for taxation by the county assessor. They alleged that their property was assessed at a proportionately higher assessment valuation than the property of other taxpayers and that such assessment was unequal and discriminatory, in contravention of the state constitution and the Fourteenth Amendment to the federal Constitution.

The county court, sitting as a Board of Review, reduced the assessments after a hearing. On appeal the Circuit Court for Kanawha County reversed the determination of the county court, and reestablished the assessments. The Supreme Court of Appeals of West Virginia, the highest court of the state, affirmed, 126 W. Va. 506, 30 S. E. 2d 513, holding that appellants had failed to make such a clear showing of the unequal effect of the tax as to justify their complaint.

The case comes here on appeal from the judgment of the Supreme Court of Appeals of West Virginia, purporting to have been taken under § 237 (a) of the Judicial Code as amended, 28 U. S. C. § 344 (a), which authorizes an appeal from the "final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, . . . where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, . . . and the decision is in favor of its validity." In their protests against the assessments, filed with the county court, appellants did not draw in question the validity of any statute. They alleged

only that the assessments were not uniform and equal with the assessments of other property owners and that they violated the Fourteenth Amendment. And in their petition for appeal to the Supreme Court of Appeals of West Virginia appellants contended only that the assessments denied to them equal protection of the laws in violation of the Fourteenth Amendment.

It is essential to our jurisdiction on appeal under § 237 (a) that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws. *Loeber* v. *Schroeder,* 149 U. S. 580, 585; *Erie R. Co.* v. *Purdy,* 185 U. S. 148, 153–4; *Fullerton* v. *Texas,* 196 U. S. 192, 193; *Corkran Oil Co.* v. *Arnaudet,* 199 U. S. 182, 193; *Wall* v. *Chesapeake & Ohio R. Co.,* 256 U. S. 125, 126; *Citizens National Bank* v. *Durr,* 257 U. S. 99, 106; *Thornton* v. *Mississippi,* 323 U. S. 668; *Carter* v. *General American Life Ins. Co.,* 323 U. S. 676; *Putzier* v. *Richardson,* 323 U. S. 677. And it has long been settled that an attack upon a tax assessment or levy, such as appellants here made, on the ground that it infringes a taxpayer's federal rights, privileges, or immunities, will not sustain an appeal under § 237 (a). *Jett Bros. Co.* v. *City of Carrollton,* 252 U. S. 1; *Citizens National Bank* v. *Durr, supra; Indian Territory Illuminating Oil Co.* v. *Board of Equalization,* 287 U. S. 573; *Miller* v. *Board of County Comm'rs,* 290 U. S. 586; *Baltimore National Bank* v. *State Tax Comm'n,* 296 U. S. 538; *Irvine* v. *Spaeth,* 314 U. S. 575; *Memphis Gas Co.* v. *Beeler,* 315 U. S. 649, 650; *Commercial Credit Co.* v. *O'Brien,* 323 U. S. 665; see *Ex parte Williams,* 277 U. S. 267, 272; cf. *Reeves* v. *Williamson,* 317 U. S. 593.

Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the

question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court. *Manhattan Life Ins. Co.* v. *Cohen,* 234 U. S. 123, 134; *Chicago, R. I. & P. R. Co.* v. *Perry,* 259 U. S. 548, 551; *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 267; *Home Ins. Co.* v. *Dick,* 281 U. S. 397, 407; *Nickey* v. *Mississippi,* 292 U. S. 393, 394; *Whitfield* v. *Ohio,* 297 U. S. 431, 435–6. But it does not appear from the opinion of the Supreme Court of Appeals that the federal question was presented to or considered by that court. While the opinion intimates that appellants' objection was made to the administration of the statute, it nowhere indicates that they contended that, as applied, the statute was invalid as repugnant to the federal Constitution.[1]

---

[1] The President of the Supreme Court of Appeals, in allowing the appeal to this Court, wrote a memorandum opinion to the effect that the question of the validity of the statute under the Constitution was raised and decided there. Appellants urge that this indicates that the appeal is proper. While a certificate of the state court, made part of the record, to the effect that the federal question in issue was decided there is generally sufficient to sustain our jurisdiction, when it is consistent with the record, *Capital City Dairy* v. *Ohio,* 183 U. S. 238, 244; *Marvin* v. *Trout,* 199 U. S. 212, 222–4; *Cincinnati Packet Co.* v. *Bay,* 200 U. S. 179, 182; *Consolidated Turnpike* v. *Norfolk & O. V. R. Co.,* 228 U. S. 596, 599; *Whitney* v. *California,* 274 U. S. 357, 360–2; *Honeyman* v. *Hanan,* 300 U. S. 14, 22, a certificate to the same effect by the presiding justice of the state appellate court does not suffice, although it may serve to interpret indefinite or ambiguous evidence in the record, relied upon to show that the federal question was raised. *Felix* v. *Scharnweber,* 125 U. S. 54, 59, 60; *Henkel* v. *Cincinnati,* 177 U. S. 170; *Gulf & Ship Island R. Co.* v. *Hewes,* 183 U. S. 66; *Home for Incurables* v. *New York,* 187 U. S. 155, 158; *Fullerton* v. *Texas,* 196 U. S. 192, 194; *Seaboard Air Line R. Co.* v. *Duvall,* 225 U. S. 477, 481; *Connecticut General Life Ins. Co.* v. *Johnson,* 296 U. S. 535; *Purcell* v. *New York Central R. Co.,* 296 U. S. 545; *Honeyman* v. *Hanan, supra,* 18, and cases cited; *Lisenba* v. *California,* 314 U. S. 219. The memorandum of the President of the West Virginia court was not sufficient of itself to establish that

Appellants in their assignment of errors in this Court have failed to attack the state statute as repugnant to the Constitution, stating only that the finding and judgment below sustaining the assessment violate the equal protection clause. Even where the federal question has been properly raised below, an appeal under § 237 (a) may be dismissed where appellants fail to attack a statute explicitly in their assignments of error here. *Cady* v. *Georgia,* 323 U. S. 676; cf. *Herbring* v. *Lee,* 280 U. S. 111, 117; *Seaboard Air Line R. Co.* v. *Watson,* 287 U. S. 86, 91; *Flournoy* v. *Wiener,* 321 U. S. 253.

For these reasons we grant appellee's motion to dismiss the appeal. Treating the papers on which the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c) of the Judicial Code, as amended, 28 U. S. C. § 344 (c), certiorari is granted, since appellants have properly attacked the validity of the assessments under the equal protection clause of the Fourteenth Amendment, and we proceed to consider the merits.

Section 14 (a) of Chapter 11, Article III of the West Virginia Code of 1941, provides that "the capital of every building and loan association and federal savings and loan association, as represented or evidenced by the investment shares and investment accounts in such association, shall be assessed at its true and actual value. . . . The real and actual value of such capital, represented by the market value of such investment shares and investment accounts as aforesaid, shall be ascertained according to the best information which the assessor may be able to obtain . . ."

Section 1 of the same chapter and article provides: "All property shall be assessed annually as of the first day of

---

appellants attacked a statute below, nor does the record contain any evidence which could be relied upon to show that the validity of a statute was drawn in question.

January at its true and actual value; . . ." And Article 10, § 1 of the Constitution of West Virginia provides: ". . . taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value." This section of the constitution also provides for the division of all taxable property into four classes, with a prescribed limitation on the amount of tax which may be levied upon each class. Class I consists of "personal property employed exclusively in agriculture, . . . products of agriculture . . ., including livestock, while owned by the producer" and includes "money, notes, bonds, bills and accounts receivable, stocks and other similar intangible personal property," which is the class of property for which appellants are taxed.

Notwithstanding these provisions of the constitution and statutes of the state, it appears from the evidence, and the state Court of Appeals found, that in 1941, and since, the assessor of Kanawha County, following the instructions of the state tax commissioner, employed a different method in the valuation and assessment of the property of building and loan associations and federal savings and loan associations, including appellants, from that employed in assessing Class I property of other taxpayers. It is this difference in the mode of assessing the property of different taxpayers which petitioners contend has resulted in taxing the property of appellants at its full value and like property of other taxpayers at less than its full valuation, in violation of the equal protection clause.

It appears from the record that the assessor in 1941 for the first time followed the uniform practice of assessing the capital of building and loan associations and federal

loan associations as evidenced by their investment shares and investment accounts, constituting their Class I intangibles, at their full value. But it also appears that in assessing other taxpayers on their Class I property, the assessor varied his method of assessment as to different types of property included in the class. As to them he valued money at 100%, bonds, notes and accounts receivable, except installment accounts, at about 70% of their face value and installment accounts at 65% of their face value. Livestock and agricultural products were valued at approximately 50% of their "purchase value." The accounts receivable and notes of small loan companies were assessed at about 85% of their face value. It does not appear how commercial banks and trust companies were assessed, but for purposes of decision the state court assumed that their Class I intangibles were assessed at their full face value.

The Court of Appeals found that small loan companies and other taxpayers whose Class I intangibles were taxed at less than their face value are engaged in a business different from and involving a greater risk than that in which building and loan associations and federal savings and loan associations are engaged. It found that there was a basis for the discount from face value employed in assessing notes and accounts of small loan associations, which was lacking in the assessment of the higher grade securities, held by building and loan associations and federal savings and loan associations, whose investments are generally more carefully made and better secured than those of other classes of taxpayers.

The court concluded that the method of assessment and valuation employed was not adopted with the purpose of taxing some but not all Class I property at less than its true value, but as a means of arriving at its true value. It said: "We do not have a case where the true and actual value was ascertained and a discount allowed from that

value; but rather a case where the discount was allowed, particularly as to intangibles, in an effort to reach the true value." While the court thought that this method of assessment might in some instances be an erroneous performance of the duties of the assessor, it held that a mere error of judgment as to the mode of assessment adopted was not sufficient to establish an unlawful discrimination "where the plan, though imperfect, is adopted in a good faith effort to secure fair and equitable assessment, and equality and uniformity in taxation."

Appellants argue that denial to them of the equal protection of the laws is established by the proof of the assessor's discrimination in his mode of assessment of the same kind of Class I property belonging to different taxpayers, and that this discrimination is shown to be "intentional and systematic." But this argument overlooks the well established rule that the constitutional prohibition applies only to taxation which in fact bears unequally on persons or property of the same class and that mere differences in modes of assessment do not deny equal protection unless they are shown to produce such inequality. *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 236; *Home Ins. Co.* v. *New York,* 134 U. S. 594, 600; *Adams Express Co.* v. *Ohio,* 165 U. S. 194, 229; *Michigan Central R. Co.* v. *Powers,* 201 U. S. 245, 298–300; cf. *Hendrick* v. *Maryland,* 235 U. S. 610; *General American Tank Car Corp.* v. *Day,* 270 U. S. 367; *Interstate Busses Corp.* v. *Holyoke Street R. Co.,* 273 U. S. 45, 51; *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245, 251. Nor does the equal protection clause prohibit inequality in taxation which results from mere mistake or error in judgment of tax officials, *Pittsburgh, C., C. & St. L. R. Co.* v. *Backus,* 154 U. S. 421, 435; *Coulter* v. *Louisville & N. R. Co.,* 196 U. S. 599, 609; *Brooklyn City R. Co.* v. *New York,* 199 U. S. 48, 52; *Sioux City Bridge* v. *Dakota County,* 260

U. S. 441, 447; *Southern R. Co.* v. *Watts,* 260 U. S. 519, 527; *Baker* v. *Druesedow,* 263 U. S. 137, 142; *Cumberland Coal Co.* v. *Board,* 284 U. S. 23, 25; *Rowley* v. *Chicago & Northwestern R. Co.,* 293 U. S. 102, 111; *Great Northern R. Co.* v. *Weeks,* 297 U. S. 135, 139; or which is not shown to be the result of intentional or systematic undervaluation of some but not all of the taxed property in a single class. *New York* v. *Barker,* 179 U. S. 279, 284, 285; *Coulter* v. *Louisville & N. R. Co., supra; Chicago, B. & Q. R. Co.* v. *Babcock,* 204 U. S. 585, 597; *Sunday Lake Iron Co.* v. *Wakefield,* 247 U. S. 350, 353; *Sioux City Bridge* v. *Dakota County, supra,* 447; *Southern R. Co.* v. *Watts, supra; Snowden* v. *Hughes,* 321 U. S. 1, 9.

In all these respects appellants have the burden of establishing the unconstitutionality of the assessments which they assail, *Sunday Lake Iron Co.* v. *Wakefield, supra,* 353, and cases cited; *Southern R. Co.* v. *Watts, supra,* 526; *Chicago G. W. R. Co.* v. *Kendall,* 266 U. S. 94, 99; *Lawrence* v. *State Tax Comm'n,* 286 U. S. 276, 284; *Great Northern R. Co.* v. *Weeks, supra,* 139; *Snowden* v. *Hughes, supra,* 9; and they have failed to sustain that burden.

It is plain that the Fourteenth Amendment does not preclude a state from placing notes and receivables in a different class from personal property used in agriculture and the products of agriculture, including livestock, and taxing the two classes differently, even though the state places them in a single class for other purposes of taxation. *Bell's Gap R. Co.* v. *Pennsylvania, supra,* 237; *Home Ins. Co.* v. *New York, supra,* 606; *Coulter* v. *Louisville & N. R. Co., supra,* 608–9; *Klein* v. *Board of Supervisors,* 282 U. S. 19.

As we have said, the state court concluded that the discount from face value allowed in assessing Class I intangibles of various taxpayers, other than appellants, was for

the purpose of arriving at the true value of the property assessed. In view of that conclusion and in the absence of any finding or persuasive evidence to the contrary, we cannot say that the allowance of the discounts has in fact resulted in the actual assessment of the intangibles of taxpayers, other than appellants, at less than their true value. Nor can we say that the discounts which were denied to appellants on their Class I intangibles for the first time in 1941 were intended to produce inequality in taxation, or were part of a systematic effort to accomplish that end, or in fact were more than errors in judgment, if that, in the administration of the tax laws.

We find no persuasive evidence in the record and are pointed to none from which it could be inferred that the value of Class I intangibles of small loan companies and other taxpayers in West Virginia, not subject to the same supervision as appellants, is not generally less than face value, or that the discount allowed by the assessor on the intangibles of any given taxpayer or class of taxpayers has in fact resulted in an assessment at less than their true value. It follows that appellants have failed to sustain the burden of showing that the assessments are unconstitutionally discriminatory, and the judgment must be

Affirmed.

MR. JUSTICE BLACK is of the opinion that the appeal raises no substantial federal question and therefore concurs in its dismissal. For the same reason he thinks certiorari should be denied.

MR. JUSTICE ROBERTS.

I am of opinion the judgment should be reversed. I think the evidence is not only without contradiction but is persuasive that persons and corporations whose circumstances are precisely similar to those of the complaining taxpayers, and persons competing in the investment

field with them and holding similar security, have been benefited by assessments purposely intended to discriminate in their favor, and against the complainants. I think the decision below plainly runs counter to decisions of this court. *Cumberland Coal Co.* v. *Board of Revision,* 284 U. S. 23; *Iowa-Des Moines National Bank* v. *Bennett,* 284 U. S. 239, 245; *Concordia Fire Ins. Co.* v. *Illinois,* 292 U. S. 535.

UNITED STATES *v.* BEACH.

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

No. 620. Argued February 9, 1945.—Decided February 26, 1945.

The Mann Act is applicable to transportation taking place wholly within the District of Columbia. P. 195.
144 F. 2d 533, reversed.

CERTIORARI, 323 U. S. 705, to review the reversal of a conviction for violation of the Mann Act.

Mr. Robert L. Stern, with whom *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl, Irving S. Shapiro* and *W. Marvin Smith* were on the brief, for the United States.

Mr. James R. Kirkland, with whom *Mr. Nathan M. Lubar* was on the brief, for respondent.

PER CURIAM.

Respondent was indicted and convicted upon a jury trial, in the District Court of the United States for the District of Columbia, of transporting another woman in Washington, D. C., for the purpose of prostitution, in violation of the Mann Act. 36 Stat. 825, 18 U. S. C. § 397, *et seq.* Section 2, 18 U. S. C. § 398, makes it a penal offense knowingly to "transport or cause to be trans-

ported, or aid or assist in obtaining transportation for, or in transporting, in interstate . . . commerce, or . . . in the District of Columbia, any woman . . . for the purpose of prostitution . . . or with the intent and purpose to induce, entice, or compel such woman . . . to give herself up to debauchery, or to engage in any other immoral practice . . ." The prohibited transportation with the intent or purpose to induce or entice the woman transported to practice prostitution violates the statute. *Hoke* v. *United States,* 227 U. S. 308; *Athanasaw* v. *United States,* 227 U. S. 326; *Harris* v. *United States,* 227 U. S. 340, 341; *Wilson* v. *United States,* 232 U. S. 563, 571; cf. *Mortensen* v. *United States,* 322 U. S. 369, 374.

The Court of Appeals for the District set aside the conviction on the ground that the Mann Act was inapplicable to transportation taking place wholly within the District. 144 F. 2d 533. That court found support for its conclusion in the numerous acts of Congress enacting local laws for the District, which make it a criminal offense for "any prostitute" to invite or persuade any person to go with her to any building for the purpose of prostitution, or for any person to entice or force any woman to go to a house of assignation, or for any person to invite, induce, or procure another to engage in prostitution or to go to any place for purposes of prostitution.[1] The court thought that the addition of the prohibition of the Mann Act to this legislation, specifically applicable only in the District, was so useless and unnecessary as to indicate that the Mann Act was not designed to apply to the District of Columbia "except in its interstate aspect." No other question was considered or decided below or discussed in the briefs and argument of counsel here, and we decide no other.

---

[1] D. C. Code (1929) Tit. 6, §§ 177, 179; D. C. Code (1940) §§ 22-2701, 22-2702, 22-2705 to 22-2712.

But none of these enactments of local application speak of "transportation" for immoral purposes, which is the act condemned by the Mann Act. The Mann Act not only penalizes such transportation in interstate commerce, which is defined in § 1, 18 U. S. C. § 397, as including any commerce into or out of the District, but it specifically and repeatedly includes in its prohibition, such transportation "in any territory or the District of Columbia." Congress, in enacting the Mann Act, made it perfectly plain by its Committee Reports on the proposed legislation that it was intended to apply to transportation taking place wholly within the District of Columbia. H. Rep. No. 47, 61st Cong., 2d Sess., p. 2; S. Rep. No. 886, 61st Cong., 2d Sess., p. 2. Both Reports declare: "All of the provisions which make the crime depend upon transportation in interstate or foreign commerce are made applicable to the District of Columbia, the Territories and possessions of the United States, including the Panama Canal Zone, without regard to the crossing of district, territorial, or state lines . . ." This was recognized both by the proponents and by the opponents of the bill on the floor of the House. 45 Cong. Rec. 812–813, 816; 45 Cong. Rec. App. 14. (The point was not debated in the Senate.) Congress thus, through the exercise of its police power over the District, followed its usual policy of extending legislation based on the commerce power to the same substantive acts taking place wholly within the District.[2]

Whether the District was already adequately protected from the evils of prostitution without the added prohibition of transportation for that purpose, was for Congress, not the courts, to decide. The prohibition was deliber-

[2] See, for example, the Sherman Act (15 U. S. C. § 12), the Federal Trade Commission Act (15 U. S. C. § 44), the Federal Denture Act (18 U. S. C. Supp. III, 1943, § 420g), the Anti-Racketeering Act (18 U. S. C. § 420b), and the Food, Drug, and Cosmetic Act (21 U. S. C. § 16).

ately adopted by Congress, and it conflicts with no other legislation applicable in the District. Hence the present reversal of the conviction for its violation was erroneous.

As the Court of Appeals did not pass upon other grounds for reversal urged by respondent, the case is remanded to it for further proceedings not inconsistent with this opinion. *Bates* v. *United States,* 323 U. S. 15, 17, and cases cited.

Reversed.

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

MR. JUSTICE MURPHY, dissenting.

We are dealing here with a statute known and referred to by Congress in § 8 as the "White-slave traffic Act." 36 Stat. 825, 827. The Congressional debates and committee reports on the legislation make it plain that the Act was designed and intended solely to prevent "white-slave" traffic and that it should not be applied to the situation present in this case. See 45 Cong. Rec. 805, 821, 1035, 1037; H. Rep. No. 47, 61st Cong., 2d Sess.; S. Rep. No. 886, 61st Cong., 2d Sess.

Prior to the passage of the Act in 1910, numerous investigations had disclosed the existence of a systematic, continuous international and interstate traffic in women and girls, who were being forced against their will to practice prostitution.[1] Fraud, trickery, deceit, force and

[1] "The testimony which has been collected, including correspondence and other documentary evidence, which was captured at the time of the arrest of certain notorious criminals, clearly reveals that an organized society exists both in this country, and abroad, formed for no other purpose than to exploit innocent girls for immoral purposes. This syndicate has headquarters, and distributing centers, in New York, Chicago, San Francisco, Denver, and many other American cities, extending even as far north as Nome in Alaska. From the data accumulated by the government agents, it appears that

liquor were used by panderers and procurers to force them into lives of shameless, immoral and involuntary servitude. Many men earned their livelihood from the sale and exploitation of these women. State laws were found entirely inadequate to cope with such an extensive international and interstate traffic.

Congress, however, was careful to distinguish this vicious traffic from immorality and prostitution in general. It made it clear that the Act was aimed solely at the white-slave traffic, which was explicitly defined as "the business of securing white women and girls and of selling them outright, or of exploiting them for immoral purposes." H. Rep. No. 47, p. 11; S. Rep. No. 886, p. 11. It was pointed out that "the women who are the victims of the traffic are unwillingly forced to practice prostitution" and that "these women are practically slaves in the true sense of the word; that many of them are kept in houses of ill fame against their will; and that force, if necessary, is used to deprive them of their liberty." H. Rep. No. 47, p. 10; S. Rep. No. 886, p. 11. "The term 'white slave' includes only those women and girls who are literally slaves—those women who are owned and held as property and chattels—whose lives are lives of involuntary servitude; those who practice prostitution as a result of the activities of the procurer, and who, for a considerable period at least, continue to lead their degraded lives because of the power exercised over them by their owners." H. Rep. No. 47, pp. 10, 11; S. Rep. No. 886, p. 11.[2] At the same time, the Congressional committees were careful to explain that there was no attempt, by invading the prov-

---

within the last ten years, hundreds of girls have been transferred to various portions of the United States, through the pernicious activities of the agents of this syndicate." 45 Cong. Rec. 1037.

[2] Webster's New International Dictionary, 2d Ed., defines "white slave" as "a woman held unwillingly for purposes of commercial prostitution."

ince of the states, to suppress or regulate immorality in general or "to regulate the practice of voluntary prostitution." No effort was made to prohibit or punish the practice of prostitution or the keeping of houses of ill fame. These matters were recognized to be within the proper and exclusive domain of state law. H. Rep. No. 47, pp. 1, 2.

This rich background of Congressional intent and the clear and obvious title of the Act give meaning and boundaries to the broad language used in the statute. It was the pernicious white-slave traffic that Congress had in mind when it provided in § 2, under which respondent was convicted, for the punishment of any person transporting in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution, debauchery or any other immoral purpose. That courts in the past have ignored the plain Congressional purpose and have applied these statutory words in a literal sense, so as to punish anyone transporting a woman for immoral purposes quite apart from any connection with white-slavery, does not command us to continue such an erroneous construction and application of the Act.

Therefore I agree with the Court to the extent that its judgment means that the Act applies to white-slave traffic solely within the District of Columbia, a result required by the words of the statute and by the Congressional history. But the application of the Act to transportation solely within the District of Columbia for purposes quite unrelated to white-slavery should not be sanctioned. The Court does not pass upon that issue directly and, in its discretion, may ignore it. But the facts of this case speak out boldly and cannot be unheeded. To do so is to impose a criminal statute unfairly upon a citizen by disregarding its true intent and purpose, thereby adding another instance of tortured and grotesque application to its already unhappy history.

The evidence here discloses that the respondent operated a dress shop in the city of Washington and employed a girl as an assistant. The girl at the same time began to live with respondent at the latter's apartment. Three days later respondent suggested to the girl that she could earn more money by "selling herself." Although she had never practiced prostitution before, the girl thought it over and finally agreed to work for respondent as a prostitute. The girl practiced prostitution in respondent's apartment and in various hotel rooms to which respondent sent her. On the day in question, respondent accompanied the girl to a hotel some four blocks from the apartment for purposes of prostitution. The trip was made by taxicab, respondent paying her own and the girl's fare. The evidence is clear that the respondent in no way compelled, enticed or induced the girl to engage in the business of prostitution through fraud, deceit or force; it was a purely voluntary matter on the part of the girl.

Thus the Court today applies the White Slave Traffic Act to a case of voluntary prostitution, despite the fact that none of the elements of white-slavery is present. Equally disregarded is the fact that Congress clearly intended such conduct to remain punishable under local laws and that adequate local laws for the District of Columbia have been provided by Congress to cope with the real evils present in this instance. Such facts make it unnecessary to invoke the White Slave Traffic Act as a means of controlling voluntary vice in the District.

The Act is applied here not because white-slavery is present but because acts of voluntary prostitution followed the payment for a four-block taxicab ride, acts which are punishable under local law. Such distortion of the legislative purpose is not required to safeguard sound rules of interpretation. It can only serve to subject residents of the District of Columbia to the evils of blackmail

and persecution and to punish unjustly those whose immoral acts do not constitute white-slavery. No principle of stare decisis and no rule of statute or reason can justify such a result.

MR. JUSTICE BLACK joins in this opinion.

GARBER *v.* CREWS ET AL.

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

No. 518. Argued February 6, 7, 1945.—Decided February 26, 1945.

The double liability imposed on stockholders of national banks by § 23 of the Act of December 23, 1913, *held* enforcible against one who sold his shares within sixty days of the closing of the bank while insolvent, even though the sale was made in good faith and though the bank's closing was voluntary. P. 202.

144 F. 2d 665, affirmed.

CERTIORARI, 323 U. S. 701, to review the affirmance of a judgment against the petitioner here in an action to enforce a national bank stockholders' liability.

Mr. P. C. Simons for petitioner.

Mr. Christy Russell, with whom *Mr. L. G. Owen* was on the brief, for respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

We are called upon to determine the application in the circumstances of this case of § 23 of the Act of Dec. 23, 1913,[1] which imposes liability upon stockholders of a closed national bank.

November 25, 1929, the American National Bank of Enid, Oklahoma, pursuant to a resolution of its directors,

---

[1] c. 6, 38 Stat. 251, 273, 12 U. S. C. § 64.

which recited that it contemplated "disposing of its current business and thereafter going into voluntary liquidation," sold its business and transferred its assets to the First National Bank of the same city in consideration of the payment of $350,000 and the assumption of its liabilities as disclosed by its books. The purchasing bank retained $110,000 to guarantee the collection of negotiable paper taken over and to cover certain real estate temporarily retained by the seller. American closed its business and promptly distributed the $240,000 cash received ratably amongst its stockholders.

The respondents were parties to an agreement, made in 1922, whereby large sums were deposited in a bank to await the settlement of disputes relative to the ownership of the funds deposited. In 1930 settlement was reached and demand made by the respondents for the payment of the deposit. It was then discovered that the fund had been dissipated and that officers of American, which was a correspondent of the bank of deposit, had participated in the embezzlements. The respondents thereupon brought action in a state court against American, its officers and directors, to fasten liability on the bank and the individuals. A judgment against American for $249,000 was affirmed by the Supreme Court of Oklahoma.[2]

The respondents brought the present suit in the District Court for Western Oklahoma to establish a trust in the liquidating dividend of $240,000 paid by American to its stockholders and to recover from the stockholders the amount necessary to satisfy the balance of the judgment remaining after restitution by stockholders of the liquidating dividend; that is, to enforce the double liability of stockholders. Recovery was had on each cause of action, and also on a third against the former directors of American. The Circuit Court of Appeals affirmed the judgment

[2] *American National Bank* v. *Crews*, 191 Okla. 53, 126 P. 2d 733.

on the first and second causes of action and ordered dismissal of the third.[3]

On November 14, 1929, the petitioner sold his stock in American in good faith and for a valuable consideration to one Oven. December 20, 1929, the stockholders and directors of American held the necessary meetings and took appropriate action under the National Bank Act [4] to go into voluntary liquidation, and thereafter such liquidation went forward. It will be observed that the sale of petitioner's stock was within sixty days of November 25th and within sixty days of December 20th. The petitioner was a defendant in the present action to enforce stockholders' liability and judgment went against him as a stockholder. In a petition for certiorari he urged a number of defenses which the Circuit Court of Appeals had overruled. We granted certiorari limited to the question whether his sale of his stock relieved him of liability.[5]

Does § 23 of the Act of 1913 justify the judgment against the petitioner? The statute reads in part:

"The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer."

We are of opinion that the petitioner is within the plain terms of the law. On its face, the Act grants no exemption due to the facts that the sale was made for consideration and in good faith; that, at the time, American was believed to be solvent; or that the existence of the claim ultimately established by the respondents was then not known to the respondents or to the petitioner.

---

[3] *Hoehn* v. *Crews*, 144 F. 2d 665.

[4] 12 U. S. C. § 181.

[5] 323 U. S. 701.

Prior to the adoption of § 23 as a part of the Federal Reserve Act of 1913,[6] the liability of shareholders in a national banking association had been imposed by R. S. 5151. Section 23 of the Act of 1913 reenacted, with slight verbal changes, the first clause of the first sentence of R. S. 5151, which provided:

"The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; . . ."

R. S. 5151 had been before this and other courts for interpretation and, under it, it was held that the gist of any action to impose liability upon a stockholder who had transferred his shares prior to the actual closing of the bank was that the transfer was not a real one or was fraudulent; that is, made with the purpose to avoid the statutory liability.[7] It is obvious that when Congress came to write the Act of 1913 it intended, while leaving the right of recovery for transfers not falling within sixty days of the bank's closing to be adjudged according to the old standard of fraud or intended evasion of liability, to announce a drastic new rule denying effect to all transfers made within sixty days of the bank's cessation of business. It is impossible to read the new enactment of 1913 in any other sense. The only cases dealing with the question in lower federal courts have so held.[8]

---

[6] *Supra,* Note 1.

[7] *National Bank* v. *Case,* 99 U. S. 628; *Bowden* v. *Johnson,* 107 U. S. 251; *Whitney* v. *Butler,* 118 U. S. 655; *Stuart* v. *Hayden,* 169 U. S. 1; *Earle* v. *Carson,* 188 U. S. 42; *McDonald* v. *Dewey,* 202 U. S. 510.

[8] *Fletcher* v. *Porter,* 20 F. 2d 23, and *Collins* v. *Caldwell,* 29 F. 2d 329, are in accord with the decision of the Circuit Court of Appeals in the instant case.

The petitioner insists that, as the initiation of the liquidation of American was voluntary, no cause of action against stockholders arose by reason of this action. But we think that where a bank closes its doors and ceases to transact business the right of creditors or of a receiver to enforce stockholders' liability matures at the time of such closing whether as a result of voluntary action or of adverse action by the Comptroller of the Currency, or of the appointment of a receiver, if at that time the bank was insolvent, as American undoubtedly was, if the respondents' claim was taken into the reckoning.[9]

The judgment of the court below was right and must be affirmed.

Affirmed.

YOUNG *v.* HIGBEE COMPANY ET AL.

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

No. 342. Argued February 1, 1945.—Decided February 26, 1945.

From a decree confirming a plan of reorganization under Chapter X of the Bankruptcy Act, an appeal was taken by P and B, holders of preferred stock. The appeal was based largely upon objections to allowances made to junior claimants; and, had it been successful, the preferred stockholders as a class would have benefited. For a consideration paid to them, P and B transferred their stock to junior claimants and agreed to abandon the appeal. Petitioner, also a holder of preferred stock, sought to intervene and prosecute the appeal. The Circuit Court of Appeals denied leave and dismissed the appeal. Petitioner thereupon filed in the bankruptcy court a petition, on behalf of himself and all other preferred stockholders, seeking an accounting by P and B to the debtor or to the preferred stockholders, for the excess of the amount which they had received over the fair value of their stock. *Held:*

---

[9] Compare *Richmond* v. *Irons*, 121 U. S. 27, 48, 50.

1. The Circuit Court of Appeals' dismissal of the appeal over petitioner's attempt to intervene did not bar petitioner's subsequent petition for an accounting. P. 208.

2. The fruit of the appeal by P and B belongs to all of the preferred stockholders. P. 213.

3. The bankruptcy court has jurisdiction to award the relief prayed. P. 214.

4. The alleged improper motive of the petitioner does not warrant denial of the prayer for relief, which was made on behalf of all the stockholders. P. 214.

142 F. 2d 1004, reversed.

CERTIORARI, 323 U. S. 689, to review a judgment which affirmed the bankruptcy court's dismissal of an application for relief.

Mr. Robert W. Purcell, with whom *Mr. James A. Butler* was on the brief, for petitioner.

Mr. Marvin C. Harrison for respondents.

Solicitor General Fahy, Messrs. Roger S. Foster, Milton V. Freeman, Theodore L. Thau and *David Ferber* filed a brief on behalf of the Securities & Exchange Commission, as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

This case presents the question of the accountability of stockholders who objected to the confirmation of a plan of reorganization under the Bankruptcy Act,[1] and abandoned their appeal for a consideration to themselves, where the basis of the appeal was that, if successful, it would benefit the entire class.

The Higbee Company, a department store with assets of more than six million dollars, filed a voluntary petition

[1] The proceedings were begun in 1935 under § 77B, 11 U. S. C. 207. June 22, 1938, Congress passed the Chandler Act, and the provisions of Chapter 10 of the Act were thereafter applicable to these proceedings. 52 Stat. 883–905, 11 U. S. C. 501–676.

for reorganization. It had three types of stocks: common, and first and second preferred. Two of its directors, Bradley and Murphy, claimed that they had acquired by purchase a junior debt against the company of $1,952,000.00. A plan for reorganization was presented under which the owners of this junior debt were to be awarded $600,000.00 in new notes and a large block of common stock. Potts and Boag, respondents here, and owners of some shares of first preferred, objected to confirmation of the plan. They contended, on several grounds, that unless the junior debt was subordinated to the preferred stock claims, the plan allotted that indebtedness too great a share in the distribution of the bankrupt's assets.[2] When the stockholders' committee of which they were members approved the plan, Potts and Boag resigned and announced the formation of a new committee to press their objections to the junior debt allowance. Notwithstanding these objections, the Securities & Exchange Commission recommended the plan's acceptance, 8 S. E. C. 777, and the District Court confirmed it. 50 F. Supp. 114. Potts and Boag appealed from the District Court's decree confirming the plan. Although appealing as individuals, their appeal was based almost entirely on objections to allowances for the junior indebtedness which left less for distribution among all the preferred stockholders. Their appeal sought no separate individual relief for them-

[2] This $1,952,000.00 junior indebtedness consisted of subordinated notes of the Higbee Company which had been bought by Midamerica Corporation for $100,000.00 at an auction sale in 1935. Potts and Boag consistently maintained that the junior debt's participation in Higbee's assets should be limited to $100,000.00. They charged that Bradley was a director of Higbee and of Midamerica, and thus occupied two conflicting fiduciary positions. They insisted that the court should find this junior debt to be "invalid and unenforceable in whole or in part" and "subordinated to the First and Second Preferred Stock."

selves; they appealed only to have the confirmation set aside. Had their appeal succeeded, the District Court would have been required to reduce the value of junior claims asserted by Bradley and Murphy, thereby increasing the value of the claims of the preferred stockholders as a class.

In this situation, Potts and Boag sold their stock and their appeal [3] to Bradley and Murphy, claimants under the junior debt; the consideration paid was $115,000.00. The par value of this stock was $26,000.00. Its admitted market value at the time, as the court below found, was $17,000.00. Pursuant to this contract for sale of the appeal a stipulation for dismissal was filed in the Circuit Court of Appeals. Petitioner Young, a preferred stockholder of the same class, sought to intervene and prosecute the appeal. His petition was denied and the case was dismissed without opinion. Young then, on behalf of himself and all other preferred stockholders, filed a petition in the District Court setting up these facts and praying that

---

[3] Potts' testimony as to the sale was:

"Q. So that in a sense you were selling something more than your stock, I take it? A. I think so.

"Q. You were selling the appeal which you had taken in behalf of yourself and Mr. Boag; that is a fair statement, isn't it? A. I think so."

The written contract between Potts and Boag and Bradley and Murphy specifically provided for sale of the appeal as well as the stock. It reads in part:

"I hereby sell, assign, transfer and set over unto Charles L. Bradley and John P. Murphy, and their assigns, 260 shares of First Preferred stock of The Higbee Company, of Cleveland, Ohio, . . . together with all rights, title and interest, benefits or privileges we, or either of us, have or may have in and to or by virtue of or arising from the matter of The Higbee Company, Debtor, J. Fred Potts and William W. Boag, Appellants, vs. The Higbee Company, Appellee, and a certain appeal taken by J. Fred Potts and William W. Boag in said proceedings, which said appeal is now pending in the United States Circuit Court of Appeals for the Sixth Circuit . . ."

he be authorized to employ counsel to compel Potts and Boag to account to the debtor for the difference between what they received and the fair value of their stock, or praying in the alternative that Potts and Boag be required to pay over that amount to the preferred stockholders.[4] After a hearing, a special master found as a fact that Potts and Boag had appealed in behalf of themselves only and had not acted as representatives of a class. The District Court approved this finding, thought it determinative of the case, and dismissed Young's petition. The Circuit Court of Appeals affirmed. 142 F. 2d 1004. Because considerations of substantial importance to the effective administration of corporate reorganizations are involved, we granted certiorari, 323 U. S. 689.[5]

First. It is argued that since the Circuit Court of Appeals dismissed the appeal of Potts and Boag over Young's attempt to intervene, Young is estopped from prosecuting the present petition. This contention has no merit, for the reason, among others, that the determinative issues

---

[4] In both courts below Young sought an order against Bradley and Murphy as well as Potts and Boag but Bradley and Murphy have not been made respondents in this Court.

[5] The petitioner has made the following statement to this Court with reference to the respondent Boag:

"During the course of the appeal in the Circuit Court of Appeals it first came to Petitioner's attention that Respondent Boag had entered the Armed Services. No one representing Boag has appeared to request a stay of proceedings pending his return. However, Petitioner has no desire to cause judgment to be entered against Boag under these circumstances. It would be entirely satisfactory to have the proceedings stayed as to Boag pending his return, although no rights against him are waived."

Under these circumstances no judgment against Boag will be entered in this case and the proceedings in the Circuit Court of Appeals will be stayed as to him. Soldiers' & Sailors' Civil Relief Act of 1940, 54 Stat. 1178.

in the two proceedings were not the same. The first petition did not pray for an accounting by Potts and Boag. The court only decided then that Young could not intervene and continue that appeal, and that the appeal should be dismissed. Now, accepting the court's dismissal of the appeal as final, Young seeks an accounting for the consideration paid Potts and Boag for agreeing to dismiss.

Second. It is argued that since Potts and Boag did not expressly specify that they appealed in the interest of the whole class of preferred stockholders, but appealed only in their own names, they owed no duty to any stockholders but themselves. The appeal here, however, was not from a denial of any individual claim of Potts and Boag. Its basis was that every other preferred stockholder, as well as themselves, would be injured by confirmation. So far as the issues raised by the appeal are concerned, the rights of Potts and Boag and the other preferred stockholders were inseparable. Thus, even though their objection to confirmation contained no formal class suit allegations, the success or failure of the appeal was bound to have a substantial effect on the interests of all other preferred stockholders. The liability of one who assumes a determining position over the rights of others must turn on something more substantial than mere formal allegations in a complaint.[6] Equity looks to the substance and not merely to the form.

Furthermore, the right of appeal granted by a statute should not be interpreted in such way as to defeat rights clearly granted in other parts of the same Act. *Peck* v. *Jenness*, 7 How. 612, 623. Potts and Boag appealed un-

---

[6] *Sprague* v. *Ticonic Bank*, 307 U. S. 161. See *Atlas Bank* v. *Nahant Bank*, 23 Pick. (Mass.) 480; *Whitten* v. *Dabney*, 171 Cal. 621, 154 P. 312; *Honesdale Co.* v. *Montgomery*, 56 W. Va. 397, 49 S. E. 434; *Rawnsley* v. *Trenton Mutual Life Ins. Co.*, 9 N. J. Eq. 95; *Wood* v. *Dummer*, 30 Fed. Cas. 435, No. 17,944.

der § 206 of the Chandler Act, which, contrary to the general bankruptcy procedure, grants any stockholder or creditor the right to be heard on all matters relating to corporate reorganizations. Courts have liberally construed this language as authorizing appeals.[7] We are now asked to say that the privilege of appeal granted to Potts and Boag by the Act vested them with an indefeasible right to sell the privilege to the disadvantage of all other stockholders in their class. But, historically one of the prime purposes of the bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt's assets; to protect the creditors from one another.[8] And the corporate reorganization statutes look to a ratable distribution of assets among classes of stockholders as well as creditors. There would be no ratable distribution of this bankrupt estate if Potts and Boag could utilize their statutory right of appeal to get for their preferred stock $7.00 for every $1.00 paid to other preferred stockholders. We are asked to say that Congress intended such a consequence, and to construe the right of a stockholder to be heard on a plan of reorganization as carrying with it the right to "sell" the very appeal which the Act grants him.

Potts and Boag, by appealing from a judgment which affected a whole class of stockholders, owed an obligation to them, the full extent of which we need not now delineate. Certainly, at the very least they owed them an obligation to act in good faith. If Potts and Boag had declined to accept this plan in bad faith, the court, under

---

[7] *In re Keystone Realty Holding Co.*, 117 F. 2d 1003; *Dana* v. *S. E. C.*, 125 F. 2d 542; cf. *Amick* v. *Mortgage Security Corp.*, 30 F. 2d 359.

[8] *Boese* v. *King*, 108 U. S. 379, 385–386; *Sampsell* v. *Imperial Paper Corp.*, 313 U. S. 215, 219; cf. *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106. See also 66 Pa. L. Rev. 224; Senate Document No. 65, 72nd Cong., 1st Sess., 6, 10, 49–93.

§ 203,[9] could have denied them the right to vote on the plan at all. The history of this provision makes clear that it was intended to apply to those stockholders whose selfish purpose was to obstruct a fair and feasible reorganization in the hope that someone would pay them more than the ratable equivalent of their proportionate part of the bankrupt assets.[10] If Potts' and Boag's opposition to confirmation sprang from such a purpose (and Potts and Boag did obstruct confirmation until they were able to "sell"

---

[9] "Sec. 203. If the acceptance or failure to accept a plan by the holder of any claim or stock is not in good faith, in the light of or irrespective of the time of acquisition thereof, the judge may, after hearing upon notice, direct that such claim or stock be disqualified for the purpose of determining the requisite majority for the acceptance of a plan." 52 Stat. 894.

[10] A year before the House Committee on the Judiciary held its extensive hearings on the Chandler Act, a Circuit Court of Appeals held that a creditor could not be denied the privilege of voting on a reorganization plan under § 77B, although he bought the votes for the purpose of preventing confirmation unless certain demands of his should be met. *Texas Hotel Corp.* v. *Waco Development Co.*, 87 F. 2d 395. The hearings make clear the purpose of the Committee to pass legislation which would bar creditors from a vote who were prompted by such a purpose. To this end they adopted the "good faith" provisions of § 203. Its purpose was to prevent creditors from participating who "by the use of obstructive tactics and hold-up techniques exact for themselves undue advantages from the other stockholders who are cooperating." Bad faith was to be attributed to claimants who opposed a plan for a time until they were "bought off"; those who "refused to vote in favor of a plan unless . . . given some particular preferential advantage." Hearings on Revision of the Bankruptcy Act before the Committee on the Judiciary of the House of Representatives, 75th Cong., 1st Sess., on H. R. 6439, Serial 9, pp. 180–182.

See also, on the same general topic, McLaughlin, Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit, 46 Yale L. J. 421; Hornstein, Problems of Procedure in Stockholder's Derivative Suits, 42 Col. L. Rev. 574, Rodgers and Groom, Reorganization of Railroad Corporations under Section 77 of the Bankruptcy Act, 33 Col. L. Rev. 571, 588–601.

their appeal) they were acting in bad faith within the statutory meaning of that term. And accepting money as the end result of such a statutory violation cannot vest them with a right to keep it. Payment to them of this money simply meant that the distribution of bankrupt assets to the junior debt claimants, who paid Potts and Boag, would represent a smaller net value. The statute contemplates, and the appeal was taken on the assumption, that the less the junior claimants were awarded the more all the preferred stockholders would receive. Therefore, the consideration of the sale which Potts and Boag made was not merely their own interest in the bankrupt estate, but the interest of all the preferred stockholders. The situation which enabled them to traffic in the interests of others was created by a statute passed to protect the interests of all of them.[11] The statute neither compels them to appeal nor to prosecute an appeal already taken contrary to their own interests; it does impose upon them the duty of good faith to all other stockholders whose interests they temporarily control because they are necessarily involved in the appeal. This control of the common rights of all the preferred stockholders imposed on Potts and Boag a duty fairly to represent those common rights.[12] This representative responsibility is emphasized

---

[11] See *Federal Communications Comm'n* v. *Sanders Radio Station*, 309 U. S. 470, 476–7; *Interstate Commerce Comm'n* v. *Oregon-Washington R. Co.*, 288 U. S. 14, 25–7.

[12] By virtue of their standing as sole appellants, Potts and Boag, during the pendency of the appeal, dominated the fate of the reorganization as completely as though they had been the majority stockholders of a going corporation. Cf. *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 492: "But the doctrine by which the holders of a majority of the stock of a corporation who dominate its affairs are held to act as trustees for the minority, does not rest upon such technical distinctions. It is the fact of control of the common property held and exercised, not the particular means by which or manner in which the control is exercised, that creates the fiduciary obligation. . . . The essential of the liability to account sought to be enforced

by the fact that they might have been awarded compensation for their services had they succeeded in reducing the claim of the junior indebtedness to the advantage of all the preferred stockholders. § 243; cf. § 249. *In re Keystone Realty Holding Co.*, 117 F. 2d 1003, 1006. They cannot avail themselves of the statutory privilege of litigating for the interest of a class and then shake off their self-assumed responsibilities to others by a simple announcement that henceforth they will trade in the rights of others for their own aggrandizement. To hold that the Chandler Act permits this, would be to say that Congress, which sought more effectively to accomplish fair and equitable treatment of investors, had, by granting a right of appeal to stockholders, defeated its purpose, and had substantially modified the whole body of law imposing the most rigorous responsibilities for fair dealing upon those who represent the rights of others.[13]

The money Potts and Boag received in excess of their own interest as stockholders was not paid for anything they owned. It came to them in settlement of litigation which if carried to a successful conclusion would have added to the value of other preferred stockholders of the common debtor. That the suit was settled and dismissed does not alter the rights of parties as to distribution of the fruits of the settlement. A distinction as to rights arising from litigation, which rests upon the difference between a judgment and a settlement of a lawsuit, under these circumstances, as in others, is "too formal to be sound." *Lyeth* v. *Hoey*, 305 U. S. 188, 195, 196; *Helvering* v. *Safe*

---

in this suit lies not in fraud or mismanagement, but in the fact that, having become a fiduciary through taking control of the old Houston Company, the Southern Pacific has secured fruits which it has not shared with the minority. The wrong lay not in acquiring the stock, but in refusing to make a pro rata distribution on equal terms among the old Houston Company shareholders.

[13] Cf. *Woods* v. *City Bank*, 312 U. S. 262, 267–269; *Meinhard* v. *Salmon*, 249 N. Y. 458, 164 N. E. 545.

Deposit & Trust Co., 316 U. S. 56, 63–67. The appeal of Potts and Boag was alleged to be for the benefit of all preferred stockholders. In the contemplation of the statute which authorized the appeal, its fruit properly belongs to all the preferred stockholders. One creditor, therefore, cannot make that fruit his own by a simple appropriation of it. Cf. *Terry* v. *Little*, 101 U. S. 216, 218.

Third. It is argued that even though the money paid in excess of the stock value does in equity and good conscience belong to the stockholders, the bankruptcy court is without power to award the relief prayed. Courts of bankruptcy are courts of equity and exercise all equitable powers unless prohibited by the Bankruptcy Act. *Securities & Exchange Comm'n* v. *United States Realty Co.*, 310 U. S. 434, 455. The District Court still has jurisdiction to exercise its powers under the Act both because of its express reservation and because of the provisions of § 222.[14] That power is ample to authorize the court to order an accounting for the funds in dispute here. *Pepper* v. *Litton*, 308 U. S. 295, 303–310; *American United Ins. Co.* v. *Avon Park*, 311 U. S. 138, 145–147; *Consolidated Rock Co.* v. *DuBois*, 312 U. S. 510, 521–523.

Nor can we sustain the contention that relief should be denied on the allegations that Young's motive in bringing the proceeding is an unworthy one. His petition sought relief for the benefit of all the stockholders. The rights of these stockholders are not to be ignored because of some motive attributable to Young.

Reversed.

The Chief Justice and Mr. Justice Jackson concur in the result.

Mr. Justice Roberts dissents.

---

[14] This Section gives the judge power, under conditions applicable here, to alter and modify a reorganization plan even after confirmation.

Counsel for Parties.

CANADIAN AVIATOR, LIMITED *v.* UNITED STATES.

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

No. 279. Argued January 5, 1945.—Decided February 26, 1945.

The Public Vessels Act provides that "a libel *in personam* in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States . . ." *Held:*

1. The remedy afforded by the Act is not confined to cases where the public vessel is the "physical instrument" by which the "physical damage" is done. P. 222.

2. Damage "caused by a public vessel" embraces damage resulting from negligence of personnel in the operation of the vessel. P. 224.

3. *The Osceola,* 189 U. S. 158; *The Vera Cruz, No. 2,* 9 L. R., Prob. Div. 96 [1884]; *Dobson* v. *United States,* 27 F. 2d 807; and *O'Neal* v. *United States,* 11 F. 2d 869, distinguished. P. 225.

4. The Act authorizes the courts to apply principles of *in rem* as well as *in personam* liability in admiralty, even though it denies a maritime lien; which is in accord with the broad purpose of the Act as evidenced in its legislative history. P. 227.

5. A complaint alleging that, while following directly astern of a public vessel as ordered by Naval authorities, complainant's vessel was damaged when it struck a submerged wreck, and that the accident resulted solely from the negligence of the public vessel and its crew, stated a cause of action under the Act. P. 228.

142 F. 2d 709, reversed.

CERTIORARI, 323 U. S. 688, to review a judgment affirming the dismissal of a libel, 52 F. Supp. 211, under the Public Vessels Act.

Mr. Eugene Underwood, with whom *Mr. Chauncey I. Clark* was on the brief, for petitioner.

Assistant Attorney General Shea, with whom *Solicitor General Fahy* and *Mr. Ralph F. Fuchs* were on the brief, for the United States.

MR. JUSTICE REED delivered the opinion of the Court.

This writ brings here for review a libel filed by the petitioner, a Canadian corporation and owner of the steamship Cavelier, against the respondent, the United States Government, to recover, under the provisions of the Public Vessels Act, 1925, 43 Stat. 1112,[1] damages alleged to have been suffered by the Cavelier due to the negligent operation of a public vessel of the United States. The United States District Court dismissed the libel on the ground that it failed to state a cause of action within the Public Vessels Act, 1925, for which the United States had consented to be sued.[2] The Circuit Court of Appeals, one judge dissenting, affirmed the District Court.[3]

The jurisdiction of the United States District Court is based on § 24 of the Judicial Code. The petition for certiorari was granted, 323 U. S. 688, because the Circuit Court of Appeals decided a question of general importance relating to the construction of a federal statute. Jurisdiction of this Court rests on § 240 (a) of the Judicial Code.

On August 4, 1942, the petitioner, the owners of the steamship Cavelier, filed a libel *in personam* in admiralty in a federal district court against the United States to recover for damages to its ship, the Cavelier, alleged to have been caused by the negligent operation of the United States Naval patrol boat, YP 249, a public vessel of the United States. The libel averred that on July 7, 1942, the Cavelier, while en route from Canada to Jamaica, was ordered by United States Naval authorities to enter Dela-

---

[1] 43 Stat. 1112. Section 1 provides: "That a libel in personam in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States . . ."

[2] *Canadian Aviator, Ltd.* v. *United States,* 52 F. Supp. 211.

[3] *Canadian Aviator, Ltd.* v. *United States,* 142 F. 2d 709.

ware Bay. Upon approaching the bay, the Cavelier received further instructions from the naval authorities that in her transit of the waters constituting the entrance to the bay, the Cavelier was to follow directly astern of the patrol boat, YP 249, a public vessel of the United States. While following directly astern of the YP 249, as ordered, the Cavelier struck a submerged wreck and sustained serious damages. It was further alleged that the collision with the wreck was due "solely to the fault and negligence of the United States vessel YP 249 and those in charge of her." [4] The libel also stated that petitioner, a Canadian corporation, elected to have its suit proceed in accordance with principles of libels *in personam* and *in rem;* that in similar circumstances the Government of the Dominion of Canada allows nationals of the United States to sue in its courts.

The respondent, United States, appeared specially and sought to have the libel dismissed because it failed to state a cause of action for which the United States had consented to be sued. Petitioner, the libelant, opposed this action, relying on § 1 of the Public Vessels Act, 1925, which provided that a "libel in personam in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States . . ." [5] The federal district court dismissed the libel on the ground that the accident alleged in the libel was not caused by the *"negligent operation of the vessel,"* that the vessel was

---

[4] The petitioner's libel alleged the following specific acts of negligence:

"1. She was not in charge of a competent person.

"2. She failed to keep a good look-out.

"3. She failed to guide the *Cavelier* safely through the waters constituting the entrance to Delaware Bay.

"4. She led the *Cavelier* directly over a submerged wreck.

"5. She failed to give the *Cavelier* proper or adequate guidance as to making a safe entrance into Delaware Bay."

[5] See note 1, *supra.*

not the "efficient cause" of the accident but that the accident arose from the *"personal and independent negligence of its officers."* The court held that the Act authorized suit only where the public vessel was the proximate cause of the damage.

The Circuit Court of Appeals affirmed the action of the district court on the theory that the phrase in the Act "caused by a public vessel" meant caused by those in charge of the vessel, with the vessel as the "noxious instrument," the "physical instrument," by which the physical damage was done; that in the instant case the physical cause was the submerged wreck. The Circuit Court also held that the Act did not authorize recovery on the admiralty principles of *in rem* liability.

The dismissal by the lower court of petitioner's libel raises three questions for consideration by this Court: Does the Public Vessels Act, 1925, authorize suit against the United States where the public vessel is not the physical cause, the "physical instrument" by which the damage is done; that is, is the Act confined to cases involving the collision situation? If not, does the Act, which authorizes the filing of a libel *in personam* against the United States, authorize recovery in such suit on admiralty principles of *in rem* as well as *in personam* liability? Finally, if the Act authorizes recovery on admiralty principles *in rem* and *in personam,* does petitioner's libel state a cause of action under those principles of admiralty law?

The Public Vessels Act, 1925, was the last in a series of statutes directed generally at affording private vessel owners an adequate and efficient remedy for damages arising from negligent operation of ships owned by the United States.[6] Prior to 1916 a private owner whose ship was

[6] Benedict, Admiralty (6th Ed.) vol. 1, 437; Robinson, Admiralty, 266; Lord, Admiralty Claims Against the Government, 19 Columbia L. Rev. 467; Borchard, Government Liability in Tort, 34 Yale L. J. 1, 35–41; 39 Yale L. J. 1189.

damaged by negligent operation of a vessel owned or operated by the United States could not recover from the United States for damages suffered due to the United States' immunity from suit. On the other hand, the United States could sue private owners for damages arising from their negligence. Recognizing the inequities of this situation, Congress passed numerous private acts granting relief in a particular case where a private vessel was damaged by negligent operation of a government ship. The delays, coupled with the inconvenience to Congress of handling each claim by separate bill, led Congress to provide in the Shipping Act of 1916, 39 Stat. 728, that Shipping Board vessels while employed as merchant vessels were subject to "all laws, regulations, and liabilities governing merchant vessels" regardless of the fact that the United States owned or had an interest in them.[7]

In *The Lake Monroe,* 250 U. S. 246, this Court held that this statutory waiver of sovereign immunity from suit subjected Shipping Board merchant vessels to proceedings *in rem* in admiralty. Since the arrest and seizure of a vessel incident to an admiralty proceeding *in rem* proved embarrassing, Congress, in 1920, adopted the Suits in Admiralty Act, 41 Stat. 525,[8] which provided

---

[7] Section 9 provides, in part, 39 Stat. 730–31:

"Every vessel purchased, chartered, or leased from the board . . . while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."

[8] 41 Stat. 525–26, § 1: "That no vessel owned by the United States . . . or in the possession of the United States . . . and no cargo owned or possessed by the United States . . . shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions . . .

"SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the com-

generally that a "libel in personam" for damages could be filed against the government in any case where if the government merchant vessel were privately owned or operated a "proceeding in admiralty" could be maintained, § 2; but that vessels subject to suit under the Act should not be subject to seizure or arrest, § 1. Although § 2 of the Act limited suit to the "filing of a libel in personam," this Court interpreted the provisions of § 3 of the Act to authorize recovery in such suit on admiralty principles of *in rem* as well as *in personam* liability.[9] *Eastern Transportation Co.* v. *United States*, 272 U. S. 675. The Act also provided that the United States should be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to owners, charterers, operators or agents of vessels, § 6.[10]

At the time the Suits in Admiralty Act was being considered by Congress, it was proposed to extend its coverage

---

mencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. . . ."

[9] 41 Stat. 526: "That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. . . . If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. . . ."

[10] 41 Stat. 527: "SEC. 6. That the United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels."

to include "public vessels" as well as merchant vessels of the United States. Apparently fearing that such an extension of the scope of the bill would delay passage, the Suits in Admiralty Act was adopted, its provisions being confined to "merchant vessels." [11]

After the introduction of several bills [12] dealing with suits against public vessels, Congress, in 1925, adopted the Public Vessels Act, 43 Stat. 1112. It provided that a "libel in personam in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States." § 1.[13] Venue of such suits is laid in the district court for the district "in which the vessel or cargo charged with creating the liability is found within the United States." [14] § 2. It was also provided that suits under the Act "shall be subject to and proceed in accordance with the provisions of . . . [Suits in Admiralty Act, 1920, 41 Stat. 525] or any amendment thereof, in so far as the same are not inconsistent herewith . . ." [15]

---

[11] Hearings of the House Committee on Judiciary, S. 3076 and H. R. 7124, Nov. 13, 1919, 66th Cong., 1st Sess., at p. 7.

[12] H. R. 13591, April 13, 1920, 66th Cong., 2d Sess.; H. R. 6989, February 14, 1924, 68th Cong., 1st Sess.; H. R. 9075, May 5, 1924, 68th Cong., 1st Sess.; H. R. 9535, May 29, 1924, 68th Cong., 1st Sess.

[13] See note 1.

[14] The Act also contained a special venue provision for cases where the vessel was outside the territorial waters of the United States. 43 Stat. 1112.

[15] 43 Stat. 1112: "SEC. 2. That such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, . . . Such suits shall be subject to and proceed in accordance with the provisions of an Act entitled 'An Act authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes,' approved March 9, 1920, or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition

The Act also specified that no suit may be brought by a national of a foreign government unless said foreign government, under similar circumstances, allows nationals of the United States to sue in its courts, § 5; §§ 8 and 9 of the Act contain provisions similar to those in the Suits in Admiralty Act, providing that the statute should not be construed to recognize the existence of a lien against a public vessel and conferring on the United States all exemptions and limitations of liability accorded by law to owners of private vessels.[16]

First. Respondent contends that § 1 of the Public Vessels Act authorizing suits against the United States "for damages caused by a public vessel" should be construed to apply only in cases where the public vessel is the "physical instrument" by which the "physical damage" is done, e. g. collision; that therefore petitioner's libel does not lie under the Act. Such a construction narrowly limits the Act's relief. We conclude that such a narrow interpretation of the Act is not justifiable. While the general history of the Act as outlined above does not establish that the statute necessarily extends to the non-collision cases in view of the rule of strict construction of statutory waiver of sovereign immunity, *United States* v. *Sherwood,* 312 U. S. 584, 586; *Eastern Transportation Co.* v. *United States, supra,* we think Congressional adoption of broad statutory language authorizing suit was deliberate and is not to be thwarted by an unduly restrictive interpretation. See *The Lake Monroe,* 250 U. S. 246;

---

of judgment unless upon a contract expressly stipulating for the payment of interest."

[16] 43 Stat. 1113: "SEC. 8. Nothing contained in this Act shall be construed to recognize the existence of or as creating a lien against any public vessel of the United States.

"SEC. 9. The United States shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels."

Nahmeh v. *United States,* 267 U. S. 122, 125–26; *Eastern Transportation Co.* v. *United States, supra; Federal Land Bank* v. *Priddy,* 295 U. S. 229, 231.

In 1924, H. R. 6989 was introduced in the House of Representatives, its provisions being similar[17] to those of the Public Vessels Act as adopted, with this material difference: Section 1 of that bill authorized suit against the United States "for damages caused *by collision* by a public vessel." (Italics added.) On reference to the House Committee on Claims, a substitute bill, H. R. 9535, was reported to the House.[18] This bill provided for suits "for damages caused by a public vessel of the United States." This bill with the latter phrase included subsequently became the Public Vessels Act. This change in the language of the Act prior to its adoption convinces us that Congress intended to authorize suits in other than collision cases. The sponsors of the bill in both houses of Congress understood that it extended to cases where damage was done "by collision, or other fault of Government vessels and Government agents."[19] Moreover, Congres-

---

[17] H. R. 6989, 68th Cong., 2d Sess., provided: "That a libel in personam in admiralty may be brought against the United States, . . . for damages caused by collision by a public vessel of the United States, . . ."

This bill was highly similar to the Public Vessels Act, 1925, 43 Stat. 1112, as finally adopted. A material variance, other than the one mentioned above, was a provision making the consent of the Attorney General a condition precedent to suit under the bill.

[18] H. Rep. No. 913, May 31, 1924, 68th Cong., 1st Sess.

[19] 66 Cong. Rec. 2087. Representative Underhill, the sponsor of the bill, stated:

"The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels whose property has been damaged by collision or other fault of Government vessels and Government agents."

Similarly, Senator Bayard, in discussing the measure in the Senate, said, 66 Cong. Rec. 3560:

"It would give a person aggrieved because of an accident by reason of the shortcomings of a United States ship the right to go into a dis-

sional reports on this bill and the course of discussion in the numerous hearings held on predecessor measures to the present bill, indicates that authority to sue was not to be limited to cases where the vessel was the physical instrument that caused the physical damage.[20]

The use of the phrase "caused by a public vessel" constitutes an adoption by Congress of the customary legal terminology of the admiralty law which refers to the vessel as causing the harm although the actual cause is the negligence of the personnel in the operation of the ship. Such personification of the vessel, treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court. *United States* v. *Brig Malek Adhel,* 2 How. 210, 233–34; *The China,* 7 Wall. 53, 68; *Ralli* v. *Troop,* 157 U. S. 386, 402–3; *The John G. Stevens,* 170 U. S. 113, 120; *The Barnstable,* 181 U. S. 464, 467. That such was the meaning attributed to this phrase is further evidenced by § 2 of the Act, relating to venue, which provides that venue shall lie in the district "in which the vessel or cargo charged with creating the liability is found." 43 Stat. 1112. The consent to suit embodied in the Act thus extends to cases where the negligence of the personnel of a public vessel in the operation of the vessel causes damage to other ships, their cargoes, and

---

trict court and prosecute his action. It provides for the appearance of the Attorney General of the United States, and all maritime accidents of any kind resulting from collision, and so on, are taken care of. A great deal of money would be saved to the Government."

[20] H. Rep. No. 913, 68th Cong., 1st Sess., at p. 63; S. Rep. No. 941, 68th Cong., 2d Sess., at p. 3; see also H. Rep. No. 1301, 66th Cong., 3rd Sess., Feb. 7, 1921, see especially letter of the Acting Secretary of the Navy, p. 8; Hearings before Committee on Judiciary of the House of Representatives, on H. R. 9075, 68th Cong., 1st Sess., May 21, 1924, pp. 6, 19, 21, 23, 28, 30.

personnel, regardless of physical contact between the two ships,[21] and where principles of admiralty law impose liability on private parties. There seems no logical reason for allowing recovery for collision and refusing recovery for damages caused by other movements of the offending vessel.

The fact that the Committee reports on the bill state that the "chief purpose" of the Act is to authorize recovery in collision cases, that the departmental letters attached to the report consider principally the "collision" situation, does not require that the statute should be so limited.[22] Respondent relies on *The Osceola,* 189 U. S. 158, in which it was held that a Wisconsin statute imposing liability "for all damages . . . done to persons or property by such ship," did not apply to injuries suffered by a member of a ship's crew arising from the negligence of the master of the vessel, since the damage was not "done by the ship herself, as the offending thing, . . ." 189 U. S. 158, 176. Since that case involved a suit by a member of the crew against his employer-owner of the vessel, the holding in that decision on its facts is clearly inapplicable to the instant case. Moreover, the language in the Wisconsin statute is narrower in scope than that in the Public Vessels Act, 1925, which refers generally to "damages caused by a public vessel." Furthermore, the legislative history of the Public Vessels Act requires a different result in so far as the *Osceola* case interprets the Wisconsin statute to apply only to cases where the vessel is itself the physical cause of the damage. These latter two considerations serve also to distinguish *The Vera Cruz, No. 2,* 9 L. R., Prob. Div. 96 [1884]. Respondent also relies on

[21] See *Coastwise Transportation Corp.* v. *United States,* 43 F. 2d 401; *The Harding Highway,* 53 F. 2d 938.

[22] H. Rep. 913, 68th Cong., 1st Sess., pp. 1, 6; S. Rep. No. 941, 68th Cong., 2d Sess., pp. 1, 6.

Dobson v. *United States,* 27 F. 2d 807, and *O'Neal* v. *United States,* 11 F. 2d 869. These cases are not apposite on the question under consideration since they also involved suits for damages, for personal injuries sustained by a seaman employee aboard his own ship, against the United States as employer.

Second. Petitioner, evidently relying on § 2 of the Act, states in its libel that it elects to have the action proceed on principles of *in rem* as well as *in personam* liability.[23] As the Circuit Court of Appeals apparently holds that the Act does not authorize recovery on principles of *in rem* liability because of the statutory denial of a maritime lien, we turn to a consideration of this holding. Does the Public Vessels Act which authorizes filing of a "libel in personam" authorize the courts to apply principles of *in rem* as well as *in personam* liability in admiralty?[24] As was indicated, p. 219 *supra,* this Court held that the Suits in Admiralty Act, which also authorizes filing of a "libel in personam" authorizes the courts to grant judgment on *in rem* as well as *in personam* principles, except that the government vessel was not subject to seizure or arrest.

---

[23] See Admiralty Rules, Supreme Court, Rule 14:

"In all suits for pilotage or damage by collision, the libellant may proceed *in rem* against the ship and/or *in personam* against the master and/or the owner."

[24] See note 1, *supra.* At the time of the Committee reports on H. R. 9535 (which when adopted became the Public Vessels Act), the courts had not yet interpreted the Suits in Admiralty Act, 41 Stat. 525, to authorize recovery on admiralty principles of both *in rem* and *in personam* liability. See *Eastern Transportation Co.* v. *United States,* 272 U. S. 675 (1927). We find no discussion of whether § 2 of the Public Vessels Act imported both principles into its text. The problem had been adverted to in the Attorney General's letters of opinion to the committees considering the problem. H. Rep. No. 913, p. 12, 68th Cong., 1st Sess.; S. Rep. No. 941, p. 12, 68th Cong., 2d Sess.; Hearings before the Committee on Judiciary of the House of Representatives on H. R. 9075, May 21, 1924, pp. 30, 31 and 34.

Section 3 of that Act, "Procedure in cases of libel in personam," [25] specifically authorizes a libelant, if he so elects, to proceed in accordance with principles of libels *in rem* if it appears that had the vessel been privately owned a libel *in rem* might be maintained; election to so proceed is not to preclude the libelant from seeking relief *in personam* in the same suit. Although the Public Vessels Act does not have a similar provision, § 2 of the Public Vessels Act expressly provides that "suits shall be subject to and proceed in accordance with the provisions" of the Suits in Admiralty Act, "in so far as the same are not inconsistent" with the provisions of the Public Vessels Act.[26] Since there is nothing in the Public Vessels Act that is inconsistent with this provision of the Suits in Admiralty Act, we hold that the incorporation clause applies. Other provisions of the Public Vessels Act support such incorporation. Authority is given to sue generally "in admiralty"; this broad generic term implies a right to invoke principles of *in rem* and *in personam* liability. Furthermore, in *Eastern Transportation Co.* v. *United States, supra,* we held that authority to resort to both types of principles of admiralty liability was borne out by the fact that the Suits in Admiralty Act provided that the United States should be entitled to all the exemptions accorded to private persons under admiralty law. We there held:

"The necessary implication is that if, under the Harter Act . . . or the Limitation of Liability Act, . . . the United States as owner of a merchant vessel should not be able to show performance of the conditions upon which such statutory limitations of liability are granted, it must assume the personal liability for negligence in such cases exactly as a private owner would." (272 U. S. 675, 690–91.)

---

[25] 46 U. S. C. § 743; see note 9, *supra.*

[26] See note 15, *supra.*

The Public Vessels Act contains the same exemption provision as that in the Suits in Admiralty Act.[27] This interpretation of the Act accords with the broad purpose expressed in the Congressional hearings and reports on the Act.[28] In addition, such an interpretation accomplishes Congress' purpose to grant foreign nationals the same rights as would be accorded our nationals in foreign courts in a similar situation; a narrower interpretation would limit the reciprocal effect of this Act.[29]

Third. Since we hold that the Public Vessels Act was intended to impose on the United States the same liability (apart from seizure or arrest under a libel *in rem*) as is imposed by the admiralty law on the private shipowner, it remains to be considered whether petitioner states a valid cause of action under general principles of admiralty law, *in rem* and *in personam.* Petitioner alleges that the respondent's vessel, having undertaken to guide petitioner's boat, the Cavelier, through the waters at the entrance of the bay, did so in a negligent fashion causing petitioner to strike a submerged wreck; that the accident was caused solely by the negligence of YP 249 and its crew. It needs no extended citation of authority to show that where a tug negligently grounds its tow, the tug and its owner are liable for the damages resulting therefrom. *The Quickstep,* 9 Wall. 665; *The John G. Stevens,* 170 U. S. 113; *The Temple Emery,* 122 F. 180; *The W. G. Mason,* 142 F. 913; see, *The Caspian,* 14 F. 2d 1013; *The Murrell,* 200 F. 826; *The Sally McDevitt* v. *The J. W. Paxon,* 24 F. 302; *The Rescue,* 74 F. 847.[30] The fact that the Cavelier was not fastened to the YP 249 by a tow rope is irrelevant.[31] The libel avers that she was under

---

[27] See note 16, *supra.*

[28] See note 20, *supra.*

[29] See note 16, *supra.*

[30] Benedict, Admiralty (6th Ed.), vol. 1, pp. 363–5, 367–69.

[31] It is clear that tort liability in admiralty does not require physical contact between the offending vessel and its victim. See *Leathers*

orders by the naval authorities to proceed directly astern of the YP 249; for all practical purposes she was as firmly fastened to the stern of the YP 249 as if she had been in tow.

The judgment of the circuit court is reversed, and the cause remanded to the district court with direction to proceed with consideration of the case on the merits.

CATLIN ET AL., TRUSTEES, *v.* UNITED STATES.

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

No. 419. Argued February 1, 2, 1945.—Decided February 26, 1945.

1. In a proceeding instituted by a petition in the District Court for the condemnation of land under the War Purposes Act of 1917, a "judgment" entered upon a declaration of taking filed pursuant to the Declaration of Taking Act of 1931, and a subsequent order denying the landowner's motion to vacate the judgment and to dismiss the petition, *held* not "final decisions" under § 128 of the Judicial Code and therefore not appealable. P. 232.
2. The right of the landowner to challenge the validity of the taking, for nonconformity with the prescribed statutory purposes, was not abrogated by the Declaration of Taking Act; but the right of appeal in this relation may be exercised only when final judgment, disposing of the cause in its entirety, has been rendered. P. 240.

142 F. 2d 781, affirmed.

---

v. *Blessing,* 105 U. S. 626, 630: "Nor is the term 'tort,' when used in reference to admiralty jurisdiction, confined to wrongs or injuries committed by direct force, but it includes wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common-law is by an action on the case." See also *Eastern Transportation Co.* v. *United States,* 272 U. S. 675; *In re Fassett,* 142 U. S. 479, 485; *Philadelphia, W. & B. R. Co.* v. *Philadelphia & H. de G. Towboat Co.,* 23 How. 209, 215–16; *The Lyndhurst,* 92 F. 681; *The Kronprinzessin Cecilie,* 192 F. 27; *The Campania,* 203 F. 855; *The Washington Irving,* 250 F. 797; *The Luke,* 19 F. 2d 923, aff'd, 19 F. 2d 925; *Coastwise Transportation Corp.* v. *United States,* 43 F. 2d 401; *The J. C. Hart,* 43 F. 2d 566; *The Favorita,* 43 F. 2d 569.

CERTIORARI, 323 U. S. 696, to review the dismissal of an appeal from a judgment and order of the District Court in a condemnation proceeding.

Messrs. Thomas S. McPheeters, Henry Davis and *George D. Burroughs* submitted for petitioners.

Mr. Ralph F. Fuchs, with whom *Solicitor General Fahy, Messrs. J. Edward Williams* and *Vernon L. Wilkinson* were on the brief, for the United States.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

The proceeding is for the condemnation of land in Madison County, Illinois, under the War Purposes Act of 1917.[1] The question for review is whether orders entered in the

---

[1] Act of August 18, 1890, 26 Stat. 316, as amended by the Acts of July 2, 1917, 40 Stat. 241, and April 11, 1918, 40 Stat. 518, 50 U. S. C. § 171. The Act provides:

"That hereafter the Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed *for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants;* such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted . . . And provided further, That when such property is acquired in time of war, or the imminence thereof, *upon the filing of the petition* for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, *immediate possession thereof may be taken* to the extent of the interest to be acquired and the *lands may be occupied and used for military purposes . . .*" (Emphasis added.)

course of the proceedings are appealable as "final decisions" within the meaning of § 128 of the Judicial Code, as amended, 28 U. S. C. § 225 (a).[2]

The petition for condemnation was filed in the District Court March 31, 1942. The same day an order for immediate possession was entered ex parte. On November 12, 1942, pursuant to the Declaration of Taking Act of February 26, 1931,[3] the Secretary of War filed a declaration and deposited in court $43,579.00 as the estimated compensation for Tract ED–7, to which petitioners assert ownership as trustees. The court thereupon entered "judgment," likewise ex parte, decreeing that title had vested in the United States upon the filing of the declaration and making of the deposit, also declaring the right of just compensation "now vested in the persons entitled thereto," and holding the cause open for further "orders, judgments and decrees."

Thereafter, on August 2, 1943, an order for service of process by publication was entered, and in October following petitioners moved to vacate the "judgment" and to dismiss the petition as to Tract ED–7. After this the Government amended its petition[4] and petitioners filed

---

[2] Section 128 is in part as follows:

"The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—

"First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title."

[3] 46 Stat. 1421, 40 U. S. C. §§ 258a–258e. Material portions of the statute are set forth in the text of this opinion and the notes.

[4] Petitioners attacked the original petition for failure to set forth (1) the purpose of the acquisition or that it was for any purpose authorized by the act; (2) that the Secretary of War had found that the land was needed or (3) had requested the Attorney General to institute the proceeding to acquire it for such a purpose. Considering these objections jurisdictional, petitioners regard "all further proceed-

an amended motion to vacate and dismiss,[5] which the court denied. From this order and the order entering the "judgment" on the declaration of taking, petitioners appealed. The Circuit Court of Appeals held the orders not final decisions within § 128 and dismissed the appeal. 142 F. 2d 781. We granted certiorari, 323 U. S. 696, in order to resolve conflict upon this question among several Circuit Courts of Appeals.[6]

We think the judgment was right. Petitioners' motions raised issues grounded in contentions that the taking was not for a purpose authorized by the War Purposes Act.[7]

---

ings based upon the said petition" as "ineffective," including the filing of the first declaration of taking and the "judgment" entered pursuant to it.

The amendment added a new paragraph to the petition stating the lands were being taken for purposes described in the language of the statute and incorporated in the petition the letter of the Secretary of War requesting the Attorney General to institute the proceedings to acquire the land "for use in the establishment of the Granite City Engineer Branch Depot." This is the specific purpose which petitioners say does not come within any set forth in the statute, for which see note 1.

[5] The amended motion urged that the amendment of the petition, by incorporating the Secretary's statement of intended use for an engineer depot, caused the petition to show on its face that the use was not within those authorized by the act. Petitioners assert the amendment "came too late to validate" the "judgment."

[6] *Dade County* v. *United States,* 142 F. 2d 230 (C. C. A. 5), accords with the decision in this case. Contrary decisions were rendered in *City of Oakland* v. *United States,* 124 F. 2d 959 (C. C. A. 9), cert. denied, 316 U. S. 679; *United States* v. *243.22 Acres of Land,* 129 F. 2d 678 (C. C. A. 2), cert. denied, 317 U. S. 698; *Puerto Rico R. Co.* v. *United States,* 131 F. 2d 491 (C. C. A. 2).

Under the comparable provision of the 1929 act applicable in the District of Columbia, where special appeal may be allowed upon interlocutory orders, D. C. Code (1940) § 17–101, compare *Lee* v. *United States,* 58 F. 2d 879, with *Keyes* v. *United States,* 119 F. 2d 444.

[7] See notes 1, 4 and 5.

Accordingly they urged that neither petition stated a cause of action, the court acquired no jurisdiction of the cause or to enter the order relating to title, and it was error to deny the motion to vacate and to dismiss. Since the issue here is whether the orders are final, for purposes of appeal, we assume, though we do not decide, that the substantive issues have sufficient merit to warrant determination upon review. Even so, we think petitioners have mistaken their remedy.

Their right to appeal rests upon § 128 of the Judicial Code. This limits review to "final decisions" in the District Court. A "final decision" generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *St. Louis, I. M. & S. R. Co.* v. *Southern Express Co.*, 108 U. S. 24, 28. Hence, ordinarily in condemnation proceedings appellate review may be had only upon an order or judgment disposing of the whole case, and adjudicating all rights, including ownership and just compensation, as well as the right to take the property. This has been the repeated holding of decisions here.[8] The rule applies to review by this Court of judgments of state courts, in advance of determination of just compensation, although by local statute "judgments of condemnation," i. e., of the right to condemn particular property, are reviewable before compensation is found and awarded. *Wick* v. *Superior Court*, 278 U. S. 574, 575; *Public Service Co.* v. *Lebanon*, 305 U. S. 558, 671; cf. *Dieckmann* v. *United States*, 88 F. 2d 902. The foundation of this policy is not in merely technical conceptions of "finality." It is one against piece-

[8] *Luxton* v. *North River Bridge Co.*, 147 U. S. 337, 341; *Southern R. Co.* v. *Postal Telegraph Co.*, 179 U. S. 641, 643; *Grays Harbor Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, 256; *Washington ex rel. McPherson Bros. Co.* v. *Superior Court*, 274 U. S. 726; *Ornstein* v. *Chesapeake & Ohio R. Co.*, 284 U. S. 572; cf. *Collins* v. *Miller*, 252 U. S. 364, 370; *United States* v. *Florian*, 312 U. S. 656.

meal litigation. "The case is not to be sent up in fragments. . . ." *Luxton* v. *North River Bridge Co.*, 147 U. S. 337, 341. Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals.

The rule applies to proceedings under the War Purposes Act of 1917.[9] That act does not purport to change or depart from the generally prevailing rule concerning appeals in condemnation proceedings. It is an amended version of the 1890 act, under which from its enactment to now that rule has been applied, except in the three decisions of Circuit Courts of Appeals reaching the contrary result, where, however, the Declaration of Taking Act of 1931 also was involved.[10] The 1917 act purports to authorize no judgment except one "for the acquirement by condemnation of any land," etc., for the purposes specified or, necessarily, one finally denying this. The provision for the proceedings "to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted . . ." had no purpose to make the right of appeal in such proceedings depend upon and vary with the local procedure in this respect, cf. *Wick* v. *Superior Court, supra; Public Service Co.* v. *Lebanon, supra,* or to incor-

[9] No case has been found in which appeal was taken, or attempted to be taken, under the 1890 and 1917 acts, from an order other than the final judgment disposing of all issues raised in the proceeding, including compensation. The uniform practice under those acts appears to have been therefore to confine appeals to such orders. Only three cases appear to have sought to raise, in appeals from final judgments, the question of the right to condemn. See *Forbes* v. *United States*, 268 F. 273; *Chappell* v. *United States*, 81 F. 764, 160 U. S. 499; *Henry* v. *United States*, 46 F. 2d 640. Numerous other cases involved appeals on questions affecting compensation without raising question concerning title or authority to condemn.

[10] Cf. note 6 and text beginning with the paragraph following note 12.

porate local ideas of "finality" in the application of § 128 to such suits. The language may be applied in other ways without introducing so much lack of uniformity into the application of § 128, if indeed the quoted provision has not been largely nullified by the Federal Rules of Civil Procedure in all respects concerning appeals.[11]

Furthermore, the 1917 act contemplated emergency action, to the extent that upon the filing of the petition immediate possession might be taken and the lands occupied "for military purposes" during war "or the imminence thereof." This purpose, it seems clear, would be largely defeated, if entry must be deferred until specific challenges to jurisdiction and the sufficiency of the petition are determined seriatim, not only by ruling of the trial court but by separate appeals from each ruling which, if sustained,[12] would end the litigation, but if lacking in merit could only prolong it. We find neither in the language nor in the purposes of the 1917 act an intent to authorize departure from the general course of applying § 128 in condemnation proceedings.

Indeed, we do not understand petitioners to urge that the 1917 act without more accomplishes the departure. They say rather that it does so when used in conjunction with the Declaration of Taking Act of 1931. It is the "judgment upon a declaration of taking" and the subsequent order denying their motion to vacate this "judgment" and to dismiss the proceedings which they contend are "final decisions" within § 128 and therefore appealable. It is "judgments" of this character which the decisions of Circuit Courts of Appeals, upon which petitioners rely,

---

[11] "In proceedings for condemnation of property under the power of eminent domain, these rules govern appeals but are not otherwise applicable." Rule 81 (a) (7).

[12] See *United States* v. *Carey*, 143 F. 2d 445; *United States* v. *Marin*, 136 F. 2d 388.

have involved. One of them relied expressly upon the 1931 act as being intended "to sever the taking of title and possession from controversies as to valuation, and to provide a procedure whereby the United States might be speedily and conclusively vested with title and possession" and therefore as having a "final and immediate effect on property rights" which "obviously should be reviewable at once, without the necessity of awaiting the outcome of long drawn out controversies as to valuation." *Puerto Rico R. Co.* v. *United States,* 131 F. 2d 491, 494. The reason stated might afford ground for Congress to provide a special appeal. However, we do not think the reason accords with the statute's provisions or their effect. Consequently it gives no ground for believing that Congress has provided a separate appeal.

We dispose shortly of the motion, or that part of it, which was directed at dismissal of the proceedings, in so far as it may require treatment separately from the motion to vacate the "judgment," if it does so at all. Had this motion been granted and judgment of dismissal been entered, clearly there would have been an end of the litigation and appeal would lie within § 128. *United States* v. *Carey,* 143 F. 2d 445; *United States* v. *Marin,* 136 F. 2d 388. But denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable. Cf. *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21. See also *Dieckmann* v. *United States,* 88 F. 2d 902. Certainly this is true whenever the question may be saved for disposition upon review of final judgment disposing of all issues involved in the litigation or in some other adequate manner. As will appear, we think such a remedy is available in this case.

The "judgment" and the order denying the motion to vacate it stand no better. The 1931 act, like that of 1917, contains no language purporting to change the general rule relating to appeals in condemnation proceedings.

Section 1, which is the basic section, makes no express reference to appeals.[13] Section 2 implies the contrary ef-

[13] Because of its importance, the Section is set forth here in full, except for the concluding paragraph which is quoted in note 14:

"An Act *To expedite the construction of public buildings and works* outside of the District of Columbia *by enabling possession and title* of sites *to be taken in advance of final judgment* in proceedings for the acquisition thereof under the power of eminent domain.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That *in any proceeding* in any court of the United States outside of the District of Columbia which has been or may be *instituted* by and in the name of and under the authority of the United States *for the acquisition of any land* or easement or right of way in land for the public use, *the petitioner may file in the cause*, with the petition or at any time before judgment, *a declaration of taking* signed by the authority empowered by law to acquire the lands described in the petition, *declaring that said lands are thereby taken* for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

"(1) A statement of the authority under which and the public use for which said lands are taken.

"(2) A description of the lands taken sufficient for the identification thereof.

"(3) A statement of the estate or interest in said lands taken for said public use.

"(4) A plan showing the lands taken.

"(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

"*Upon the filing said declaration of taking and of the deposit in the court*, to the use of the persons entitled thereto, *of the amount of the estimated compensation* stated in said declaration, *title to the said lands* in fee simple absolute, or such less estate or interest therein as is specified in said declaration, *shall vest in the United States of America, and said lands shall be deemed to be condemned* and taken for the use of the United States, *and the right to just compensation for the same shall vest in the persons entitled thereto;* and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the

fect. It provides: "No appeal in any such cause nor any bond or undertaking given therein shall operate to prevent or delay the vesting of title to such lands in the United States." While the section does not in terms deny the right of appeal contended for, neither does it confer that right. The possibility of delaying or preventing the vesting of title by appeals was explicitly in the mind of Congress, when it included this section. If it had thought granting an earlier appeal than the existing procedure allowed, upon the severed issue of the right to take the property, would expedite the taking or the vesting of title or the proceedings in any other manner, slight additional words would have made provision for such an appeal. The omission, and the clear import of the language used, are against the implication that separate appeals were to be allowed.

This seems reinforced by § 4. It makes the right to take possession and title "in advance of final judgment" *additional* to other rights, powers or authority conferred by federal or local law, and expressly states that this right "shall not be construed as abrogating, limiting, or modifying any such right, power, or authority." One of the rights of the Government under preexisting federal law was the right not to have the proceeding, or the taking of

---

date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

"Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency." (Emphasis added.)

possession,[14] delayed by separate appeals over issues of title or taking.[15] Its right was rather to have these issues determined with others in the final judgment dispositive of the whole cause. This right, we think, was guarded by § 4 against being construed as having been abrogated, limited or modified, by virtue of the *additional* right conferred "to take possession and title *in advance of final judgment.*" (Emphasis added.) Other provisions of the statute, as will appear, support the same conclusion.

Moreover, the statute does not purport in terms to authorize such a "judgment" as was entered in this cause or to make its entry the event upon which title is changed, if so summary a procedure could be valid. The "judgment" apparently was entered ex parte, prior to service of process or publication of notice. Cf. *Pennoyer* v. *Neff,* 95 U. S. 714. By the terms of § 1, "Upon the filing said declaration of taking [in the condemnation proceeding] and of the deposit in the court . . . title . . . shall vest in the United States . . . and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein . . ." [16]

---

[14] This was authorized by the Act of 1917, cf. note 1 above, as well as by the Act of 1931 in the concluding paragraph of § 1, which is as follows:

"Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable."

[15] See note 9.

[16] See note 13 for the complete text.

The exact effect of these provisions is not entirely clear. But we find nothing in the statute to indicate that Congress intended to deprive the owner of all opportunity to challenge the validity of the taking for departure from the statutory limits. Such a purpose cannot be implied from the provision for transfer of title itself and the fact that the specific references to the final judgment in § 1 speak only concerning compensation. Those references, we think, are counterbalanced by other provisions and considerations, in so far as they may be thought to exclude matters of title from the final adjudication.

We think the purpose was to leave intact the owner's remedy existing before the statute was adopted. For one thing, the statute is not an independent one for condemnation. It provides for no new condemnation proceeding. It merely affords steps ancillary or incidental to suits brought under other statutes; and was so used in this case in conjunction with the suit brought under the Act of 1917. Its declared purpose is to expedite, in the cases to which it applies, the construction of public buildings and works "by enabling possession and title of sites to be taken *in advance of final judgment* in proceedings for the acquisition thereof under the power of eminent domain," (emphasis added) as the title states, and it applies to "any proceeding . . . instituted . . . under the authority of the United States for the acquisition of any land . . . for the public use . . ." § 1. The procedure clearly is ancillary to the main condemnation proceeding, cf. *United States* v. *17,280 Acres of Land,* 47 F. Supp. 267, 269, is intended to dovetail with it and by § 4 is declared expressly to provide rights which are to be "in addition to" preexisting rights and are not to "be construed as abrogating, limiting, or modifying" them. This provision, inserted primarily to safeguard the Government's interest, is not expressly so limited; and we think it may be applied also to safeguard

the owner's preexisting rights where doing this will not be in essential conflict with the additional rights validly conferred on the Government. This would be done by preserving his preexisting right of appeal.

While the language and the wording of the act are not wholly free from doubt, we see no necessary inconsistency between the provisions for transfer of title upon filing of the declaration and making of the deposit and at the same time preserving the owner's preexisting right to question the validity of the taking as not being for a purpose authorized by the statute under which the main proceeding is brought. That result may be reached if the statute is construed to confer upon the Government, upon occurrence of the events specified, only a defeasible title in cases where an issue concerning the validity of the taking arises. So to construe the act would accomplish fully the purposes for which it was adopted in the large number of cases where no such issue is made. In others this would go far toward doing so, for not all such issues will be followed through to final decision or, if so followed, will turn out adversely to the Government. The alternative construction, that title passes irrevocably, leaving the owner no opportunity to question the taking's validity or one for which the only remedy would be to accept the compensation which would be just if the taking were valid, would raise serious question concerning the statute's validity. In any event we think it would run counter to what reasonable construction requires.

Some stress is placed upon the provisions of §§ 3 and 5 relating to irrevocable commitment of the United States to pay the amount ultimately to be awarded,[17] together

[17] Section 3 is set forth in note 18. Section 5 is as follows:

"In any case in which the United States has taken or may take possession of any real property during the course of condemnation proceedings and in advance of final judgment therein and the United

with the provision of § 1 authorizing award of more than the amount deposited as estimated compensation, as indicating a purpose to make the transfer of title irrevocable upon the filing of the declaration and the making of the deposit.[18] From the fact that the Government may become irrevocably committed to pay, it does not follow that the owner is irrevocably committed to submit to the taking, since the statute's terms are not *in pari materia* in this respect. Neither § 3 nor § 5 purports to bind the owner irrevocably. On the contrary, § 5 deals only with authority to expend appropriated funds for demolition of existing structures and construction of new ones; and the concluding proviso, requiring the opinion of the Attorney General that "title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound *by the final judgment therein,*" (emphasis added) before the funds are expended, seems clearly to contemplate that title is not indefeasibly vested in the United States merely by following the administrative procedure. Final judg-

---

States has become irrevocably committed to pay the amount ultimately to be awarded as compensation, it shall be lawful to expend moneys duly appropriated for that purpose in demolishing existing structures on said land and in erecting public buildings or public works thereon, notwithstanding the provisions of section 355 of the Revised Statutes of the United States: *Provided,* That in the opinion of the Attorney General, the title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein."

[18] Including or following the finding required by § 3, which provides:

"Action under this statute irrevocably committing the United States to the payment of the ultimate award shall not be taken unless the chief of the executive department or agency or bureau of the Government empowered to acquire the land shall be of the opinion that the ultimate award probably will be within any limits prescribed by Congress on the price to be paid."

ment in "such proceeding," that is, the main condemnation suit, is necessary for that purpose. The operation of §§ 3 and 5 is to cut off the Government's right to abandon the proceedings. It is not to compel the owner to submit to unauthorized takings.

Accordingly, in our opinion the right of the owner to challenge the validity of the taking, for nonconformity with the prescribed statutory purposes, was not destroyed by the 1931 act. Nor was the right to do this upon appeal, existing before that act was adopted, affected. No such "severance" was made as the court deciding the *Puerto Rico* case thought was created. No new right of separate appeal was given. The preexisting right of appeal, including appeal on grounds relating to validity of the taking, remained in force to be exercised when and only when final judgment, disposing of the cause in its entirety, has been rendered. The statute makes no other explicit provision. Nor is one so clearly implied that we can make it. The weightier implications are the other way.

We have not discussed other issues presented or suggested in the briefs or argument, since that has not been necessary to the disposition of this cause. These include the question whether, when possession has been taken and damage has been done to the premises in the course of proceedings not authorized, the remedy by appeal is adequate. That issue has not been made in this case, since the grounds urged rest upon the provisions of the 1931 act relating to title and their effect, through the proceedings had, upon the petitioners right. They do not relate simply to the taking of possession, the right to take it or damages resulting from exercise of that right, apart from the question of title. Possession in this case had been taken, pursuant to the terms of the 1917 act, prior to the time of the purported transfer of title. It will be time enough to con-

sider the question concerning adequacy of the appeal or possible existence of other remedy affecting such a case when it arises.

The judgment is

Affirmed.

MR. JUSTICE ROBERTS and MR. JUSTICE DOUGLAS concur in the result.

GEMSCO, INC. ET AL. *v.* WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR.

NO. 368. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued December 5, 1944.—Decided February 26, 1945.

Under § 8 (f) of the Fair Labor Standards Act, the Administrator has authority, as a necessary means of making effective a minimum wage order for the embroideries industry, to prohibit industrial homework. Pp. 254, 269.

144 F. 2d 608, affirmed.

CERTIORARI, 323 U. S. 695, to review a judgment affirming a wage order promulgated by the Administrator under the Fair Labor Standards Act.

Messrs. Samuel S. Allan and *Seymour D. Altmark,* with whom *Messrs. Walter Brower, Samuel J. Cohen, Coleman Gangel, Ilo Orleans* and *Myron P. Gordon* were on the brief, for petitioners.

---

*Together with No. 369, *Maretzo et al.* v. *Walling, Administrator of the Wage and Hour Division, U. S. Department of Labor,* and No. 370, *Guiseppi et al.* v. *Walling, Administrator of the Wage and Hour Division, U. S. Department of Labor,* also on certiorari to the Circuit Court of Appeals for the Second Circuit.

Mr. Archibald Cox, with whom *Solicitor General Fahy, Messrs. Douglas B. Maggs, Louis Sherman* and *Kenneth Meiklejohn* were on the brief, for respondent.

Briefs were filed by *Messrs. Nathaniel L. Goldstein,* Attorney General of New York, *Orrin G. Judd,* Solicitor General, *Wendell P. Brown,* First Assistant Attorney General, and *Roy Wiedersum,* Assistant Attorney General, on behalf of the Industrial Commissioner of the State of New York, and by *Messrs. John H. Nolan,* Attorney General of Rhode Island, and *John J. Cooney,* on behalf of the State of Rhode Island and Providence Plantations, as *amici curiae,* in support of the respondent.

Mr. Justice Rutledge delivered the opinion of the Court.

The issue to be decided in these cases is narrow. It is whether respondent, as Administrator, has authority under § 8 (f) of the Fair Labor Standards Act, 52 Stat. 1060, to prohibit industrial homework as a necessary means of making effective a minimum wage order for the embroideries industry. The question arises in proceedings brought to review the order pursuant to § 10. The cases were consolidated for hearing in the Circuit Court of Appeals, which sustained the Administrator's action, one judge dissenting. *Guiseppi* v. *Walling,* 144 F. 2d 608. Because of the public importance of the question and its importance for purposes of administering the statute, certiorari was granted, 323 U. S. 695, limited to the stated issue.[1]

One of the Act's primary objectives was "a universal minimum wage of 40 cents an hour in each industry

[1] The petition sought review also on questions of due process and delegation of legislative power. Cf. note 10 *infra.*

engaged in commerce or in the production of goods for commerce" and to reach this level as rapidly as was "economically feasible without substantially curtailing employment." § 8 (a). Accordingly, § 6 established basic minimum statutory wages, to be stepped up from 25 cents an hour to 40 cents generally [2] during the seven years from the section's effective date, October 23, 1938. Limited flexibility was provided in accordance with the declared purpose to reach the 40-cent level earlier if "economically feasible." Cf. 83 Cong. Rec. 9256. Section 8 empowers the Administrator to convene industry committees which, after investigation, report to him their recommendations concerning minimum wages [3] and reasonable classifications. § 8 (a), (b), (c), (d). The Administrator is then required by order to approve and carry into effect the committee's recommendations, after notice to interested persons and opportunity to be heard, if he finds they "are made in accordance with law, are supported by the evidence . . . and . . . will carry out the purposes" of the section; otherwise he must disapprove them. § 8 (d).

The Act's scheme is therefore a combination of "statutory" minimum wages fixed by § 6 and what may be termed "committee" wages,[4] fixed by order made pursuant

---

[2] Section 6 (a) (3), cf. also § 8 (e) and text *infra* page 267, provides for issuance and continuance in effect of wage orders, to some extent at least, after the seven-year period: "Sec. 6 (a). Every employer shall pay to each of his employees . . . (3) after the expiration of seven years . . . not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower . . ."

[3] "The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry." § 8 (b). Recommendations for classifications are covered by § 8 (c).

[4] Cf. the concurring opinion of L. Hand, C. J., 144 F. 2d 608, 623. The combination is the result of a compromise, reached in con-

to § 8. The former prevail in the absence of special administrative action; the latter, when such action has been taken to prescribe for a specific industry a higher level than the generally prevailing statutory floor. The order in this case, entered on approval of the committee's recommendations, after notice and extensive hearings,[5] prescribed a minimum wage of 40 cents an hour, an increase

---

ference, of differences between the Senate and the House as to the structure of the bill. Cf. text *infra* at note 32.

[5] The Industry Committee (No. 45) was appointed June 6, 1942, and on June 30 following submitted its unanimous report and recommendations, for the 40-cent rate, to the Administrator. Published notice of public hearing was given September 16. The hearing extended over ten days of the following November. The Administrator broadened its scope to include the question "what, if any, prohibition, restriction, or regulation of home work in this industry is necessary to carry out the purpose of such order," etc.

Industry representatives, who appeared, were unanimous, with one exception, in supporting the committee's recommendation, but divided on restricting or prohibiting industrial homework. Labor representatives supported both proposals, as did representatives of federal and state agencies, including the Departments of Labor of the United States and of the States of New York and Rhode Island.

Extensive testimony was taken and many exhibits were received in evidence. In many of its aspects the Administrator found the evidence repetitious of that upon which previous findings were based approving the recommendations of an earlier industry committee (No. 15), which resulted in establishing the 37½-cent rate by order effective January 27, 1941. Oral argument was restricted to the question of homework, to which the greater part of the record of 1,691 pages relates. The procedure was substantially that which had been followed, upon the same question, in the cases of six other industries. See the Administrator's Findings and Opinion on the minimum wage recommendation of Industry Committee No. 26 for, and industrial homework in, the Jewelry Manufacturing Industry, dated October 16, 1941, and in relation to the Knitted Outerwear Industry (March 30, 1942), Women's Apparel Industry (July 8, 1942), Gloves and Mittens Industry (August 22, 1942), Button and Buckle Manufacturing Industry (September 19, 1942), and Handkerchief Manufacturing Industry (January 22, 1943).

of 2½ cents over the previously prevailing "committee" rate.[6] Petitioners have not contested this, the primary, term of the order.

In this statutory setting stands § 8 (f), the crucial provision which in material part is as follows:

"(f) *Orders issued under this section* shall define the industries and classifications therein to which they are to apply, and *shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.* No such order shall take effect until after due notice is given . . ." (Emphasis added.)

I

The narrow issue turns upon the scope properly to be given the emphasized portions of the section. Respondent says that this authorizes him to take whatever action he finds necessary to prevent circumvention or evasion of the order so that the wage rate it establishes may be safeguarded; and that in this case his findings, amply

---

[6] The provision for the 40-cent rate became effective September 20, 1943. The order provided the prohibition of homework should become effective after November 15, 1943. But the date was postponed, successively, until July 26, 1944, when the Circuit Court of Appeals stayed enforcement until this Court should act on the petition for certiorari.

The Administrator found that "the estimated direct increase in the wage bill resulting from the establishment of a minimum wage rate of 40 cents an hour would be 1.2 per cent in the three main areas and 2.6 per cent in the other areas." These findings are related to others to the effect that "almost 90 percent of the embroidery establishments are located in the New York City (including northern New Jersey), Chicago, and Philadelphia metropolitan areas. . . ." The Administrator concluded that "the insignificant rise in operating costs which will result from the recommended minimum will not cause substantial curtailment of employment." Cf. § 8 (b), (d).

sustained by the evidence, show prohibition of industrial homework is necessary to accomplish this end. As applied in this case, he has construed "necessary" not as meaning "helpful," "consistent," or "convenient," [7] but as connoting that the prohibition is absolutely essential to achieve those purposes. He says the wage rate cannot be maintained unless industrial homework is prohibited, with the comparatively minor exceptions the order allows.[8] His findings and indeed his express conclusions therefore necessarily determine that regulation, by measures short of prohibition, cannot accomplish the relevant purposes of the order and of the statute.[9]

---

[7] Cf. *Armour & Co.* v. *Wantock,* 323 U. S. 126.

[8] The exceptions relate to persons obtaining special homework certificates who are "unable to adjust to factory work because of" age, physical or mental disability or are unable to leave home because their presence is required to care for an invalid; and were engaged in industrial homework in the industry prior to November 2, 1942 (except that this requirement is not to be applied in cases of unusual hardship) or are engaged in such homework under the supervision of a state vocational rehabilitation agency or a sheltered workshop as defined in the Code of Federal Regulations.

[9] The Administrator's opinion reviews at length the conditions surrounding homework in the industry inevitably tending to produce violation of minimum wage requirements; and the efforts previously made under both state and federal legislation to overcome these tendencies by regulatory measures.

His conclusions, upon the evidence, were in general that both state and federal efforts at regulation had been ineffective; that violations were widespread, of great variety and in great part concealed; and that these were due to factors inherent in the conditions under which industrial homework is performed and impossible to correct by the regulatory measures applied.

The Administrator's review of efforts at regulation, by both state, cf. note 17 *infra,* and federal authorities prior to the Fair Labor Standards Act, led him to conclude "that labor conditions in industrial home work are not susceptible to regulation," and that, according to "the nearly unanimous viewpoint of Federal and State officials having experience in the administration of labor laws, . . . regulation, re-

Petitioners do not dispute the Administrator's findings of fact or that the evidence fully sustains them. Nor indeed do they question his conclusions in any respect except that he has no legal authority to make the prohibition.[10] The petition for certiorari conceded, as does also the brief, that the prohibition was included solely because respondent found "he could not [otherwise] enforce the minimum wage rate as to the home workers employed in the industry." The brief states further that petitioners, "during the entire course of the proceedings, . . . challenged only the statutory authority" of the respondent to include the prohibition.

In this sharply chiseled state of the issue, the accuracy of the Administrator's findings and conclusions and the sufficiency of the evidence to sustain them must be taken

---

striction or prohibition of industrial home work must be on a Nation-wide basis if minimum wage standards are to be preserved and upheld."

Likewise, "experience under the Fair Labor Standards Act of 1938 [to November, 1942] has also indicated that labor conditions in industrial homework in this Industry are not susceptible to regulation that will guarantee that the home worker will be paid the established minimum rate. . . . Compliance with the Act has been the exception rather than the rule." Cf. note 16 *infra*. Such homework, it is further concluded, "furnishes a ready means of circumventing or evading the minimum wage order for this Industry" and "mere regulation . . . including regulation of the record-keeping practices of employers or governmental establishment of piece rates will not be adequate to secure enforcement of the minimum wage order for the Embroideries Industry."

[10] In the petition for the writ of certiorari the only questions presented were (1) whether the statute authorizes inclusion of the prohibition as a "term and condition" of the wage order; (2) whether, if so, this delegation of authority is confined by adequate standards; and (3) whether the Fifth Amendment forbids Congress to authorize the prohibition "solely because of the inability to enforce the minimum wage rate applicable to homeworkers, without regard to the social and economic character of such employment." Cf. note 1 and text *supra*.

not only as true but as conceded, apart from the single question of authority to include the prohibition notwithstanding it is so buttressed in fact.[11] The posture of the case therefore compels acceptance of the Administrator's position that, without the prohibition, the wage rate cannot be maintained, and that circumvention and evasion cannot be prevented.

Furthermore, upon the findings that is true not only with reference to the employees who are themselves homeworkers. It is true also as to all other employees in the industry.[12] According to the best available estimates, the number of homeworkers at peak employment (April 1, 1939, to July 15, 1942) ranged from 8,500 to 12,000, whereas the number of factory workers as of June, 1942, was 18,500. The number of wage earners per factory in 1939 employed in some 1,431 establishments averaged between 12 and 13 workers.[13] Not only therefore is it im-

---

[11] By § 10, "The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive."

[12] The Administrator's report stated: "It was testified at the hearing that home work is cheaper in terms of labor costs than factory work and is used by employers to reduce production costs, despite the advantages derived from the direct supervision over production, standardization, and specialization which are possible in the factory. The evidence . . . conclusively shows that large proportions of home work employees . . . are paid less than the applicable minimum. It is apparent that if some employers are allowed to utilize home workers at subminimum wage scales, other employers compelled to pay a 40-cent minimum will be placed at a competitive disadvantage."

[13] The nature of homework, it was said, is such that estimates of the number of homeworkers in this industry are difficult, whereas by contrast employment figures for factory workers may be ascertained with ease and definiteness. The estimates stated are from data submitted by the Economics Branch, Wage and Hour Division, United States Department of Labor. The figures concerning the number of establishments and of factory workers were derived from the Census of Manufactures.

possible for the Administrator, without the prohibition, to follow the statute's mandate (§ 8 (d)) to "carry into effect" the recommendations of the committee as to 8,500 to 12,000 homeworkers, who generally are part-time pieceworkers.[14] He neither can do so as to factory workers, who generally are full-time workers.

Hence, if the prohibition cannot be made, the floor for the entire industry falls and the right of the homeworkers and the employers to be free from the prohibition destroys the right of the much larger number of factory workers to receive the minimum wage. This is true not merely as a matter of inference from evidence having only prospective and predictive value. It is proved conclusively by the Administrator's experience in attempting by regulatory methods to secure compliance with the previously

---

[14] According to the report of the Economics Branch, cf. note 13 *supra,* entitled *The Current Status of Home Work in the Embroideries Industry,* October, 1942, one of the most important factors affecting earnings of homeworkers is "the great multiplicity of designs and styles." Variations are constant and short lived. Piece rates must be determined and applied with every change. Few operations lend themselves to standardization, especially for homework. In one instance, during a period of six months, a "lace-cutting firm received work requiring the cutting of 300 different designs, each of which had a different piece rate." The report further states: "Piece rates for plant workers can readily be checked . . . The setting of piece rates to yield the minimum wage for home workers is a much more complex problem than for plant workers."

The Administrator's opinion states the most common practice in setting piece rates for home operations is by the timing of a sample worker in the factory and the evidence showed this worker may be a very skilled and experienced one. Of the firms inspected by the Wage and Hour Division June 1, 1939, to July 1, 1942, "a review of 211 showed that 80, or 37.9 percent, fixed piece rates for home workers upon the basis of arbitrary estimates; 73, or 34.6 percent, based the rates for home workers on time tests of plant sample workers; and only 40, or 19 percent, based the rates for home workers on time tests of some of the home workers themselves." Cf. also note 16 *infra.*

prevailing [15] lower "committee" rate.[16] His experience is borne out by that of state and federal authorities prior to the Fair Labor Standards Act.[17] Attempts to maintain

---

[15] Cf. note 6 *supra.*

[16] Cf. note 9 *supra.* The Administrator's report stated: "The Economics Branch found that even during the boom period from January 27, 1941 to July 1942, 61.2 percent of the home workers in the Industry as a whole were paid less than 37½ cents an hour, in violation of the applicable minimum wage order. It was found that 52.6 percent of the home workers received less than 35 cents an hour; nearly 30 percent less than 25 cents; and 17.4 percent less than 20 cents. Fifteen home workers, or 1.8 percent of the total number, were paid as little as 10 cents an hour or less. The percentage receiving less than 37½ cents an hour was highest, 90.2 percent, in lace cutting and lowest, 23.3 percent, in crochet beading. Miscellaneous embroidery had 81.3 percent of the home workers receiving less than the wage order minimum, passementerie, 74.1 percent, hand embroidery, 72.6 percent, and Schiffli and Swiss hand-machine embroidery, 31.1 percent."

Much other evidence, including testimony of individual homeworkers and of the Director of the Women's Division, New York Department of Labor, relating to inspections made in 1941 and 1942 involving 1,582 homeworkers, sustained the Administrator's statement, "The evidence in the record, including the report of the Economics Branch, which showed low subminimum earnings for the bulk of the homeworkers in this industry, was not seriously contested at the hearing," and his further conclusions that, in view of competitive relationships, mere regulation of homework would not be adequate to secure effective enforcement of the order and, likewise, that this could not be had by applying the prohibition to only part of the industry.

[17] He found specifically that the efforts of New York and New Jersey in prohibiting distributors who operate no shops from distributing homework and in restricting such contractors, though having a beneficial effect, had not "changed the economic structure of the Industry as presently carried on"; that hidden child labor is a widespread characteristic of the system, discoverable only after extensive investigation presenting an almost insurmountable problem for enforcement agencies, employers and homeworkers themselves; that violations of record keeping regulations by employers and workers are consistent and widespread; and that "in view of the competitive relationship

minimum wages by regulating homework have failed generally of their purpose. This failure, after fair trial, is responsible for the Administrator's resort to prohibition in the present order.

The case therefore comes down squarely to whether or not minimum wages may be effectively prescribed and required in this industry. If homework can be prohibited, this is possible. If it cannot, the floor provided by the order cannot be maintained and, further, what is more important, it inevitably follows that no floor, whether of "statutory" or of "committee" wages, can be maintained.[18]

---

between different types of embroidery, any regulatory, restrictive, or prohibitory order affecting only certain operations would create a competitive disadvantage for the employers engaged in those operations."

Noting that twelve states had legislated, before 1900, to regulate tenement workshops, the Administrator found that "effective enforcement was impossible, however, and home work remained a serious problem." The subsequent period of legislation by a few states "achieved little effective control prior to 1930." New state laws, enacted during the 1930's, providing for abolition of homework by administrative order, "became the only effective statutory approach to a problem generally considered beyond regulation." Under the National Industrial Recovery Administration, 118 of the 556 codes included homework provisions; and 86 percent of the 118 prohibited homework. Homework in consequence was greatly reduced, but its volume turned sharply upward when the National Industrial Recovery Act was declared unconstitutional in *Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).

[18] No reason is apparent which would make any factor in the homework situation effective to nullify the 40-cent rate that would not apply also to the 37½-cent rate or any other minimum, however fixed, except one placed so low that even homeworkers would seek other kinds of employment or accept idleness in preference. The Administrator made no findings or conclusions concerning this self-evident matter.

In this light petitioners' position is, in effect, that the statute cannot be applied to this industry. Their argument is not put in these terms. It comes to that. So to state it is to answer it. The industry is covered by the Act. This is not disputed. The intent of Congress was to provide the authorized minimum wage for each employee so covered. Neither is this questioned. Yet it is said in substance that Congress at the same time intended to deprive the Administrator of the only means available to make its mandate effective. The construction sought would make the statute a dead letter for this industry.

The statute itself thus gives the answer. It does so in two ways, by necessity to avoid self-nullification and by its explicit terms. The necessity should be enough. But the Act's terms reinforce the necessity's teaching. Section 8 (d) requires the Administrator to "carry into effect" the committee's approved recommendations. Section 8 (f) commands him to include in the order "such terms and conditions" as he "finds necessary to carry out" its purposes. These duties are backed up by other provisions.[19] When command is so explicit and, moreover, is reinforced by necessity in order to make it operative, nothing short of express limitation or abuse of discretion in finding that the necessity exists should undermine the action taken to execute it. When neither such limitation nor such abuse exists, but the necessity is conceded to be well founded in fact, there would seem to be an end of the matter.

II

Petitioners' objections are not procedural. They have not contended that the provision of the order forbidding homework is a definition or classification of the industry

[19] Cf. text at note 38ff *infra*.

or, either for that reason or any other, must be submitted to the industry committee and made only upon its recommendation. Such a position would have nullified their argument that the statute confers no authority in any case to prohibit homework. The provision is neither a definition nor a classification of an industry. It relates merely to a mode or method of conducting the industry. The statute provides that the committee shall recommend minimum wage rates and reasonable classifications, and that the Administrator, if he disapproves "such recommendations," shall refer them either to the committee or to another committee. § 8 (a), (b), (c), (d). Nothing in the Act requires the Administrator to take the committee's recommendation concerning the terms and conditions found necessary to make their recommendation and the order based on it effective. He must find that the terms and conditions he imposes are necessary for this purpose. He did so in this case, after extended hearings, upon ample evidence and upon findings of necessity not questioned. To say that in such circumstances he can adopt no term or condition which materially alters the industry is only to say Congress did not mean what it said and that the industry cannot be made subject to the statute's regulation. It is also to ignore "the distinct separation of the functions to be performed by the committee under § 8 (a), (b), (c), (d), from that to be performed by the Administrator after submission of the committee's report . . ." *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 147.

Petitioners' arguments rest chiefly on their views of the legislative history and the character of the prohibition. The latter, they say, is not a "method of enforcement" but is rather a form of "experimental social legislation" touching a matter not incidental to the order, but in the nature

of a wholly independent subject beyond the purview of the statute and therefore of the Administrator's power.

This argument is closely interlaced with the contentions drawn from the legislative history and the statute's enforcement provisions, presently to be noted. In so far as it is independent of these, however, it rests on wholly untenable premises. One is that the prohibition is merely an "enforcement" measure. It is rather primarily preventive in character, intended to aid in making the order effective and to eliminate the need for enforcement. But, in accordance with their "enforcement" conception, petitioners' larger fallacy is that the Administrator can take no action toward making his order effective which, if taken as a matter of independent legislation not expressly related to the Fair Labor Standards Act's objects, would produce substantially the same social and economic effects, apart from those objects. In this view the Administrator's power is so restricted that he can do nothing if, in addition to making the rate effective and safeguarding it against circumvention, other social and economic consequences would result.

The answer is obvious. Section 8 (f), in directing the Administrator to include "such terms and conditions" as he "finds necessary to carry out the purposes of such orders," did not forbid him to take the only measures which would be effective, merely because other consequences necessarily would follow. The language neither states expressly nor implies that he is to do only what will achieve the stated ends and nothing more. The statute does not direct the Administrator to make the rate effective by all necessary means except those which may have other social or economic consequences.

His power, it is true, is not one of social or economic reform, except as that power relates to maintaining authorized minimum wages and the statutory hours of labor.

But the Administrator has not exercised his authority for such an extraneous purpose. He expressly disclaimed any such object.[20] The entire record supports the disclaimer. The whole bearing of the evidence and the findings was toward the effects of homework upon the wage rate and its maintenance, not upon other evils it may generate. Petitioners' argument, not questioning the necessity for the prohibition or the finding that it exists, would accomplish indirectly what direct challenge which they do not attempt would achieve, if successful. Absent the necessity, the Administrator's power would not go to this length. Present that necessity, to deny it, because other effects necessarily but incidentally must follow his action, would be to nullify both his power and the statute. Nothing in the statute, whether of letter or of substance, warrants such a limitation. What is "incidental," what "independent" of stated statutory ends often presents a difficult issue. But that is seldom if ever true when to deny the authority or other feature questioned would nullify the Act by reading out of its purview the only means for making it effective.[21]

Homework in this case is not an independent industry. It is conducted largely by the same employers who maintain factory establishments or by "contractors" who are

---

[20] His opinion expressly states: "This proceeding is not concerned with the question whether home work is desirable or undesirable from a social point of view or as a form of economic organization. It is concerned solely with whether the home work system in the Embroideries Industry furnishes a means of circumventing or evading a wage order putting into effect the minimum wage recommendation of Industry Committee No. 45 so that it is necessary to provide in the wage order for its regulation, restriction or prohibition in order to carry out the purposes of such order and to safeguard the minimum wage rate established therein."

[21] Cf. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 392; *United States* v. *Powers*, 307 U. S. 214, 217; *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 333; *Bird* v. *United States*, 187 U. S. 118, 124.

in competition with such employers. Homeworkers are an integral part of the single industry. Their labor competes with the labor of factory workers, within the same establishment, between establishments, and between regions where the industry is concentrated. The effects of their competition with factory workers are, as has been shown, to destroy the latters' right as well as their own to have, practically speaking, the benefit of the minimum wage guaranteed by the Act. They represent the smaller fraction of the industry, both in numbers and in working time. Such are the uncontested findings of fact.[22]

When all of these facts are taken into account, the case is clearly not an instance of effort to achieve ends beyond or independent of the statutory objects. It rather exhibits but an exercise of the necessary means to accomplish those objects. This is confirmed, further, by the evidence and the findings which show that the prohibition will not eliminate the great majority of homeworkers from the industry; but on the contrary will result only in transfer of the scene of their work from the home to the factory and will do this without undue hardship.[23]

---

[22] Cf. notes 12, 13 and text at notes 14 and 16 *supra*. Other relevant findings of the Administrator need not be quoted or noted specifically, reference being made to his opinion for them.

[23] The Administrator's opinion devotes some seventeen pages to review of the evidence in this aspect of the case, including previous experience with ability of both employers and homeworkers to adjust to the prohibition. This experience related to the effects of prohibitions under various state laws and the National Industrial Recovery Act. With reference to the latter, of 75 firms investigated by the Children's Bureau, Department of Labor, only one discontinued the line of goods on which homeworkers had been employed and of 3,135 homework employees prior to the prohibition, 2,588 or 82 percent were employed in factories after the prohibition. Similar results were shown in the experience with state laws in New Jersey, New York and Rhode Island.

Petitioners presented contrary evidence, largely statements of individual homeworkers in embroidery that they could not or would

For the larger number of workers unable to make the transfer, the exceptions allowed by the order will provide an adequate mode for permitting continuance of work at home.[24]

The argument from the legislative history undertakes, in effect, to contradict the terms of § 8 (f) by negative inferences drawn from inconclusive events occurring in the course of consideration of the various and widely differing bills which finally, by compromise and adjustment between the two Houses of Congress, emerged from the conference as the Act. The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. This is such a case.

Petitioners' most insistent emphasis is upon two things. One is that the committee in charge of the original Senate bill reported that it was limited to two objectives, the establishment of minimum wages and maximum hours and the prohibition of industrial child labor.[25] The other, that at various stages of consideration the Senate bill contained, in the section (9 (6)) comparable to what is now § 8 (f), a parenthetical clause which expressly included

---

not make the transfer, for various reasons, if the prohibition were adopted. The Administrator found some of this evidence unacceptable "as furnishing a sound basis for predicating their actual conduct when faced with actual prohibition" and concluded that reasonable adjustment could be made to the prohibition both by employees and by the employers.

[24] Cf. note 8 *supra*. Because "relatively few home workers will be eligible to continue home work under this exception," the Administrator found that "no threat to the standards of the wage order" would be presented by making it.

[25] S. Rep. No. 884, 75th Cong., 1st Sess.; cf. 81 Cong. Rec. 7658, 7659.

homework among other specified practices the Administrator was authorized to restrict or prohibit,[26] and this clause was omitted from the final conference draft.

The first objection merely repeats in another guise the argument that homework is an independent subject matter wholly without the statute's purview, but bolsters this with the assumption that because oppressive child labor was covered expressly, homework and all other factors affecting maintenance of minimum wages were left entirely untouched, if they produce other evils which independent legislation might reach, merely because they were not also specifically mentioned. The assumption ignores the fact that the child labor provisions are themselves independent prohibitions, not limited to operation in situations where child labor has harmful effects on maintaining the minimum wage rate but working entirely inde-

[26] The clause assumed various forms in the course of consideration of the Senate bill. The section comparable to § 8 (f) was 9 (6). The original parenthesis, apparently, was inserted in committee in the form, "(including the restriction or prohibition of such acts or practices)." S. Rep. No. 884, 75th Cong., 1st Sess., 8. This was amended on the floor, without debate or record vote, to read, "(including the restriction or prohibition of industrial home work or of such other acts or practices)," thus introducing the first specific reference to homework. 81 Cong. Rec. 7891. The bill passed the Senate with the clause in this form. 81 Cong. Rec. 7957.

The House Committee on Labor approved and reported the Senate bill with this version of the parenthesis, which was retained through many revisions of the bill after it was recommitted. Eventually the clause was expanded in the House Committee to read, "(including the restriction or prohibition of industrial home work or such other acts or practices and such requirements as the keeping of records, labeling, periodic reporting and posting of orders and schedules)." House Confidential Subcommittee Print "A" of February 18, 1938. The clause disappeared entirely from the House bill when, shortly before passage, that body changed the entire scheme by substituting "statutory" for "committee" wages. Cf. H. Rep. No. 2182, 75th Cong., 3d Sess.; cf. also text *infra* at notes 32, 33.

pendently of such consequences.[27] Those provisions are therefore not merely means of putting into effect and maintaining the wages required by the Act, as is the Administrator's prohibition of homework. The former would apply regardless of any effect upon the wage structure. The latter can apply only when it is clear that such effects require this in order to maintain and safeguard that structure.

This difference is in fact the difference between end and means, made such by the terms of the statute itself. Congress by stating expressly its primary ends does not deny resort to the means necessary to achieve them. Mention of child labor therefore gives no ground to infer, from failure expressly to mention homework, that the latter was not included within the general language which comprehends all necessary means to achieve the Act's primary objects. Exactly the opposite conclusion must be drawn on the record, in view of the Administrator's uncontested findings concerning the effects of homework in producing hidden child labor at substandard wages, thus circumventing the Act in two of its primary objects.[28] These findings therefore give added reason to sustain his conclusion that homework was not put beyond his power to prescribe the means necessary to achieve the purposes of the order and of the Act.

---

[27] Cf. § 12 and § 3 (l). The latter defines "oppressive child labor." The former prohibits producers, manufacturers and dealers to "ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed . . ." See also note 17 *supra*.

[28] The Administrator, referring to the prohibition of § 12, cf. note 27 *supra*, noted that the employment of children in either factories or homes, in the production of goods for commerce, must be hidden and commented: "This in itself contributes to the deterioration of minimum wage standards."

The second objection fares no better. It is mere negative inference drawn from the bare fact that the illustrative parenthetical clause was omitted from the final conference draft which became the Act. Nothing in the committee or conference reports or in the debates indicates a purpose to put homework, or the other practices enumerated at one time or another within the parentheses, beyond the purview of the Act or of the Administrator's power wherever these practices are shown to prevent achievement of the statute's ends.

The answer to the argument microscopically made from the long course of legislative events is obvious. From the beginning the parenthetical clause was but illustrative of the general authority conferred by the provision of which it was a part.[29] It "grew up through step by step additions, among which 'homework' was one," 144 F. 2d 624, until the parenthetical illustrations threatened to swallow up the general authority. If nothing more had occurred than elimination of the illustrations from a bill otherwise accepted, the change well might be put down, as Judge Hand suggests, 144 F. 2d 624, "to the belief that it was unwise to specify so much, lest the specification be taken as exhaustive."

However, as he points out, the course of events was quite different, and even more conclusive against the petitioners' view. The section containing the parenthesis began, and continued, as a feature of the Senate bill. This followed an entirely different plan from the one eventually adopted, which was a compromise of Senate and House proposals. The Senate bill placed administration of the Act in the hands of a board, which was by order to fix all minimum wages. In this form, including the parenthetical reference to homework,[30] the Senate adopted the bill.

---

[29] Cf. note 26 *supra; Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 188ff, 211; *Federal Land Bank* v. *Bismarck Co.,* 314 U. S. 95, 100.

[30] Cf. note 26 *supra.*

The House Committee to which the measure was referred likewise approved it. But the House itself declined to do so. It adopted a different scheme, substituting statutory wages for wages fixed by order as the Senate bill proposed.[31] There was therefore no need for, and the House bill did not contain, the parenthesis or the general provision of which it formed a part.

When the two bills came to conference, compromise was worked out by writing around the conference table the final measure combining features of both bills.[32] The House provisions for an administrator and for statutory wages were retained. But the latter were modified by providing for "committee" wages, to be fixed by order of the Administrator, by including the provisions of § 8, including 8 (f), and also of § 6 (a) (3) and (4).

Section 8 (f), which originated in the Senate, thus found its way back into the final form of the measure, though without the parenthesis. The Conference report (H. Rep. No. 2738, 75th Cong., 3d Sess.) contains no reference to the elision and none appears in the record of the ensuing debate. 83 Cong. Rec. 9158, 9246. The history, accordingly, does not sustain the negative inference petitioners would draw from the omission. The paren-

---

[31] The House bill also substituted an administrator for the Senate's board. Petitioners argue from the fact that substitution of "statutory" for "committee" wages was made because the House objected to the discretionary powers given the board in the Senate bill, H. Rep. No. 2182, 75th Cong., 3d Sess., and because it later rejected substitute bills patterned after the Senate measure, cf. 83 Cong. Rec. 7389, 7378, 7373, that Congress, in effect, rejected every feature of the bills which the House refused to enact. The non sequitur is apparent. But it may be noted the contention ignores entirely the Senate's part in legislation, as well as the compromise effected in conference between the two bodies and the fact that this reintroduced some of the discretionary features contained in the bills the House rejected.

[32] Cf. 83 Cong. Rec. 9256; H. Rep. No. 2738, 75th Cong., 3d Sess. (Conference Report).

thesis was inserted, in the Senate, without discussion or controversy. It was likewise eliminated without discussion or controversy. So far as appears, it was never separately considered. Not the clause alone or particularly, but the entire bill containing it was rejected by the House.

That rejection is no evidence that this single feature had special significance. Rejection of an entire bill cannot be taken to be a specific rejection of each and every feature, more especially of those later reintroduced in the final draft.[33] The most tenable conclusion is drawn by Judge Hand, that "the section, which had apparently died with the Senate plan, was lifted out of that setting, and was put into the compromise bill as it had stood originally." As he says, "It would be indeed a far cry to infer from that that all the items which by accretion had made their way into the parentheses were in this way excised from the Administrator's powers. Indeed, if so—as he argues—he could not even regulate labels . . ." 144 F. 2d at 624.

The amendment to § 6, relating to homework in Puerto Rico and the Virgin Islands, adopted in 1940,[34] and Congress' failure in 1939 and 1940 to adopt an amendment proposed by the Administrator to authorize explicitly prohibition of homework [35] cannot operate retroactively, as is urged, to give the statute enacted in 1938 a different meaning from what it then acquired.[36] And petitioners' con-

---

[33] Cf. note 31 *supra*.

[34] Sections 6 (a) (5), 6 (c), 5 (e), added by Act of June 26, 1940, 54 Stat. 615, 616. Section 6 (a) (5) deals in detail with homeworkers in Puerto Rico and the Virgin Islands.

[35] Cf. H. R. 5435, 76th Cong., 1st Sess., § 4; H. Rep. No. 522, 76th Cong., 1st Sess., 8; 84 Cong. Rec. 3498; 86 Cong. Rec. 5122.

[36] It is not altogether clear, from the terms of the proposed amendment, cf. note 35 *supra*, whether its purpose and effect were to clarify preexisting provisions or to extend the Administrator's authority. The debate, 84 Cong. Rec. 6620–6622, indicates that opposition in the House was due primarily to belief that the amendment, if adopted,

tentions drawn from the Act's enforcement provisions misconceive their effect.

The idea seems to be twofold, first, that the Administrator has no enforcement functions under this Act; or, in any event, that the Act provides no means for enforcing the "terms and conditions," including restriction or prohibition of homework, which he may include in his order.[37]

The Administrator's function under § 8 (f), though primarily preventive, obviously is related to enforcement. And further, he is expressly granted powers bearing directly to that end. Apart from his investigative authority under § 11, he has power also by express provision of that section to bring suits under § 17 to restrain violations of wage orders.[38]

We need not determine whether this includes authority to sue independently to restrain violations of "terms and conditions" properly included in such an order or to ask for this relief as incidental to enjoining violations of the rate specified. Cf. *Hecht Co.* v. *Bowles,* 321 U. S. 321, 330; *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 461;

---

would "take away some of the exemptions that so-called farm people enjoy under the Act."

[37] It is said that § 8 (f) does not provide for a hearing with reference to the "terms and conditions" of a wage order and the failure of the Act to provide expressly for their enforcement, as it does for enforcement of orders issued under §§ 11 (c), 12 and 14, indicates "the statute did not include the prohibition of homework as a 'term and condition' of a wage order." The argument, it may be noted, applies to all "terms and conditions." In effect it urges that all are unenforceable; and therefore none was intended.

[38] Section 11 (a) provides: "The Administrator . . . may investigate . . . such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. . . . Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act." Cf., e. g., *Walling* v. *Helmerich & Payne,* 323 U. S. 37; *Walling* v. *Belo Corp.,* 316 U. S. 624.

United States v. *Morgan*, 307 U. S. 183, 194; *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526, 532. But certainly the absence of such authority cannot be assumed, closely related as it would be to enforcement of the order's primary term. Congress did not include authority to prescribe "terms and conditions" merely as a preachment. Cf. *California Drive-In Restaurant Assn.* v. *Clark*, 22 Cal. 2d 287, 140 P. 2d 657. We do not therefore consider further these assumptions.

Finally, petitioners insist that power to prohibit homework could not have been intended because the authority to prescribe "terms and conditions" applies only to "committee," not to "statutory" wages and will expire, by the terms of § 8 (e),[39] on October 23, 1945, seven years from the effective date of § 8. This argument involves a medley of assumptions and conclusions, some contrary to the fact, others of doubtful validity. Among them are the ideas: (1) that the power to prescribe "terms and conditions" applies only to "committee" wages; (2) that the power to prescribe or maintain such wages expires altogether at the end of the seven years; and (3), upon these hypotheses, that it would be "absurd to assume that Congress intended that the Administrator could make so disruptive but temporary a regulation as the prohibition of homework would entail."

The last conclusion might be accepted, if its foundations were solid. But they crumble. In the first place the

[39] "No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry."

authority conferred by § 8 (f) is to be read, not as if it were given as of the date of the order (August, 1943) or the time when it may become effective,[40] but as of 1938, when the section took effect. Accordingly, at the minimum, the authority given was to apply over a period of seven years. And these were the most crucial, because the initial, years in the statute's anticipated life. The scope of the power was not cut down because the Administrator chose to try first the less effective, but similarly conferred though less extensive power of regulation.

Beyond this, it is not true that the power either to prescribe "committee" wages or to include "terms and conditions" in the order expires altogether at the end of the first seven years. Section 8 (e) expressly provides for continuance or issuance of wage orders after that time, whenever the industry committee recommends and the Administrator finds "by a preponderance of the evidence . . . that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry." And § 6 (a) (3), perhaps also 6 (a) (4), expressly contemplates continuance of wage orders issued under § 8 after the initial seven years. The exact scope of these provisions need not now be determined. It is enough, for present purposes, that they leave some room, and it may be considerable, for the issuance or continued effectiveness of wage orders after October 23, 1945.

Finally, it is not necessary in this case to decide whether the power to prescribe "terms and conditions" applies only to "committee" wages and not to "statutory" wages. Strong reasons have been suggested for believing it applies to both.[41] But this case involves only "committee"

---

[40] Cf. note 6 *supra*.

[41] Cf. the opinion of L. Hand, C. J., 144 F. 2d 608, 623, and the reservation in that of Frank, C. J., at 614, with the authorities he cites in note 7.

wages. The power to make them effective and to prevent evasion would not be cut down, were it more clear than it is that there is no authority to prescribe "terms and conditions" for "statutory" wages or were it true that authority to require "committee" wages would expire altogether with the initial seven-year period. The question whether the authority to prescribe "terms and conditions" applies to "statutory" wages may be left for decision when it arises. Uncertain as the answer now is, it cannot give solid ground for inference that the power to prohibit homework was not a necessary means of making effective the minimum wage prescribed by the order.

Petitioners' arguments have been directed chiefly to the power to prohibit. If valid, they would apply equally to the authority to restrict or regulate. They would nullify the Administrator's power to establish or maintain minimum wages in the embroideries industry. They can have no such potency.

The judgments are

Affirmed.

MR. JUSTICE FRANKFURTER, concurring.

The Fair Labor Standards Act gives the Administrator charged with its enforcement power to fix wages so that they attain a basic minimum rate. In view of the vast and varied range of situations thus placed under his wage-fixing authority, the Administrator naturally enough was given by Congress the power to issue these wage orders on "such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein." § 8 (f), 52 Stat. 1060, 1065, 29 U. S. C. § 208 (f). It would disregard the authority thus given by Congress to deny that the power to fix minimum wages carries with it the subsidiary power to forbid and to prevent evasion of

wages so fixed. In the light of the showing made on this record concerning the embroideries industry for which the Administrator concededly fixed valid wage rates, the measures that the Administrator took through provisions dealing with homework in the embroideries industry were relevant to, and in enforcement of, the subsidiary power granted by Congress to prevent evasion of the rates fixed for that industry.

And so I join in the Court's opinion.

MR. JUSTICE ROBERTS.

With deference I venture to think that the Court here essays to read into the law what its words, fairly construed, do not import. The Court arrives at that result by forming a judgment as to what Congress probably should have said, and would have said, if it had considered the matter, in order to make the statute what the Court deems a more perfect instrument for attaining the general objective which Congress sought to attain, and then makes the necessary additions to the language Congress has used. The principal, if not the only argument I find in the opinion for reading something into the statute, is that otherwise it cannot be most effectively applied to certain industries unless the industries themselves are made over.

Section 8 (f) provides that the Administrator's orders issued under the section "shall define the industries . . . to which they are to apply." It is not suggested that the order in question is of this description. That with which the industry committee's investigation dealt was a single industry in which two methods of work were pursued. Obviously it is not a definition of the industry to exclude from it some of those who labor in it.

The section also provides that the Administrator's orders "shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of

such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein." The philosophy of the court's opinion can be nothing less than that the Administrator may, if he finds it necessary, rewrite the statute. Suppose he finds that, in a given industry, it is, as he puts it, impossible to enforce the minimum wage provision. May he thereupon issue an order prohibiting the further prosecution of that industry and requiring all those who pursue it to follow some other calling? It may be said that the supposition is, on its face, ridiculous. But is it any more so than what was here accomplished? Forty per cent of the workers in an industry, under pain of otherwise losing their occupation, are compelled to give up what they have done time out of mind, and if they desire to pursue their calling to do so under completely changed economic conditions, not in their homes but in factories which, if they are available at all, may be remote from their homes.

The language of § 8 (f) has a reasonable and proper office in the context of the Act. The provisions permitted by that section to be inserted in an order are obviously such as are incidental to administration, such as pertain to keeping records or filing reports; not exorbitant or excessive so as to amount to a regulation or suppression of an existing and recognized industry.

In my view, one need not go outside the provisions of the Act to be convinced that Congress never intended to grant the Administrator the power he has assumed. If it be thought, however, that the phraseology of § 8 (f) is of doubtful import, the legislative history seems to me to demonstrate that Congress purposely, and not by inadvertence, denied the asserted power to the Administrator.

The statute aimed at three things—the limitation of the hours of work, the fixing of minimum compensation per hour, and the prohibition of child labor. We may elim-

inate from consideration the first and third of these objects, and the statutory provisions implementing them, since we are concerned only with minimum wages. The Act creates a Wage and Hour Division in the Department of Labor and authorizes the appointment of an administrator to be in charge of it (§ 4). It requires the appointment of industry committees representing those engaged in any industry (§ 5). It requires every employer to pay every employe engaged in commerce, or in the production of goods for commerce, at the rate of not less than twenty-five cents an hour for the first year, not less than thirty cents an hour during the next six years, and not less than forty cents an hour after the expiration of seven years. The Administrator is given no authority to issue any orders concerning these prescribed rates or their application in industry, with the sole exception about to be mentioned.

Provision is made to raise wages above the prescribed minima during the seven year period after the effective date of the Act, without curtailing employment or disrupting the economy of an industry. Section 6 refers the reader to § 8 creating machinery to accomplish this. The latter section provides for the convening of industry committees to which the Administrator shall refer the question what minimum wage rate shall be set for the industry. The committee is to investigate conditions in the industry, hold hearings, and recommend the highest minimum wage rates which it determines, having regard to economic and competitive conditions, will not substantially curtail employment.

Upon receiving the committee's recommendation, the Administrator, after an opportunity for hearing, may approve or disapprove the committee's recommendation. If he approves, he shall do so by an order the effect of which is to put into force the recommended wage scale. Such orders are not to continue in force after seven years from the effective date of the statute unless the committee

and the Administrator conclude, and so declare, that it is within the purposes of the Act that the wage fixed by the order shall remain in effect after expiration of that period notwithstanding the requirement of § 6 that all wages shall reach the minimum of forty cents an hour at that time.

Now it is only in enforcement of a committee's report that the Administrator has power to issue an order with respect to wages, and it is in this context that § 8 (f) permits him to include in his order "such terms and conditions" as he "finds necessary to carry out the purposes" of the order, to prevent circumvention or evasion, and to safeguard the wage rates thereby established.

With respect to the minima fixed by § 6, which apply universally (except where the special procedure authorized by § 8 is invoked), the Administrator has no authority to issue orders such as that issued in this case. He cannot, because he finds it difficult to enforce the Act in an industry, either remake or suppress the industry. The result of the decision is that, in the exceptional case where a special rate of wages is set in advance of the prescribed rate, the Administrator may do what, in the generality of cases, he may not do. This circumstance gave one of the judges below so much trouble that he was willing to hold, in the teeth of § 6, that the Administrator might in all cases make such orders as that here in question. Thus, instead of writing in additional provisions in § 8 (f), as does this court, he was prepared to write in a new provision in § 6 to make the Act a complete and logical statute.

We have, then, this situation: With respect to any industry which has not been taken out of the provisions of § 6 by an industry committee's report and an Administrator's order, the Administrator cannot forbid home work. As respects an industry in which wages have been fixed by a committee, the Administrator has these sweep-

ing and destructive powers. And this, in spite of the fact that the committee is authorized and required to deal with the wages of the industry as a whole, and did so deal with them here. The committee never considered the question of an appropriate wage for the industry, under the conditions which would prevail, after the suppression of a substantial part of it by the Administrator's order. The interpretation now sanctioned of the Administrator's statutory authority to make orders "to prevent the circumvention or evasion" of the purposes of the Act, as including the power to make over the industry to which a wage order is to apply, thus defeats one of the most fundamental purposes of the Act. By § 8 no wage order is to be promulgated with respect to an industry unless the question of the minimum wage for the industry has been referred by the Administrator to the industry committee, and the conditions in the industry and the appropriate wage for it have been the subjects of investigation and report by the committee. The committee is specifically enjoined to recommend to the Administrator "the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry." And by § 8 (d) the Administrator, before he promulgates a wage order, is required to find, after "taking into consideration the same factors as are required to be considered by the industry committee," that its recommendations will carry out the purpose of § 8. These requirements make it clear that the terms and conditions which § 8 permit the Administrator to attach to his wage orders do not include those which materially alter the conditions of the industry which must be considered and reported upon by the committee. Such requirements are futile if the Administrator, under guise of preventing evasion of a minimum wage order, which the committee has recommended, has power, on promulgating a wage

order, to change the industry into one which the committee has never investigated. The Administrator's action is in effect a subversion of the committee's report, whereas the Act contemplates a resubmission to the committee in such a case. *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 146–149.

Surely, if any such sweeping construction is to be given words having a narrower import, inquiry into the legislative history is of capital importance. That history, instead of being "wholly ambiguous" and furnishing a "dubious basis" for conflicting inferences, seems to me to be letter-clear.

The Presidential message urging enactment of this legislation states two objects: "To reduce the lag in the purchasing power of industrial workers" and to put an end to "the existence of child labor." Both purposes were to be accomplished "without creating economic dislocation." [1] Pursuant to this recommendation, Senate Bill No. 2475 was introduced and a similar bill, H. R. 7200, was introduced in the House. Joint hearings were held by Senate and House committees. Senate Bill No. 2475 was reported to the Senate. Those in charge of it on the floor repeatedly stated that the purpose was to limit the bill strictly to minimum wages, maximum hours, and child labor. There is no question that many experts in the field felt that the prohibition of home work was essential to the accomplishment of the objective of the legislation. In the joint hearings, the Secretary of Labor testified that power should be given to the administrative authority to "prohibit entirely the use of industrial home work." [2] In this connection the Secretary also advised that the administrative powers to be granted should be carefully defined by the Congress so that the Act would clearly state

[1] H. R. Report No. 1452, 75th Cong., 1st Sess., pp. 6–7.

[2] Testimony at Joint Hearings, pp. 184, 190, 196, 197.

them.[3] The question of home work was again broached at the hearings at various points. Notwithstanding this, the bill, as reported to the Senate, contained no provision for the prohibition of home work. The measure was debated at length in that body. As it then stood, § 9 (6), dealing with administrative orders, which became § 8 (f) in the bill as enacted, provided that an order might contain terms and conditions the administrative authority should find necessary to carry out the purposes of the order to prevent circumvention or evasion, or to "safeguard the fair labor standards therein established." It will be seen that this language is not materially different in meaning from that finally embodied in § 8 (f). An amendment was proposed from the floor to add the words "including the restriction or prohibition of industrial home work" and was agreed to.

In order to expedite the adoption of the legislation, the House Committee limited its consideration to the bill passed by the Senate and reported it favorably with amendments. Without detailing the House proceedings, it is enough to say that ultimately a bill was presented largely embodying the provisions of Senate Bill No. 2475 but creating an administrator in lieu of a board. Section 9 (6), which related to wage orders, contained the same provisions respecting prohibition of home work as the Senate bill.[4]

The objections to the Senate bill in the House were such that a new measure was reported establishing fixed minimum wages and maximum hours and granting the Secretary of Labor only the power to declare that a particular industry was "an industry affecting commerce" and so subject to the Act. It contained no provision for administrative orders. During debate on this proposed

[3] *Ibid.*, p. 195.

[4] 82 Cong. Rec. 1511–1516, 1572–1577, 1580, 1585.

bill a substitute was presented containing a section relating to wage orders, with provisions respecting home work the same as were contained in the Senate bill as passed and in the substitute theretofore offered to the House. The bill thus offered was rejected and the newly reported House bill was passed. Conferees were appointed amongst whom were the Senator who had first proposed the amendment respecting orders prohibiting home work and two of the Representatives who had presented bills containing similar provisions. The Conference Committee deliberated for a matter of twelve days and evidently gave the most meticulous care to each section of each of the bills before it. It in effect rewrote the measure. The Conference Report shows that the committee adopted the theory of the House bill fixing definite minimum standard wages to step up periodically in the future and also, as respects industry committees and interim orders based on industry committees' reports, adopted the more flexible system embodied in the Senate bill.

It is clear that in redrafting § 8 (f), which was § 9 (6) of the Senate bill, the conferees consciously and deliberately rejected the clause "including the restriction or prohibition of industrial home work or of such other acts or practices." The Conference Report was accepted, the bill passed both houses, and was signed by the President.

The Wage and Hour Division of the Department of Labor recognized that it had no power to abolish home work. In its First Annual Report, that Division stated (p. 14) that it was treating home workers as employes and not as independent contractors. In the same report (p. 31) the Division went into detail with respect to regulations for record keeping in respect of home work. At page 46, the Division said: "A difficult problem which has required the use of special inspectors and special techniques is that of industrial homework. It has been necessary to make elaborate and time-consuming investigations at the

establishment of the employer and in the homes of the workers." That Division cooperated in the drafting of a bill (H. R. 5435)[5] introduced by Representative Norton of the Labor Committee, which provided, *inter alia:* "The Administrator shall have power to make, issue, amend, and rescind such regulations and orders as are necessary or appropriate to carry out any of the provisions of this Act. Without limiting the generality of the foregoing, such regulations and orders may . . . make special provision with respect to, including the restriction of, home work subject to this Act to the extent necessary to safeguard the minimum standards provided in this Act or in any regulation or order issued pursuant thereto, . . ." The proposed amendment was debated at length and was defeated. With respect to it Representative Norton said:[6]

"I am sure that business would be less jittery about this law if the Administrator had the right to define the application of the law. Without this amendment he may not do so and some business has suffered as a result. I believe that he further needs the power to define technical and trade terms used in the act and the power to make special provisions with respect to industrial home work and make special provision for constant-wage plans consistent with section 7 relating to hours of work. Home work has long been a blot on the economic picture of this country, and I regret to say that in some cases employers have resorted to this means of employment to escape the provisions of this law."

Again she stated to the House:[7]

". . . we are proposing in section 4 of H. R. 5435 to authorize the Administrator to make rules and regulations to carry out any of the provisions of the act. This section

---

[5] First Annual Report, 1939, p. 160.

[6] 84 Cong. Rec. 3498.

[7] 86 Cong. Rec. 5122.

will also give him the right to define terms used in the act and make special provisions with respect to industrial home work.

"As the act is now written it is extremely doubtful whether the wage and hour standards which it establishes can be enforced as to industrial home workers. Under present practice in industrial home work industries, the Administrator is unable to secure proper records on wages and hours of home workers. Business concerns relying on home work for their labor do not ordinarily deal directly with the home workers but turn over the goods or articles on which the work is to be done to contractors who employ the home workers. If time permitted, I could give you concrete examples of cruelty in this field. Section 4 of the amendments would give the Administrator the necessary authority to cope with this situation."

In the Annual Report of the Wage and Hour Division for 1940 industrial home work was discussed at page 89 and statements made as to the requirements of record keeping in respect of it.

After the Wage and Hour Act had become law it developed that if the prescribed minimum hourly wages were enforced in Puerto Rico certain industries there, which consisted almost entirely of home work, would be destroyed. It was believed that the only relief which would correct the situation would be to amend the statute to abrogate the fixed minima named in § 6 to provide for an industry committee to fix lower standard wages for industries consisting largely of home workers in the island. Such minima would be recommended by an industry committee and implemented by orders of the Administrator.[8] The amendment was adopted in 1940.

[8] See Annual Report, Wage and Hour Division, 1940, p. 113; Hearings Senate Committee on Appropriations, Emergency Relief Appropriation Act, 1941, p. 3; S. R. 1754, 76th Cong., 3d Sess., p. 5ff; H. R. No. 2186, 76th Cong., 3d Sess., p. 15.

Far from indicating any thought on the part of Congress or the Division that the Administrator was empowered to ban home work, this legislation, taken in connection with the defeat of H. R. 5435, indicates quite clearly that no one concerned either in the passage or the administration of the law had any notion that the Administrator was authorized to deal with the economic problem involved in home work.

A section of the Wage and Hour Division's Report for 1940 contained a discussion of enforcement of the Act with respect to home work, without any suggestion that the Administrator could deal with it by abolishing it. (p. 89)

In the Report for 1941 the Division, for the first time, suggested that the Administrator had been considering, in connection with wage orders, the question: "Must homework be abolished as one of the terms and conditions of a wage order in order to safeguard and effectuate enforcement of the order." (p. 64)

Thus it appears that the Administrator, having failed to obtain explicit authority from Congress, began contemplating the effort to persuade the courts that he had implied authority in the premises.

In the Report for 1942 (p. 19) all that appears is the following:

"The problem of industrial homework has been one of the most important administrative questions since the inception of the Fair Labor Standards Act. For the guidance of the Administrator, the data were presented for the jewelry and knitted outerwear industries, showing conditions of industrial homework, the average earnings of homeworkers, the difficulties of enforcement of minimum wage provisions for homeworkers, and the methods of evasion of minimum wage regulations by workers and employers."

Though there was no declaration of a purpose to enter the sort of order now in question, it was, in fact, entered August 21, 1943.

In the Report for 1943, for the first time, Congress was apprised of action being taken (p. 19) thus:

"Enforcement measures established to protect the standards of the Act for factory employees have not been effective in controlling hours and wages of homeworkers. This failure prompted regulation of industrial homework under wage orders in industries in which homework is prevalent. These regulations are designed to protect factory employees against unfair wage competition.

"Industrial homework in these industries is restricted to persons who are unable to adjust to factory work because of age or physical or mental disability or who are home-bound because of an invalid in the home and who have been engaged in the particular industry prior to a specified date. This latter requirement may be waived in unusual hardship cases. These restrictions were adopted after searching examination of the subject which included the opinions and convictions of representatives of management and labor. A total of 4,451 applications for industrial homework certificates have been received and 3,701 certificates have been granted."

But, by that time, this case had been taken to the Circuit Court of Appeals to test the validity of the order here under review.

I would reverse the judgment.

The CHIEF JUSTICE joins in this opinion.

ROBINSON *v.* UNITED STATES.

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

No. 514. Argued February 8, 1945.—Decided March 5, 1945.

The Federal Kidnapping Act authorizes a sentence of death when recommended by the jury, "provided that the death sentence shall not be imposed by the court if, prior to its imposition, the kidnapped person has been liberated unharmed." *Held:*

1. The fact that the injuries inflicted on the kidnapped person were not permanent, or were healed before imposition of sentence, did not bar the death penalty. P. 285.

2. In the case of a defendant who twice violently struck his victim on the head with an iron bar, inflicting injuries from which she was still suffering when liberated, and upon whom the death sentence was imposed, the proviso was not invalid for uncertainty in the meaning of the words "unharmed" and "liberated unharmed." P. 286.

144 F. 2d 392, affirmed.

CERTIORARI, 323 U. S. 808, to review the affirmance of a conviction and sentence of death for violation of the Federal Kidnapping Act.

Mr. Robert E. Hogan for petitioner.

Mr. Edward J. Ennis, with whom *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. W. Marvin Smith, Robert S. Erdahl,* and *Miss Beatrice Rosenberg* were on the brief, for the United States.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner was indicted and convicted in a District Court for violating the Federal Kidnapping Act, 47 Stat. 326, 48 Stat. 781, by transporting in interstate commerce a person whom he had kidnapped and held for a reward. The jury recommended and the court imposed the death penalty. The Circuit Court of Appeals affirmed, 144 F.

2d 392. We granted certiorari limited to the sole question of the court's statutory authority to impose the death sentence.

The Act authorizes the death sentence when recommended by a jury "provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnapped person has been liberated unharmed." The indictment charged, and there was evidence before the jury, to the effect that the kidnapping victim yielded to capture only after the petitioner had twice violently struck her on the head with an iron bar; that while held in custody her lips were abrased and made swollen by repeated applications of tape on her mouth; and that wounds resulting from these assaults were not healed when she was liberated after six days' captivity. No evidence was introduced, nor did the indictment charge, that the injuries inflicted were permanent, or that the victim still suffered from them when the petitioner was sentenced, nine years after commission of the offense.[1] The trial court charged the jury that in determining whether the victim had been "liberated unharmed" they were limited to a consideration of her condition at the time she was liberated, and that they were not authorized to recommend the death penalty if at the time of her liberation she had recovered from her injuries. Petitioner took no exception to the charge, and asked no other. Its correctness is before us only to the extent that we are asked to say that the injuries inflicted must be permanent or they must be in existence at the time of sentence in order to authorize the infliction of the death sentence.

The scant legislative history of the Act is of little assistance to us in interpreting this proviso. Two possible rea-

[1] Petitioner pleaded guilty to the offense in 1936. In August, 1943, a district court held his plea of guilty invalid on the ground that he had been denied counsel. This appeal is from a trial which took place in October, 1943. See *Robinson* v. *Johnston,* 118 F. 2d 998; 316 U. S. 649; 130 F. 2d 202; 50 F. Supp. 774.

sons suggest themselves, however, as to the motivation of Congress in making the severity of a kidnapper's punishment depend upon whether his victim has been injured. The first reason is the old belief that the severity of the injury should measure the rigor of the punishment. If this be the reasoning implicit in the statute, it would appear that Congress intended that for a kidnapper to obtain the benefit of the proviso he must both liberate and refrain from injuring his victim. Congress may equally have intended this provision as a deterrent, on the theory that kidnappers would be less likely to inflict violence upon their victims if they knew that such abstention would save them from the death penalty. This assumption finds some slight support in the legislative history,[2] is not contested by the government, has been accepted in one case [3] and is the chief prop for the interpretation which the petitioner urges. He argues upon this assumption that the wider the scope of the exemption from the death penalty, the greater the inducement for the kidnapper to release the victim. To magnify the inducement, we are asked to interpret the proviso as granting immunity from the death sentence to any kidnapper who does not permanently injure his victim. We cannot ex-

---

[2] When the original kidnapping bill was passed by the Senate it did not provide for a death penalty. The House Committee on the Judiciary reported it to the floor with an amendment which authorized a death penalty unless the jury recommended mercy. 75 Cong. Rec., Part 12, 13294. Considerable opposition to the death sentence developed in the ensuing debate. *Ib.* pp. 13282–13304. Some of the opposition rested on the argument that the death penalty would cause kidnappers to kill their victims rather than release them because of fear that a liberated victim could send a kidnapper to the electric chair. *Ib.* pp. 13285, 13304. The bill as passed did not authorize the death penalty, 47 Stat. 326. Two years later an amendment was passed containing the present proviso. 48 Stat. 781. Its legislative history throws no additional light on its purpose.

[3] *United States* v. *Parker,* 19 F. Supp. 450, 103 F. 2d 857.

pand the meaning of the statute on such a hypothesis and we turn to its language.

We accept the word "unharmed" appearing in the proviso as meaning uninjured. Neither the word "permanent" nor any other word susceptible of that meaning was used by Congress. The quality of the injury to which Congress referred is not defined. It may be possible that some types of injury would be of such trifling nature as to be excluded from the category of injuries which Congress had in mind. We need indulge in no speculation in regard to such a category. The injuries inflicted upon this victim were of such degree that they can not be read out of the Act's scope without contracting it to the point where almost all injuries would be excluded. We find no justification whatever for grafting the word "permanent" onto the language which Congress adopted.

Nor can we construe the proviso as precluding the death sentence where the kidnapped person's injuries have been healed at the time sentence is imposed. It is not to be assumed that Congress intended a matter of such grave consequence to defendants and the public to turn on the fortuitous circumstance of the length of time that a case is pending in the courts. Far too many contingencies are involved, for example, the time it takes to apprehend a criminal, the condition of the trial docket, and the uncertainties of appeals. We would long hesitate before interpreting the Act so as to make the severity of sentence turn upon the date sentence is ultimately imposed, even if the language of the Act more readily lent itself to such a construction than this one does. At the very least, the proviso's language must mean that the kidnapped person shall not be suffering from injuries when liberated; the kidnapped person here was still suffering from her injuries when liberated.

Nevertheless it is argued that the death penalty proviso should be held invalid on the ground that there is uncer-

tainty as to the precise meaning and scope of the word "unharmed" and the phrase "liberated unharmed." In most English words and phrases there lurk uncertainties. The language Congress used in this Act presents no exception to this general truth. One thing about this Act is not uncertain, and that is the clear purpose of Congress to authorize juries to recommend and judges to inflict the death penalty, under certain circumstances, for kidnappers who harmed their victims. And we cannot doubt that a kidnapper who violently struck the head of his victim with an iron bar, as evidence showed that this petitioner did, comes within the group Congress had in mind. This purpose to authorize a death penalty is clear even though Congress did not unmistakably mark some boundary between a pin prick and a permanently mutilated body. It is for Congress and not for us to decide whether it is wise public policy to inflict the death penalty at all. We do not know what provision of law, Constitutional or statutory, gives us power wholly to nullify the clearly expressed purpose of Congress to authorize the death penalty because of a doubt as to the precise congressional purpose in regard to hypothetical cases that may never arise.

The trial court committed no error of which this petitioner can complain.

Affirmed.

MR. JUSTICE RUTLEDGE, dissenting.

The penalty of death should not be imposed upon conditions defined so uncertainly that their identity cannot be ascertained or is left open to grave doubt. If words ever need to be clear, they do when they perform this function. I do not know what Congress meant when it commanded that "the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnapped person has been liberated unharmed." 48 Stat. 781.

The words have the sound of certainty which simple, everyday language gives forth. The certainty is only illusion. What does "liberated unharmed" mean? The statute does not tell us. Nor does the legislative history.[1] Neither does the Court's opinion. It rather demonstrates the statute's ambiguity. It does not say what Congress meant. It says only that Congress meant one of two things, and either would cover this case.[2] A third possible construction, put forward by petitioner, is rejected. The statute, it is held, does not mean that the death penalty can be imposed only when the injuries inflicted are permanent or, presumably, only when they remain at the time of sentence, though not permanent. The Court does not say what "liberated" means. Nor does it define "unharmed," except that it excludes the injury inflicted in this case.

What act is pointed to by "liberated"? Does it refer only to release by the kidnapper or does it include a case of rescue overcoming his will and purpose? Does it cover his abandonment of the victim in flight, leaving him perhaps gagged and bound in some lonely spot or cell, not free but no longer in the kidnapper's power? Or must he, before the pressures become too great, change his mind, exercise discretion and set the victim free before he is forced to do so?

Similarly, what is "unharmed"? A scratch, a cut, abrasions left by removal of tape or rope, bruises, nervous

---

[1] The Government's brief candidly states: "The interpretation of the proviso here involved must be determined from the face of the statute itself since neither the legislative history nor prior state legislation offers guidance." No hearings were held on the 1934 amendments, providing for the death penalty. They were accepted upon conference reports by both houses without debate. H. Rep. No. 1595, 73d Cong., 2d Sess.; 78 Cong. Rec. 8775, 8856–8857. Neither H. Rep. No. 1595 nor H. Rep. No. 1457, 73d Cong., 2d Sess., gives light on the meaning of the limitation.

[2] Cf. note 3.

shock, disturbance of digestion, all of a kind which heals or passes before "liberation" occurs? Few kidnappings take place without harm of some kind to the victim. They may be executed by force or by mere threats. One produces traumatic injury, from minor abrasion to death, the other nervous or mental shock of momentary or lifetime duration. How much injury, and what kind, did Congress have in mind?

Is the death penalty to be imposed for the identical cut or abrasion, whether minor or serious, inflicted during the act of taking the victim, merely because in one case the kidnapper releases or abandons him quickly, perhaps because forced to do so, but forbidden in another because he holds the victim until the injury heals? Is reward thus to be given for prolonging the agony?

Is the jury to range throughout the category of human ills, not only to find that injury has been inflicted but to evaluate whether those ills are "injuries" within the meaning of the statute? Or is this a question of law to be determined by the judge upon some vague criterion of "trifling nature" such as the opinion appears to suggest? Whether Congress meant all injuries, slight, substantial, serious or permanent, or only some of these, the statute does not say and the legislative history gives no guide. The judge, or the jury, or both together not only must apply, they must determine and write the law in this respect, until at any rate this Court, equally without legislative guidance, tells them what Congress had in mind.

There are still other uncertainties. Was it the intent (1) that the kidnapper must both liberate and refrain from injuring his victim or (2) merely that he must not inflict harm, however the liberation may occur? We are not told what was Congress' purpose, whether to measure the rigor of the punishment by the severity of the injury or to induce kidnappers not to use violence at all, deter-

ring them by the threat of death for its use in whatever degree.[3] Neither the legislative history nor the opinion gives light on this question. If Congress wished to induce gentle kidnappings, injuries inflicted in the course of the act of kidnapping are covered, provided they remain at the time of "liberation." They would not be included, if healed before it, however grave when inflicted or however distant liberation from infliction. What if the kidnapper, knowing that time is crucial, keeps his victim until the injuries are healed? Was it Congress' purpose to induce longer detention, the more serious the injury inflicted during the original act? What if it is inflicted afterward, but during the course of the detention? Once injury has taken place, the inducement held out by the statute necessarily is either to hold the victim until cure is effected or to do away with him so that evidence, both of the injury and of the kidnapping, is destroyed.[4] The more serious

---

[3] At one point the opinion declines to express a choice between these possible alternatives. At another it states "the clear purpose of Congress" was to authorize "the death penalty, under certain circumstances, for kidnappers who harmed their victims." Is this to be taken as deciding that "liberated unharmed" means "liberated not having been harmed at all"? If so, the Court's view differs from the Government's, which is that the words mean "unharmed at the time of liberation." Cf. note 5. Moreover, the opinion, if so effective, invites for the victim the very danger Congress sought to avoid by placing the limitation upon the power to impose the sentence.

[4] These considerations for the safety of the victim, recently dramatized by the Lindbergh case, were influential in bringing about the omission from the original Kidnapping Act of 1932 (47 Stat. 326) of any provision for the death penalty. Representative Celler stated them thus:

"If you insist upon the death penalty, I wager that you will inflict a penalty on the victim who is kidnapped. The victim may be murdered or slain because the prisoner [sic] has nothing to gain by the victim being kept alive, because he forfeits his own life, in any event. . . . The person kidnapped is the witness who, even when

the injury the stronger these inducements. It is only upon such considerations, affecting the victim's safety, that Congress' qualification of the power to impose the sentence of death can be accounted for.[5]

Finally, was Congress attempting to offer the maximum inducement to liberation? If this was the purpose, petitioner's construction, rejected by the Court, has more force than the other possible ones among which it declines to choose. For in that event the kidnapper would have inducement, once injury is inflicted, though serious, to

---

rescued, can always point the accusing finger at the guilty. Doing away with the victim would save the life of the guilty." 75 Cong. Rec. 13285. See 75 Cong. Rec. 13282–13304 for other statements opposing the extreme penalty.

From the viewpoint of possible effectiveness in securing the victim's safety, the qualification imposed by the 1934 Act would seem to be directed more toward the kinds of danger Congress had in mind during the 1932 debate than toward preventing all use of force in the kidnapping act itself. Cf. note 5 and *United States* v. *Parker*, 19 F. Supp. 450, affirmed, 103 F. 2d 857, cert. denied, 307 U. S. 642.

[5] The Government has urged adoption of the construction which takes account of these considerations. The brief states:

"The words 'liberated unharmed' . . . are subject to two interpretations. They may be construed to mean liberated without having been harmed at any time in the course of detention, or . . . liberated in an unharmed condition at the time of liberation. The first construction attributes to Congress the intention to cause kidnappers not to harm the victim but without tending to secure liberation of a victim who has been harmed. The second construction offers the kidnapper an inducement, in addition to the inducement not to harm, to care for and to cure an injured victim so that he may be unharmed when liberated. The second construction encourages kidnappers not to murder an injured victim, an inducement not present under the first construction. *In view of the temptation to kidnappers to murder their victims in order to dispose of witnesses to their crime, and in view of the interest disclosed in Congress to avoid a death penalty provision which would encourage this result,* the Government submits that the second construction *more properly reflects the intention of Congress* and should be adopted." (Emphasis added.)

surrender the victim in the hope that care after surrender might bring about cure before imposition of sentence. If the single and vague word "unharmed" is construed to mean absence of permanent injury or grave injury, though not permanent, he would have the hope, the inducement that surrender might give escape from the maximum sentence. Contrary to the Court's view that this interpretation is impossible, it goes directly to the unanswered questions, how much and what kinds of injury Congress had in mind; and to adopt it would accord with the rule that criminal statutes should be strictly construed. Moreover it would apply in this case, since there is no evidence of permanent injury or even that the injuries inflicted were critical at the time of the victim's release. She testified at the trial.

It is true this construction would make imposition of that penalty depend upon fortuitous circumstances, the length of time between release and sentence, as well as the chances of the victim to recover and their successful working out in that period. But any other construction either makes it depend upon circumstances equally fortuitous or has the inevitable effect, in many cases, of holding out inducement to the kidnapper to inflict the ultimate harm rather than to refrain from inflicting harm at all. Petitioner's construction more than any other takes into account the victim's safe surrender. Once the victim is hurt, the kidnapper's problem of what to do with him becomes inescapable and the provision for the extreme penalty can work only to defeat or defer liberation. Was this what Congress intended, knowing that few kidnappings can occur in which some substantial harm will not be done?

I doubt that Congress intended these consequences. I do not know from its words what it did intend. The opinion does not enlighten me, except that this case is one of possibly many, vaguely indicated, which may have been in mind. Congress has broad power to prescribe

penalties for crime, including death. It may give wide discretion to courts in selecting from a broad range of defined penalties to fit the individual case. Within limits this discretion may include the death penalty.

It is one thing, however, for Congress to confer the discretion confined by specified and ascertainable limits. It is another thing for Congress itself to turn the exercise of the conferred discretion upon conditions which cannot be ascertained from its mandate or can be located only with the greatest uncertainty.

Two things are clear. Congress did not intend the death penalty to apply to all convictions under the statute. Nor was its imposition intended to rest absolutely or exclusively either upon the jury's recommendation or in the court's discretion. The purpose obviously was to forbid it in some cases. But these can be determined only by choice among conflicting inferences which set one purpose Congress may have had in mind at war with others equally attributable to it.

This case involves the law's extreme penalty. That penalty should not rest on doubtful command or vague and uncertain conditions. The words used here, for its imposition, are too general and unprecise, the purposes Congress had in using them too obscure and contradictory, the consequences of applying them are too capricious, whether for the victim or for the kidnapper, to permit their giving foundation for exercise of the power of life and death over the citizen, though he be a convicted criminal. Other penalties might be rectified with time, if wrong. This one cannot be.

Moreover, the Court's refusal to resolve the statute's admitted ambiguity leaves hanging over the heads of future victims the danger which flows from "a death penalty provision which would encourage" the same irreparable fate for them. When that fate falls it will not be "hypothetical" and there will be nothing either we or Congress can do to revoke it.

I think the statute turns the power to impose the death penalty upon facts so vaguely defined that only judicial legislation can remedy the defect. This is not the kind of thing courts should be left to work out case by case through the "gradual process of inclusion and exclusion." This business rather belongs to Congress, not to the courts. As the Court's opinion states, though I think in contradiction of its judgment, "It is for Congress and not for us to decide whether it is wise public policy to inflict the death penalty at all." Congress' mandate in such matters must be clear; otherwise we, not Congress, decide. In this one it is beyond understanding.

I would vacate the judgment and remand the cause for the petitioner to be resentenced.

MR. JUSTICE MURPHY joins in this opinion.

UNITED STATES *v.* FRANKFORT DISTILLERIES, INC.

NO. 523. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.*

Argued February 8, 1945.—Decided March 5, 1945.

1. A conspiracy of producers, wholesalers and retailers to fix and maintain retail prices of alcoholic beverages shipped into a State, by adoption of a single course in making contracts of sale and boycotting others who would not conform, *held* a violation of the Sherman Antitrust Act. P. 296.
2. Neither the Miller-Tydings Amendment of the Sherman Act nor the Colorado Fair Trade Act permits combinations of businessmen to coerce others into making "fair trade" contracts. P. 296.

---

*Together with No. 524, *United States* v. *National Distillers Products Corp.*; No. 525, *United States* v. *Brown Forman Distillers Corp.*; No. 526, *United States* v. *Hiram Walker, Inc.*; No. 527, *United States* v. *Schenley Distillers Corp.*; No. 528, *United States* v. *Seagram-Distillers Corp.*; No. 529, *United States* v. *McKesson & Robbins, Inc.*; and No. 530, *United States* v. *Speegle*, also on certiorari to the Circuit Court of Appeals for the Tenth Circuit.

3. The fact that the ultimate object of the conspiracy was the fixing or maintenance of local retail prices did not render the Sherman Act inapplicable. P. 298.
4. The Twenty-First Amendment of the Constitution does not preclude prosecution of the violation of the Sherman Act here alleged. P. 299.
5. The Twenty-First Amendment conferred upon the States broad regulatory power over the liquor traffic within their boundaries, but did not give the States plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business. P. 299.

144 F. 2d 824, reversed.

CERTIORARI, 323 U. S. 699, to review the reversal of a conviction, 47 F. Supp. 160, of violation of the Sherman Antitrust Act.

Mr. Edward H. Levi, with whom *Solicitor General Fahy*, *Assistant Attorney General Berge*, *Messrs. Charles H. Weston* and *Matthias N. Orfield* were on the brief, for the United States.

Mr. Robert S. Marx, with whom *Messrs. Thomas Kiernan*, *Newell W. Ellison*, *A. H. Stuart*, *C. Frank Reavis* and *George R. Beneman* were on the brief, for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

Respondents are producers, wholesalers, and retailers, of alcoholic beverages, who were indicted in a federal district court for having conspired and combined to restrain commerce in violation of § 1 of the Sherman Act as amended. 26 Stat. 209; 50 Stat. 693. Their demurrers and motion to quash having been overruled, respondents pleaded nolo contendere to one count of the indictment. On these pleas they were adjudged guilty by the District Court and fined. 47 F. Supp. 160. The Circuit Court of Appeals reversed, on the ground that the indictment failed to show that the conspiracy charged was in restraint of

interstate commerce. 144 F. 2d 824. The importance of the questions involved prompted us to grant certiorari.[1]

The indictment alleged that 98% of the spirituous liquors and 80% of the wines consumed in Colorado were shipped there from other states. The annual shipments into the state were 1,150,000 gallons of liquors and 800,000 gallons of wine. Seventy-five percent of these beverages were handled by the defendant wholesalers. Respondents were charged with conspiring, in violation of the Sherman Act, to raise, fix and maintain the retail prices of all these beverages by raising, fixing, and stabilizing retail markups and margins of profit.

To accomplish the objects of the conspiracy, it is alleged that they adopted the following course of action. All of the respondents agreed amongst themselves to (1) discuss, agree upon and adopt arbitrary non-competitive retail prices, markups, and margins of profit; (2) defendant retailers and wholesalers agreed to persuade and compel producers to enter into fair trade contracts on every type and brand of alcoholic beverage shipped into the state, thereby to establish arbitrarily high and non-competitive retail markups and margins of profit, agreed upon by defendants; (3) the retailers were to prepare and adopt forms of fair trade contracts, and agree with producers and wholesalers upon these forms; (4) a boycott program was adopted by all of the defendants under which retailers would refuse to buy any of the beverages sold by wholesalers or producers who refused to enter into or enforce compliance with the terms of the price-fixing agreements, and non-complying retailers would be denied an opportunity to buy the goods of the defendant producers and wholesalers. Machinery was set up to make the boycott program effective.

---

[1] 323 U. S. 699.

The facts alleged in the indictment, which stand admitted on demurrer, and on the plea of nolo contendere, indicate a pattern which bears all the earmarks of a traditional restraint of trade. The participants are producers, middlemen, and retailers. They have agreed among themselves to adopt a single course in making contracts of sale and to boycott all others who would not adopt the same course.

The effect, and if it were material, the purpose of the combination charged, was to fix prices at an artificial level. Such combinations, affecting commerce among the states, tend to eliminate competition, and violate the Sherman Act per se. *United States* v. *Socony Vacuum Co.*, 310 U. S. 150, 223–224. Price maintenance contracts fall under the same ban, *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 458, except as provided by the 1937 Miller-Tydings Amendment to the Sherman Act. 50 Stat. 693. The combination charged against respondents does not fall within this exception. It permits the seller of an article which bears his trade mark, brand, or name, to prescribe a minimum resale price by contract, if such contracts are lawful in the state where the resale is to be made and if the trade-marked article is in free and open competition with other articles of the same commodity. This type of "Fair Trade" price maintenance contract is lawful in Colorado. Session Laws of Colorado, 1937, Chap. 146. But the Miller-Tydings Amendment to the Sherman Act does not permit combinations of businessmen to coerce others into making such contracts, and Colorado has not attempted to grant such permission. Both the federal and state "Fair Trade" Acts expressly provide that they shall not apply to price maintenance contracts among producers, wholesalers and competitors. It follows that whatever may be the rights of an individual producer under the Miller-Tydings Amendment to make price maintenance contracts or to refuse to sell his goods to those who

will not make such contracts, a combination to compel price maintenance in commerce among the states violates the Sherman Act. *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 719–723. *United States* v. *Univis Lens Co.*, 316 U. S. 241, 252–253. Consequently, respondents were properly convicted, unless as they argue, their conduct is not covered by the Sherman Act, either because the price fixing applied only to retail sales which were wholly intrastate, or because the state's power to control the liquor traffic within its boundaries makes the Sherman Act inapplicable.

These two questions thus posed relate to the extent of the Sherman Act's application to trade restraints resulting from actions which take place within a state. In resolving them, there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states. It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce. The cases relied upon by respondents [2] fall within this category. All of them involved the application of the Anti-Trust laws to combinations of businessmen or workers in labor disputes, and not to interstate commercial transactions. On the other hand, the sole ultimate object of respondents' combination in the in-

[2] *Industrial Association of San Francisco* v. *United States*, 268 U. S. 64; *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103; *United Leather Workers* v. *Herkert & Meisel Trunk Co.*, 265 U. S. 457; cf. *Local 167* v. *United States*, 291 U. S. 293, 297, and *United States* v. *Hutcheson*, 312 U. S. 219.

stant case was price fixing or price maintenance. And with reference to commercial trade restraints such as these, Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it "exercised all the power it possessed." *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 495.

The fact that the ultimate object of the conspiracy charged was the fixing or maintenance of local retail prices, does not of itself remove it from the scope of the Sherman Act; retail outlets have ordinarily been the object of illegal price maintenance.[3] Whatever was the ultimate object of this conspiracy, the means adopted for its accomplishment reached beyond the boundaries of Colorado. The combination concerned itself with the type of contract used in making interstate sales; its coercive power was used to compel the producers of alcoholic beverages outside of Colorado to enter into price-maintenance contracts. Nor did the boycott used merely affect local retail business. Local purchasing power was the weapon used to force producers making interstate sales to fix prices against their will. It may be true, as has been argued, that under Colorado law, retailers are prohibited from buying from out-of-state producers, but this fact has no relevancy. The power of retailers to coerce out-of-state producers can be just as effectively exercised through pressure brought to bear upon wholesalers as though the retailers brought such pressure to bear directly upon the producers. And combinations to restrain, by a boycott of those engaged in interstate commerce, through such indirect coercion is prohibited by the Sherman Act.[4]

---

[3] See, e. g., *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 404; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436; *United States* v. *Univis Lens Co.*, 316 U. S. 241, 244, 245.

[4] *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 465; *Loewe* v. *Lawlor*, 208 U. S. 274.

It is argued that the Twenty-first Amendment to the Constitution bars this prosecution. That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories.[5] It has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries. Granting the state's full authority to determine the conditions upon which liquor can come into its territory and what will be done with it after it gets there, it does not follow from that fact that the United States is wholly without power to regulate the conduct of those who engage in interstate trade outside the jurisdiction of the State of Colorado.

The Sherman Act is not being enforced in this case in such manner as to conflict with the law of Colorado. Those combinations which the Sherman Act makes illegal as to producers, wholesalers and retailers are expressly exempted from the scope of the Fair Trade Act of Colorado, and thus have no legal sanction under state law either.[6] We therefore do not have here a case in which the Sherman Act is applied to defeat the policy of the state. That would raise questions of moment which need not be decided until they are presented. The judgment of the Cir-

---

[5] *Carter* v. *Virginia*, 321 U. S. 131; *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132, 138; *State Board* v. *Young's Market Co.*, 299 U. S. 59.

[6] The Colorado Fair Trade Act, 1937 Col. Session Laws, Ch. 146, provides that under certain conditions sellers of commodities can contract with buyers not to resell, and to require subsequent purchasers not to resell, at less than the minimum price stipulated by the seller. But that Act specifically provides that it shall not apply to horizontal agreements, "to any contract or agreement between or among producers or between or among wholesalers or between or among retailers as to sale or resale prices." The Colorado Unfair Practices Act, 1941 Col. Session Laws, Ch. 227, amending and reenacting 1937 Col. Session Laws, Ch. 261, makes it unlawful to sell goods below cost to injure or destroy competition, and states that the express purpose of the Act is "to safeguard the public against . . . monopolies and to foster and encourage competition."

cuit Court of Appeals is reversed and that of the District Court is affirmed.

It is so ordered.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, concurring.

The Twenty-first Amendment made a fundamental change, as to control of the liquor traffic, in the constitutional relations between the States and national authority. Before that Amendment—disregarding the interlude of the Eighteenth Amendment—alcohol was for constitutional purposes treated in the abstract as an article of commerce just like peanuts and potatoes. As a result, the power of the States to control the liquor traffic was subordinated to the right of free trade across state lines as embodied in the Commerce Clause. The Twenty-first Amendment reversed this legal situation by subordinating rights under the Commerce Clause to the power of a State to control, and to control effectively, the traffic in liquor within its borders. The course of legal history which made necessary the Twenty-first Amendment in order to permit the States to control the liquor traffic, according to their notions of policy freed from the restrictions upon state power which the Commerce Clause implies as to ordinary articles of commerce, was summarized in my concurring opinion in *Carter* v. *Virginia*, 321 U. S. 131, 139.

As a matter of constitutional law, the result of the Twenty-first Amendment is that a State may erect any barrier it pleases to the entry of intoxicating liquors. Its barrier may be low, high, or insurmountable. Of course, if a State chooses not to exercise the power given it by the Twenty-first Amendment and to continue to treat intoxicating liquors like other articles, the operation of the Commerce Clause continues. Since the Commerce Clause

is subordinate to the exercise of state power under the Twenty-first Amendment, the Sherman Law, deriving its authority from the Commerce Clause, can have no greater potency than the Commerce Clause itself. It must equally yield to state power drawn from the Twenty-first Amendment. And so, the validity of a charge under the Sherman Law relating to intoxicating liquors depends upon the utilization by a State of its constitutional power under the Twenty-first Amendment. If a State for its own sufficient reasons deems it a desirable policy to standardize the price of liquor within its borders either by a direct price-fixing statute or by permissive sanction of such price-fixing in order to discourage the temptations of cheap liquor due to cutthroat competition, the Twenty-first Amendment gives it that power and the Commerce Clause does not gainsay it. Such state policy can not offend the Sherman Law even though distillers or middlemen agree with local dealers to respect this policy. If an agreement among local dealers not to buy liquor through channels of interstate commerce does not offend the Sherman Law though a like agreement as to other commodities would, an agreement among liquor dealers to abide by state policy for a uniform price—which is far less restrictive of interstate commerce than a comprehensive boycott—can hardly be a violation of the Sherman Law.

Thus the question in this case, as I see it, is whether in fact the policy of Colorado sanctions such an arrangement as the indictment charges. Such a policy may be expressed either formally by legislation or by implied permission. Unless state policy is voiced either by legislation or by state court decisions, it is precarious business for an outsider to be confident about the legal policy of a State. So far as our attention has been called to materials relevant for ascertaining the policy of Colorado toward such a price arrangement as is here charged, it would be temerarious to suggest that Colorado does sanction it. Indeed, the leg-

islation of Colorado looks in the opposite direction. And we have no guidance from state decisions to suggest that the apparent condemnation of such an arrangement under the Colorado Fair Trade Act, § 2, Colo. Stat. Ann., ch. 165, § 20 (2), does not condemn the price arrangements before us. Although the Attorney General of Colorado has filed a brief as *amicus curiae* on the side of the respondents, his argument is not based on the contention that the policy of Colorado sanctions that which it is claimed the Sherman Law forbids. In the view I take of the matter, if a State authorized the transactions here complained of, the Sherman Law could not override such exercise of state power. For, in any event, if state policy did so authorize it, conformity with the state policy could not be deemed an "unreasonable" restraint of interstate commerce. But I do not find that Colorado has done so.

The decision of the court below is not without support in what has been said in the past in holding that, apart from the Twenty-first Amendment, this was a restraint local in its nature and therefore outside the scope of the Sherman Law. But price-fixing is such an immediate restraint upon trade that I do not think that the reach of the consequences of such an obvious restraint should be determined by drawing too nice lines as a matter of pleading. The case is before us, in effect, on demurrer to the indictment and judged abstractly, as a matter of pleading, I cannot say that the indictment was demurrable.

MR. JUSTICE ROBERTS concurs in this opinion.

COMMISSIONER OF INTERNAL REVENUE *v.* WEMYSS.

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

No. 629. Argued January 9, 1945.—Decided March 5, 1945.

1. Pursuant to an antenuptial agreement, respondent made a transfer of property to his prospective wife in consideration of her promise of marriage and to compensate for her loss of trust income which upon her marriage would go to a child by a former marriage. *Held* that, under §§ 501 and 503 of the Revenue Act of 1932 and applicable Treasury Regulations, the transfer was a taxable gift in its entirety. P. 306.
2. The decision of the Tax Court that the transfer was not made for a "consideration in money or money's worth," within the meaning of § 503, is binding on review. P. 307.
3. To relieve a transfer from the gift tax under the Revenue Act of 1932 there must be a consideration in money or money's worth of benefit to the transferor; detriment to the transferee is insufficient. P. 307.

144 F. 2d 78, reversed.

CERTIORARI, 323 U. S. 703, to review the reversal of a decision of the Tax Court, 2 T. C. 876, sustaining the Commissioner's determination of a deficiency in federal gift taxes.

Miss Helen R. Carloss, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *I. Henry Kutz* were on the brief, for petitioner.

Mr. Cecil Sims for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

In 1939 taxpayer proposed marriage to Mrs. More, a widow with one child. Her deceased husband had set up

two trusts, one half the income of which was for the benefit of Mrs. More and the other half for that of the child with provision that, in the event of Mrs. More's remarriage, her part of the income ceased and went to the child. The corpus of the two trusts consisted of stock which brought to Mrs. More from the death of her first husband to her remarriage, about five years later, an average income of $5,484 a year. On Mrs. More's unwillingness to suffer loss of her trust income through remarriage the parties on May 24, 1939, entered upon an agreement whereby taxpayer transferred to Mrs. More a block of shares of stock. Within a month they married. The Commissioner ruled that the transfer of this stock, the value of which, $149,456.13, taxpayer does not controvert, was subject to the Federal Gift Tax, §§ 501 and 503 of the Revenue Act of 1932, 47 Stat. 169, 245, 247, 26 U. S. C. §§ 1000, 1002. Accordingly, he assessed a deficiency which the Tax Court upheld, 2 T. C. 876, but the Circuit Court of Appeals reversed the Tax Court, 144 F. 2d 78. We granted certiorari to settle uncertainties in tax administration engendered by seemingly conflicting decisions. 323 U. S. 703.

The answer to our problem turns on the proper application of §§ 501 (a) and 503 *supra* to the immediate facts. These provisions are as follows:

"Sec. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual . . . of property by gift."

"Sec. 503. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be

included in computing the amount of gifts made during the calendar year."

In view of the major rôle which the Tax Court plays in Federal tax litigation, it becomes important to consider how that court dealt with this problem. Fusing, as it were, §§ 501 and 503, the Tax Court read them as not being limited by any common law technical notions about "consideration." And so, while recognizing that marriage was of course a valuable consideration to support a contract, the Tax Court did not deem marriage to satisfy the requirement of § 503 in that it was not a consideration reducible to money value. Accordingly, the Court found the whole value of the stock transferred to Mrs. More taxable under the statute and the relevant Treas. Reg. 79 (1936 ed.) Art. 8: "A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift." In the alternative, the Tax Court was of the view that if Mrs. More's loss of her trust income rather than the marriage was consideration for the taxpayer's transfer of his stock to her, he is not relieved from the tax because he did not receive any money's worth from Mrs. More's relinquishment of her trust income, and, in any event, the actual value of her interest in the trust, subject to fluctuations of its stock earnings, was not proved. One member of the Tax Court dissented, deeming that the gift tax legislation invoked ordinary contract conceptions of "consideration."

The Circuit Court of Appeals rejected this line of reasoning. It found in the marriage agreement an arm's length bargain and an absence of "donative intent" which it deemed essential: "A donative intent followed by a donative act is essential to constitute a gift; and no strained and artificial construction of a supplementary statute should be indulged to tax as a gift a transfer actually lacking donative intent." 144 F. 2d 78, 82.

Sections 501 and 503 are not disparate provisions. Congress directed them to the same purpose, and they should not be separated in application. Had Congress taxed "gifts" *simpliciter,* it would be appropriate to assume that the term was used in its colloquial sense, and a search for "donative intent" would be indicated. But Congress intended to use the term "gifts" in its broadest and most comprehensive sense. H. Rep. No. 708, 72d Cong., 1st Sess., p. 27; S. Rep. No. 665, 72d Cong., 1st Sess., p. 39; cf. *Smith* v. *Shaughnessy,* 318 U. S. 176; *Robinette* v. *Helvering,* 318 U. S. 184. Congress chose not to require an ascertainment of what too often is an elusive state of mind. For purposes of the gift tax it not only dispensed with the test of "donative intent." It formulated a much more workable external test, that where "property is transferred for less than an adequate and full consideration in money or money's worth," the excess in such money value "shall, for the purpose of the tax imposed by this title, be deemed a gift . . ." And Treasury Regulations have emphasized that common law considerations were not embodied in the gift tax.[1]

To reinforce the evident desire of Congress to hit all the protean arrangements which the wit of man can devise that are not business transactions within the meaning of ordinary speech, the Treasury Regulations make clear that no genuine business transaction comes within the purport of the gift tax by excluding "a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is *bona fide,* at arm's length, and free from any donative intent)." Treas. Reg. 79 (1936 ed.) Art. 8. Thus on finding that a transfer in the

[1] Treas. Reg. 79 (1936 ed.) Art. 1: "*Imposition of tax.*— . . . The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth."

circumstances of a particular case is not made in the ordinary course of business, the transfer becomes subject to the gift tax to the extent that it is not made "for an adequate and full consideration in money or money's worth." See 2 Paul, Federal Estate and Gift Taxation (1942) p. 1113.

The Tax Court in effect found the transfer of the stock to Mrs. More was not made at arm's length in the ordinary course of business. It noted that the inducement was marriage, took account of the discrepancy between what she got and what she gave up, and also of the benefit that her marriage settlement brought to her son. These were considerations the Tax Court could justifiably heed, and heeding, decide as it did. Its conclusion on the issue before it was no less to be respected than were the issues which we deemed it was entitled to decide as it did in *Dobson* v. *Commissioner,* 320 U. S. 489, *Commissioner* v. *Heininger,* 320 U. S. 467, *Commissioner* v. *Scottish American Co.,* 323 U. S. 119.

If we are to isolate as an independently reviewable question of law the view of the Tax Court that money consideration must benefit the donor to relieve a transfer by him from being a gift, we think the Tax Court was correct. See *Commissioner* v. *Bristol,* 121 F. 2d 129. To be sure, the Revenue Act of 1932 does not spell out a requirement of benefit to the transferor to afford relief from the gift tax. Its forerunner, § 320 of the 1924 Act, 43 Stat. 253, 314, was more explicit in that it provided that the excess of the transfer over "the consideration received shall . . . be deemed a gift." It will hardly be suggested, however, that in re-imposing the gift tax in 1932 Congress meant to exclude transfers that would have been taxed under the 1924 Act. The section taxing as gifts transfers that are not made for "adequate and full [money] consideration" aims to reach those transfers which are withdrawn from the donor's estate. To allow

detriment to the donee to satisfy the requirement of "adequate and full consideration" would violate the purpose of the statute and open wide the door for evasion of the gift tax. See 2 Paul, *supra,* at 1114.

Reversed.

MR. JUSTICE ROBERTS dissents, and would affirm the judgment for the reasons given in the opinion of the Circuit Court of Appeals.

MERRILL *v.* FAHS, COLLECTOR OF INTERNAL REVENUE.

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

No. 126. Argued January 9, 1945.—Decided March 5, 1945.

1. By § 503 of the Revenue Act of 1932, transfers of property are relieved from the gift tax to the extent that they are made for an "adequate and full consideration." *Held,* in the case of a transfer of property pursuant to an antenuptial agreement, that the relinquishment of marital rights can not to any extent constitute "adequate and full consideration." P. 312.
2. Provisions of the federal gift and estate tax statutes are to be construed harmoniously; and, where obvious reasons do not compel divergent treatment, identical phrases concerning the same subject matter are to be given identical construction. P. 313.

142 F. 2d 651, affirmed.

CERTIORARI, 323 U. S. 686, to review the reversal of a judgment of the District Court for the taxpayer, 51 F. Supp. 120, in a suit for a refund of gift taxes.

Messrs. Sam R. Marks and *Harry T. Gray,* with whom *Mr. Francis M. Holt* was on the brief, for petitioner.

Miss Helen R. Carloss, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *I. Henry Kutz* were on the brief, for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a companion case to *Commissioner* v. *Wemyss, ante,* p. 303.

On March 7, 1939, taxpayer, the petitioner, made an antenuptial agreement with Kinta Desmare. Taxpayer, a resident of Florida, had been twice married and had three children and two grandchildren. He was a man of large resources, with cash and securities worth more than $5,000,000, and Florida real estate valued at $135,000. Miss Desmare's assets were negligible. By the arrangement entered into the day before their marriage, taxpayer agreed to set up within ninety days after marriage an irrevocable trust for $300,000, the provisions of which were to conform to Miss Desmare's wishes. The taxpayer was also to provide in his will for two additional trusts, one, likewise in the amount of $300,000, to contain the same limitations as the *inter vivos* trust, and the other, also in the amount of $300,000, for the benefit of their surviving children. In return Miss Desmare released all rights that she might acquire as wife or widow in taxpayer's property, both real and personal, excepting the right to maintenance and support. The inducements for this agreement were stated to be the contemplated marriage, desire to make fair requital for the release of marital rights, freedom for the taxpayer to make appropriate provisions for his children and other dependents, the uncertainty surrounding his financial future and marital tranquillity. That such an antenuptial agreement is enforceable in Florida is not disputed, *North* v. *Ringling,* 149 Fla. 739, 7 So. 2d 476, nor that Florida gives a wife an inchoate interest in all the husband's property, contingent during his life but absolute upon death. Florida Statutes (1941) § 731.34; *Smith* v. *Hines,* 10 Fla. 258; *Henderson* v. *Usher,* 125 Fla. 709, 170 So. 846. The parties married, and the agreement was fully carried out.

On their gift tax return for 1939, both reported the creation of the trust but claimed that no tax was due. The Commissioner, however, determined a deficiency of $99,000 in taxpayer's return in relation to the transfer of the $300,000. Upon the Commissioner's rejection of the taxpayer's claim for refund of the assessment paid by him, the present suit against the Collector was filed. The District Court sustained the taxpayer, 51 F. Supp. 120, but was reversed by the Circuit Court of Appeals for the Fifth Circuit, one judge dissenting. 142 F. 2d 651. We granted certiorari in connection with *Commissioner* v. *Wemyss, supra,* and heard the two cases together. 323 U. S. 686.

This case, unlike the *Wemyss* case, does not come here by way of the Tax Court. No aid can therefore be drawn from a prior determination by the tribunal specially entrusted with tax adjudications. (See Griswold, The Need for a Court of Tax Appeals (1944) 57 Harv. L. Rev. 1153, 1173.) But like the *Wemyss* case, this case turns on the proper application of § 503 of the Revenue Act of 1932, 47 Stat. 169, 247, 26 U. S. C. § 1002. In the interest of clarity we reprint it here: "Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year." Taxpayer claims that Miss Desmare's relinquishment of her marital rights constituted "adequate and full consideration in money or money's worth." The Collector, relying on the construction of a like phrase in the estate tax, contends that release of marital rights does not furnish such "adequate and full consideration."

We put to one side the argument that in any event Miss Desmare's contingent interest in her husband's property had too many variables to be reducible to dollars and

cents, and that any attempt to translate it into "money's worth" was "mere speculation bearing the delusive appearance of accuracy." *Humes* v. *United States,* 276 U. S. 487, 494. We shall go at once to the main issue.

The guiding light is what was said in *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 44: "The gift tax was supplementary to the estate tax. The two are in *pari materia* and must be construed together." The phrase on the meaning of which decision must largely turn—that is, transfers for other than "an adequate and full consideration in money or money's worth"—came into the gift tax by way of estate tax provisions. It first appeared in the Revenue Act of 1926. Section 303 (a) (1) of that Act, 44 Stat. 9, 72, allowed deductions from the value of the gross estate of claims against the estate to the extent that they were *bona fide* and incurred "for an adequate and full consideration in money or money's worth." It is important to note that the language of previous Acts which made the test "fair consideration" was thus changed after courts had given "fair consideration" an expansive construction.

The first modern estate tax law had included in the gross estate transfers in contemplation of, or intended to take effect in possession or enjoyment at, death, except "a bona fide sale for a fair consideration in money or money's worth." § 202 (b), Revenue Act of 1916, 39 Stat. 756, 777. Dower rights and other marital property rights were intended to be included in the gross estate, since they were considered merely an expectation, and in 1918 Congress specifically included them. § 402 (b), 40 Stat. 1057, 1097. This provision was for the purpose of clarifying the existing law. H. Rep. No. 767, 65th Cong., 2d Sess., p. 21. In 1924 Congress limited deductible claims against an estate to those supported by "a fair consideration in money or money's worth," § 303 (a) (1), 43 Stat. 253, 305, employing the same standard applied to transfers in con-

templation of death, H. Rep. No. 179, 68th Cong., 1st Sess., pp. 28, 66. Similar language was used in the gift tax, first imposed by the 1924 Act, by providing, "Where property is sold or exchanged for less than a fair consideration in money or money's worth" the excess shall be deemed a gift. § 320, 43 Stat. 253, 314.

The two types of tax thus followed a similar course, like problems and purposes being expressed in like language. In this situation, courts held that "fair consideration" included relinquishment of dower rights. *Ferguson* v. *Dickson,* 300 F. 961; and see *McCaughn* v. *Carver,* 19 F. 2d 126; *Stubblefield* v. *United States,* 6 F. Supp. 440. Congress was thus led, as we have indicated, to substitute in the 1926 Revenue Act, the words "adequate and full consideration" in order to narrow the scope of tax exemptions. See *Taft* v. *Commissioner,* 304 U. S. 351, 356. When the gift tax was re-enacted in the 1932 Revenue Act, the restrictive phrase "adequate and full consideration" as found in the estate tax was taken over by the draftsman.

To be sure, in the 1932 Act Congress specifically provided that relinquishment of marital rights for purposes of the estate tax shall not constitute "consideration in money or money's worth." The Committees of Congress reported that if the value of relinquished marital interests "may, in whole or in part, constitute a consideration for an otherwise taxable transfer (as has been held to be so), or an otherwise unallowable deduction from the gross estate, the effect produced amounts to a subversion of the legislative intent . . ." H. Rep. No. 708, 72d Cong., 1st Sess., p. 47; S. Rep. No. 665, 72d Cong., 1st Sess., p. 50. Plainly, the explicitness was one of cautious redundancy to prevent "subversion of the legislative intent." Without this specific provision, Congress undoubtedly intended the requirement of "adequate and full consideration" to exclude relinquishment of dower and other marital rights

with respect to the estate tax. *Commissioner* v. *Bristol,* 121 F. 2d 129; *Sheets* v. *Commissioner,* 95 F. 2d 727.

We believe that there is every reason for giving the same words in the gift tax the same reading. Correlation of the gift tax and the estate tax still requires legislative intervention. *Commissioner* v. *Prouty,* 115 F. 2d 331, 337; Warren, Correlation of Gift and Estate Taxes (1941) 55 Harv. L. Rev. 1; Griswold, A Plan for the Coordination of the Income, Estate and Gift Tax Provisions (1942) 56 Harv. L. Rev. 337. But to interpret the same phrases in the two taxes concerning the same subject matter in different ways where obvious reasons do not compel divergent treatment is to introduce another and needless complexity into this already irksome situation. Here strong reasons urge identical construction. To hold otherwise would encourage tax avoidance. *Commissioner* v. *Bristol, supra* at 136; 2 Paul, Estate and Gift Taxation (1942) p. 1118. And it would not fulfill the purpose of the gift tax in discouraging family settlements so as to avoid high income surtaxes. H. Rep. No. 708, 72d Cong., 1st Sess., p. 28; S. Rep. No. 665, 72d Cong., 1st Sess., p. 40. There is thus every reason in this case to construe the provisions of both taxes harmoniously. *Estate of Sanford* v. *Commissioner, supra.*[1]

Affirmed.

MR. JUSTICE ROBERTS dissents.

MR. JUSTICE REED, dissenting.

This case differs from *Commissioner* v. *Wemyss, ante,* p. 303. Whether the transferor of the sums paid for the release of dower and other marital rights, received ade-

[1] Treasury Regulations 79 (1936 ed.) Art. 8 is inapplicable. To find that the transaction was "made in the ordinary course of business" is to attribute to the Treasury a strange use of English.

quate and full consideration in money and money's worth is a question of fact. The agreement recites that the parties contemplate marriage and provides that the trust shall be set up only in the event of and following the marriage. Petitioner was obligated to create the trust upon consideration of the relinquishment of marital rights and did so, and hence this is not a case involving marriage alone as consideration. Through the tables of mortality, the value of a survivor's right in a fixed sum receivable at the death of a second party may be adequately calculated. By adopting present value as the accepted future value, the uncertainty inherent in fluctuations of an estate's value is theoretically eliminated. The trial court thus found the present value of the release of the taxpayer's estate from the wife's survivorship rights largely exceeded the amount paid by the taxpayer and that the transactions between the parties were made in good faith for business reasons and not an attempt to evade or avoid taxes. Thus the District Court findings bring this transaction within the express language of the applicable Treasury Regulation.[1] *Merrill* v. *Fahs,* 51 F. Supp. 120. Its determination, we think, also makes it clear that the husband's estate

[1] Treasury Regulations 79 (1936 ed.):

"Art. 8. *Transfers for a consideration in money or money's worth.*— Transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift."

received practical advantages of value in excess of the cost paid. See *Henderson* v. *Usher,* 125 Fla. 709, 727, 170 So. 846.

The question of the taxability as gifts of transfers to spouses in consideration of the release of marital rights had been a matter of dispute in courts before the passage of the Revenue Act of 1932, § 503, 47 Stat. 169, 247.[2] Congress in the 1932 act, § 804, declared that a transfer of marital rights should not be "consideration in 'money or money's worth'" under the estate tax provisions. Thus Congress put beyond any question the liability of transferors for estate taxes where marital rights were the consideration for the transfer. On the other hand, in the same 1932 Revenue Act the language of the gift tax section, § 503, did not have a provision forbidding the valuation of marital rights. Consequently, § 503 as interpreted by Regulations 79, Art. 8, permits the treatment of the relinquishment of such rights, not donative in intent or effect, as "money's worth" consideration for property transferred. It seems to us clear that with the judicial history of the difficulties in estate and gift taxes as to the transfer of marital rights, when Congress expressly provided that relinquishment of dower, curtesy or other statutory estate was not "consideration" for estate tax purposes and left the gift tax provision without such a limitation, it intended that these rights be accorded a different treatment under these sections. This has been the determination of the Tax Court.[3]

In our view this judgment should be reversed.

The CHIEF JUSTICE and MR. JUSTICE DOUGLAS join in this dissent.

---

[2] *Ferguson* v. *Dickson,* 300 F. 961; *McCaughn* v. *Carver,* 19 F. 2d 126; *Stubblefield* v. *United States,* 79 Ct. Cls. 268, 6 F. Supp. 440.

[3] *Bristol* v. *Commissioner,* 42 B. T. A. 263; *Jones* v. *Commissioner,* 1 T. C. 1207; *Wemyss* v. *Commissioner,* 2 T. C. 876, 881.

DRUMMOND *v.* UNITED STATES.

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

No. 520. Argued February 7, 8, 1945.—Decided March 5, 1945.

1. A suit by the United States to enforce restrictions on Indian lands is not barred by a prior judgment in proceedings in which the United States was not formally a party, but in which the Secretary of the Interior had authorized employment and approved the fees of counsel for the Indian. P. 317.
2. A mortgage of lands inherited from an Osage allottee, given by the heir prior to the state court decree adjudging heirship, was invalid under § 7 of the Act of April 18, 1912, even though the heir had a certificate of competency at the time of the execution of the mortgage. P. 318.
3. Within the meaning of § 7 of the Act of April 18, 1912, lands inherited from an Osage allottee, though an incompetent, are "turned over" to the heir when the probate court decrees heirship. P. 319.

144 F. 2d 375, affirmed.

CERTIORARI, 323 U. S. 699, to review the reversal of a judgment against the United States in a suit brought by it to cancel a mortgage and to quiet title to lands.

Messrs. Roy St. Lewis and *Chas. R. Gray* for petitioner.

Mr. Roger P. Marquis, with whom *Solicitor General Fahy, Messrs. J. Edward Williams* and *Norman MacDonald* were on the brief, for the United States.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Mamie Fletcher Pitts, a full-blood Osage Indian, died on May 24, 1937, leaving land allotted to her as a member of her tribe. Her husband, George Pitts, also a full-blood Osage, was appointed administrator of her estate in appropriate proceedings in an Oklahoma court. His certificate of competency which had been granted him in

1910, § 2, Seventh, Act of June 28, 1906, 34 Stat. 539, 542, was revoked by the Secretary of the Interior on June 24, 1938. On September 9, 1938, he was adjudged to be the sole heir by the Oklahoma court, which entered an order directing distribution of Mamie's estate to him. Prior to that order, however, on July 12, 1937, Pitts had executed a mortgage of his wife's land to Drummond, the petitioner, to secure a contemporaneous promissory note. It is the validity of this mortgage, under the relevant Indian legislation, which is in controversy.

Petitioner in 1939 instituted a suit against Pitts in the state court to recover judgment on the note and to foreclose the mortgage. In that litigation Pitts, asserting the invalidity of the mortgage, was represented by a private attorney. Foreclosure was decreed, and this was upheld in the Supreme Court of Oklahoma. *Pitts* v. *Drummond,* 189 Okla. 574, 118 P. 2d 244.[1] Thereafter, the United States brought the present action in its own right and on behalf of Pitts to cancel the mortgage and to quiet title. The petitioner succeeded in the District Court, but the judgment was reversed by the Circuit Court of Appeals for the Tenth Circuit. 144 F. 2d 375. The conflict in result between the decision below and the earlier decision of the Oklahoma Supreme Court led us to grant certiorari, 323 U. S. 699.

A claim of *res judicata* meets us at the outset. Petitioner contends that the adjudication in *Pitts* v. *Drummond, supra,* binds the United States. To escape from the rule that the United States is not precluded from enforcing restrictions on Indian lands by any prior judgment in proceedings to which it was a stranger, *Bowling* v. *United States,* 233 U. S. 528, 534–535; *United States* v. *Hellard,* 322 U. S. 363, 366; and see Cohen, Handbook of Federal

[1] To complete the history of this litigation we note that certiorari was denied, 315 U. S. 814.

Indian Law (1941) 369, petitioner relies on the authorization by the Secretary of the Interior of the employment of Pitts' attorney and the approval of the latter's fee. If the United States in fact employs counsel to represent its interest in a litigation or otherwise actively aids in its conduct, it is properly enough deemed to be a party and not a stranger to the litigation and bound by its results. Compare *United States* v. *Candelaria,* 271 U. S. 432; 16 F. 2d 559, with *Logan* v. *United States,* 58 F. 2d 697. But to bind the United States when it is not formally a party, it must have a laboring oar in a controversy. This is not to be inferred merely because the Secretary of the Interior enables an incompetent Indian to protect his interests.

This brings us to the merits of the controversy—the validity of the mortgage given by Pitts as security for a loan before the Oklahoma court adjudged him to be his wife's heir. The decision turns on the construction of the Act of April 18, 1912, and more particularly on §§ 6 and 7, 37 Stat. 86. Section 6, so far as here relevant, removes restrictions on alienation of land inherited by heirs who have certificates of competency or who are not tribal members. After providing that allotment lands or funds shall not be liable or subjected to any claim arising prior to the granting of a certificate of competency, § 7 continues: "That no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs." These provisions have the characteristic infelicity of draftsmanship in Indian legislation which is such a fertile breeder of wasteful litigation. But the language, together with the light shed by the relevant Senate Report, makes the meaning clear enough.

Since Pitts incurred the debt to petitioner before the probate court adjudged him to be the heir, the transaction comes clearly within the invalidation of § 7. Petitioner contends that even though Pitts incurred the debt to him before the probate court decreed heirship, power to mortgage the land is authorized by § 6 which removed restrictions on land inherited by an heir having a certificate of competency which Pitts did have at the time of the mortgage transaction. But this result would render meaningless the sentence we have quoted from § 7 and disregard the purpose of § 7 as authoritatively stated in the Senate Report proposing the legislation. The object of § 7, according to the Senate Committee, was that "no land or money inherited shall be subject to any prior indebtedness." S. Rep. No. 127, 62d Cong., 1st Sess., p. 2. Since the sentence dealing with the invalidation is preceded by one which gives full protection against debts incurred prior to the issuance of a certificate of competency, the second sentence would have no function whatever unless it be construed to render unenforceable any claims against inherited property arising at any time before it was "turned over" to an heir. And this brings us to the final argument.

It is urged that § 7 is inapplicable because Mamie's land was never "turned over" to Pitts but came to him automatically on the death of his wife. The basis of this argument is that, inasmuch as Mamie was an incompetent, her estate was not subject to any claims against her and therefore necessarily would come to her heir unburdened. But § 7, in speaking of turning over lands to an heir, was surely not concerned with the mysteries of seisin. It dealt with the practicalities of ascertaining ownership through inheritance by appropriate proceedings. To that end § 3 of the Act of 1912 conferred probate jurisdiction upon

the state courts. *In re Thompson's Estate,* 179 Okla. 240, 65 P. 2d 442. The statute, that is, had in mind the judicial process of ascertaining the heir and the completion of that process by court action whereby the land was "turned over" to the ascertained heir. And so here, when the Oklahoma court decreed that Pitts was Mamie's heir, the land in the sensible use of the phrase "turned over" was turned over to Pitts.

Other arguments have not been overlooked but they need not be separately considered.

Affirmed.

MR. JUSTICE JACKSON dissents.

DOW CHEMICAL CO. *v.* HALLIBURTON OIL WELL CEMENTING CO.

NO. 50. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.*

Argued February 6, 1945.—Decided March 5, 1945.

1. To resolve a conflict between Circuit Courts of Appeals as to the validity of a patent, this Court will determine independently the factual issue of validity. P. 322.
2. Grebe and Sanford Patent No. 1,877,504, Claims 1, 5, 7, 8 and 9, for a method of treating deep wells to increase production, *held* invalid for want of invention. Pp. 324, 331.

   In the described process there was no patentable invention in any of the following claims or any combination thereof: (1) addition of an inhibiting agent to the hydrochloric acid solution to prevent corrosion; (2) use of a dilute rather than a concentrated hydrochloric acid solution; (3) use of the ordinary pump tube instead of a specially protected supply pipe to introduce the acid into the well.
3. The application of an old process to a new and analogous use lacks the very essence of an invention. P. 327.

---

*Together with No. 61, *Halliburton Oil Well Cementing Co.* v. *Dow Chemical Co.,* also on certiorari to the Circuit Court of Appeals for the Sixth Circuit.

4. The mere addition of water to dilute a known chemical solution does not entitle one to a patent monopoly, at least unless a definite dilution point or range is discovered corresponding to a physical phenomenon. P. 329.
5. The mere substitution of equivalents which do substantially the same thing in the same way, even though better results may be produced, is not such an invention as will sustain a patent. P. 330.
6. That a claimed invention filled a long felt want and has been a commercial success is relevant only when the question of invention is otherwise in doubt. P. 330.

139 F. 2d 473, affirmed.

CERTIORARI, 322 U. S. 719, on cross-petitions by a patent owner (petitioner in No. 50) and an alleged infringer (cross-petitioner in No. 61), to review the affirmance of a decree holding invalid certain claims of a patent and dismissing the complaint in a suit for infringement.

Messrs. Bernard A. Schroeder and *Charles J. Merriam,* with whom *Messrs. Russell Wiles, Wilber Owen, Calvin A. Campbell* and *Don L. Conner* were on the brief, for the Dow Chemical Co.

Mr. Leonard S. Lyon, with whom *Messrs. Frederick S. Lyon* and *Earl Babcock* were on the brief, for the Halliburton Oil Well Cementing Co.

MR. JUSTICE MURPHY delivered the opinion of the Court.

In issue here is the validity of United States Patent No. 1,877,504, relating to "the treatment of deep wells, such as oil, gas, brine or water wells, to increase the output therefrom," issued to John J. Grebe and Ross T. Sanford on September 12, 1932.

Petitioner, the owner of the patent, brought this suit against respondent for alleged infringement. Both the District Court for the Eastern District of Michigan and the Sixth Circuit Court of Appeals held the patent invalid for want of invention and denied relief. 139 F. 2d

473. Previously the Tenth Circuit Court of Appeals, in reversing the judgment of the District Court for the Northern District of Oklahoma, had held the patent valid and infringed in a suit brought by petitioner against another party. *Dow Chemical Co.* v. *Williams Bros. Well Treating Corp.*, 81 F. 2d 495, cert. denied, 298 U. S. 690. The conflicting views of the appellate courts concerning the validity of the same patent led us to grant certiorari in this case, 322 U. S. 719, and oblige us to decide independently the factual issue of validity. *Universal Oil Co.* v. *Globe Co.*, 322 U. S. 471, 473.

The stated object of the Grebe-Sanford patent is "to counteract some preventable natural causes for the decline of yield of a well" where the well has been drilled into a limestone or other calcareous formation. As oil is pumped from a well, the underground flow to the well decreases and the yield declines until pumping is no longer profitable. Yet it is known that when that point is reached there often remains embedded in the rock formation a great deal of oil unrecoverable by ordinary processes. Many methods have been suggested to recover this hidden oil. The forcing of water or gas into the rock formation, the heating of the surrounding rock and the use of explosives have all been proposed but found wanting in one way or another.

Eventually, however, the idea was conceived of using acid to dissolve the limestone, thus opening channels through which the oil could flow into the well. This idea first appears to have been developed in United States Patent No. 556,669, issued on March 17, 1896, to Herman Frasch, with a half interest being assigned to John W. Van Dyke. The essence of this patent was the introduction into the oil well of a large solution of hydrochloric acid under pressure, with fresh water being added later to force the acid further into the limestone. Frasch recommended the use of commercial hydrochloric acid containing from 30% to 40% by weight of the acid gas

HCl; he further recommended that the acid remain in the well for twelve hours. A suitably arranged packer was to be used to confine the acid to the lower or oil-yielding portion of the well hole.

Frasch also recognized that the hydrochloric acid was likely to corrode the metal well equipment. Hence the patent suggested that the regular well tubing be removed and that an enameled or lead-lined pipe be inserted to conduct the acid down into the well, "or it may be otherwise made proof against corrosion." An additional suggestion was that an alkaline liquid be introduced to neutralize the acid after it had performed its function.

Frasch's method proved successful in disintegrating limestone rock and increasing the flow of oil. The record shows that at least fourteen commercial wells near Lima, Ohio, were treated with this process in 1895 and 1896, resulting in substantial production increases in most instances. Wide publicity was given to these operations. But despite this success, Frasch and Van Dyke soon discontinued their work along these lines. The reasons for this abandonment are not clearly disclosed by the record. Respondent suggests personal reasons on the part of Frasch and Van Dyke and claims that the relatively undeveloped oil industry at that time had little use for such an invention. Petitioner, however, contends that Frasch's method was so cumbersome and expensive that it was commercially impracticable; [1] such is also the reason advanced by the court in the *Williams Bros.* case, 81 F. 2d at 496.

---

[1] Petitioner argues that (1) Frasch used concentrated acid that was so corrosive as to compel the use of the costly and cumbersome expedient of removing the ordinary well tube and inserting a special acid supply pipe; (2) concentrated acid being less effective than diluted acid in reacting on the limestone rock, the production increases achieved by Frasch were too small to justify the expense of the treatment; and (3) viscous spent acid was difficult to remove under the Frasch method from the pores of the rock and hence blocked or lessened the flow of oil to the well hole.

Whatever the reason for the failure of the Frasch method to achieve wide-spread use, the Grebe-Sanford patent in issue claims to be an improved method of treating wells with a hydrochloric acid solution. The patent expressly recognizes the Frasch treatment but states that it was never generally adopted "due to the fact that the acid attacks the metallic casing, pump tube, etc. about as actively as the rock, and causes serious damage thereto." To meet this alleged defect, the Grebe-Sanford patent proposes the use of a hydrochloric acid solution containing "a small amount of a substance capable of inhibiting attack of the acid upon metal surfaces . . . with which it comes in contact." The preferred inhibiting agent is one of several specified arsenic compounds, to be added in the amount of from 1% to 5% of the weight of the solution. Numerous other inhibitors are also suggested. The patent further states that "the strength of the aqueous hydrochloric acid solution, in general best adapted to the purpose in hand, may be between about 5 per cent and about 20 per cent, and preferably should be between 10 and 15 per cent although other concentrations may be used, if desired." Claim 8 (claims 1, 5, 7, 8 and 9 are in issue) best sums up the preferred form of the Grebe-Sanford process:

"The method for increasing the output of an oil well which comprises charging into the pump tube a quantity of a 5 to 20 per cent hydrochloric acid solution containing a relatively small amount of a corrosion inhibitor, expelling the acid from the tube into the bore of the well by applying pressure thereon, permitting the acid to act upon the rock formation surrounding the well cavity and withdrawing the spent acid."

The parties differ as to the precise scope of the alleged patentable improvement over the Frasch method of acidizing wells. Respondent urges, and the two courts below held, that the sole object of the Grebe-Sanford

process is simply to protect the well equipment from corrosion by adding an inhibiting agent to the hydrochloric acid solution.[2] Petitioner has consistently claimed, on the other hand, that the patent specifies three novel points which elevate the described process to the level of an invention: (1) the addition of an inhibiting agent to the hydrochloric acid solution to prevent corrosion; (2) the use of a dilute rather than a concentrated hydrochloric acid solution; and (3) the use of the ordinary pump tube instead of a specially protected supply pipe to introduce the acid into the well. Assuming without deciding that petitioner's version of the alleged improvement is correct, however, we hold that no one of these three claims and no combination thereof evidences that degree of skill and ingenuity which constitutes the essential ingredient of a true invention.

(1) *The addition of an inhibiting agent.* It is clear that the Grebe-Sanford suggestion that an inhibiting agent, preferably an arsenic compound, be added to the hydrochloric acid solution presents no patentable advance over the prior art. Petitioner makes no claim that the inhibiting agent in any way affects the chemical action of the acid on the limestone rock; it states merely that the inhibitor acts so as to prevent or restrict the corrosive effect of the acid on the metal well tubing and equipment. But long before the Grebe-Sanford process was patented it had been known that inhibiting agents could be used to protect metals from acid solutions. More particularly, it

[2] One of petitioner's experts testified that the main claim of the Grebe-Sanford patent is the addition to the hydrochloric acid of some material which will inhibit the action of the acid and that the claimed result "would be limited apparently to the equipment, rather than to the well itself." He stated further that the suggested inhibitors "would have no effect on the acid, in connection with its reaction upon limestone" and that they "have a specific function on the metal equipment used in connection with the well treatment."

was well known that arsenic compounds mixed with hydrochloric acid solutions acted as effective inhibitors and numerous patents embodying that principle had been granted.[3] Various inhibitors were available on the market at the time of the conception of the Grebe-Sanford process and were used extensively in the commercial pickling of iron and steel products in acid solutions and in the transportation of acids in metal containers.

There was evidence, moreover, that in 1928 and 1929 the Gypsy Oil Company had successfully used inhibited hydrochloric acid to remove scale from certain of its oil wells drilled in sandstone formations. This process was based upon a report made on behalf of the Mellon Institute at Pittsburgh at the request of the Gypsy Oil Company, which had been bothered by the formation of scale on the metal well equipment. The report, after noting that "the selection of a solvent was a simple matter" and that "the commercial use of inhibitors for the protection of metals in acid solutions is not new," recommended the removal of the scale by the use of a hydrochloric acid solution treated with an inhibitor obtainable on the market. Even if petitioner be correct in labeling this Gypsy Oil Company use as an abandoned experiment not amounting to anticipation, it is significant that the use of an inhibitor to check the hydrochloric acid from corroding the metal well equipment while attacking the scale suggested itself without trouble.

Thus prior to the patenting of the Grebe-Sanford process in 1932 the following facts were manifest and ele-

---

[3] See, for example, Patent to Beneker, No. 914,916 (1909); Patent to Gravell, No. 1,678,775 (1928). For patents involving the use of inhibitors other than arsenic compounds, see Patent to Holmes, No. 1,470,225 (1923); Patent to Rhodes, No. 1,746,677 (1930); Patent to Rhodes, No. 1,746,678 (1930); Patent to Vignos, No. 1,750,651 (1930); Patent to Harrison, No. 1,766,902 (1930); Patent to Corson, No. 1,773,953 (1930); Patent to Calcott, No. 1,785,513 (1930); Patent to Burke, No. 1,789,805 (1931).

mentary to any one skilled in the art: (a) hydrochloric acid would dissolve limestone and increase the production of oil wells, as demonstrated by the Frasch patent; (b) hydrochloric acid would also corrode metal with which it came in contact; (c) arsenic compounds and other chemicals could be added to hydrochloric acid to inhibit this corrosive effect; and (d) inhibited hydrochloric acid could effectively be utilized to remove scale from metal well equipment without corroding the metal. A representative of the Pure Oil Company then suggested to Grebe and Sanford the possibility of acidizing oil wells to increase production. The latter, from their knowledge of brine well acidizing and of corrosion inhibition, immediately recommended the use of hydrochloric acid containing an inhibitor. Grebe and Sanford at this time apparently did not know about the Frasch patent. But spurred by the suggestion of the Pure Oil Company, they worked out the process in issue on the basis of known facts and reactions.

All the Grebe-Sanford process taught was the obvious fact that hydrochloric acid could be inhibited to prevent corrosion while being used to dissolve limestone rock pursuant to the Frasch method of acidizing wells. No new mental or physical operation was required to add, as suggested by the Grebe-Sanford process, an arsenic compound of from 1% to 5% of the weight of a hydrochloric acid solution. No new or unexpected results were obtained by the addition of such an inhibitor. It was perfectly plain to an expert that the metal well equipment would thereby be protected from corrosion. The Grebe-Sanford method, in short, involved in this respect no more than a mere application of an old process of inhibition to a new and analogous use of protecting metal well equipment from corrosion when the well is being acidized to increase production. Such a process lacks the very essence of an invention. See *Electric Cable Co.* v. *Brooklyn Edison Co.*, 292 U. S. 69, 79, 80; *Paramount Publix Corp.* v.

American Tri-Ergon Corp., 294 U. S. 464, 473; *Cuno Engineering Corp.* v. *Automatic Devices Corp.*, 314 U. S. 84, 89.

The fact that prior to 1932 no one had apparently thought to use an inhibitor while acidizing an oil well to increase production cannot inject into the Grebe-Sanford process the attributes of an invention. Especially is this so since there is no evidence of any one trying unsuccessfully to inhibit hydrochloric acid for such purposes. He who is merely the first to utilize the existing fund of public knowledge for new and obvious purposes must be satisfied with whatever fame, personal satisfaction or commercial success he may be able to achieve. Patent monopolies, with all their significant economic and social consequences, are not reserved for those who contribute so insubstantially to that fund of public knowledge.

(2) *The use of a dilute rather than a concentrated hydrochloric acid solution.* Petitioner lays great stress on the fact that the Grebe-Sanford process suggests the use of a dilute hydrochloric acid solution containing only 5% to 20% HCl (preferably 10% to 15%). It is pointed out that Frasch's patent called for the use of commercial hydrochloric acid, which contains from 30% to 40% of HCl, and that in some of his treatments from 27% to 28% was actually used. Petitioner claims that the dilution recommended by the Grebe-Sanford process substantially reduces the viscosity of the acid, greatly slows its reaction on limestone (thus allowing the acid to open up channels distant from the well hole instead of spending itself immediately and entirely on the nearby rock) and greatly reduces its corrosive action on iron and steel.[4]

Nothing appears in the Grebe-Sanford patent claims, however, to support the thesis that dilution is part of the

[4] There was evidence introduced to the effect that a hydrochloric acid solution is much more corrosive when it contains 30% HCl than when it contains from 5% to 20%.

alleged invention. The main concern seems to have been directed at the failure of Frasch to recommend the use of an inhibiting agent. The suggested strength of the Grebe-Sanford solution is merely the one "in general best adapted to the purpose in hand" and it is said that "other concentrations may be used, if desired." Apparently dilution is recommended since the inhibiting agent can act more effectively with a weaker acid, which is obviously less corrosive than a more concentrated acid. At the same time, the recommended dilution allows the solution to be of a strength such that the soluble salts formed by its action on the rock will remain dissolved therein. The patent does not state that an acid outside the range of 5% to 20% strength will fail and no affirmative advantage over the Frasch method is claimed insofar as the strength of the acid is concerned.

But even assuming that a dilute solution is an ingredient of the alleged invention, we can find none of the elements of true invention adhering thereto. The mere addition of water to dilute a known chemical solution does not entitle one to a patent monopoly, at least unless a definite dilution point or range is discovered corresponding to a physical phenomenon. *Kwik Set, Inc.* v. *Welch Grape Juice Co.*, 86 F. 2d 945, 947. No such discovery was made here. The advantages said to accompany a dilute solution do not correspond to any particular dilution point or range. The patent recommends that the acid be diluted to a 5% to 20% strength but it is recognized that "other concentrations may be used, if desired," to achieve the purpose at hand. Such a broad and indefinite specification as to dilution is fatal to a claimed invention.

(3) *The use of the ordinary pump tube.* The Grebe-Sanford patent mentions the use of the ordinary pump tube to convey the acid to the bottom of the well hole, whereas the Frasch patent had contemplated withdrawal of

the ordinary pump tube in favor of a smaller and specially protected supply tube. But this is at most an incidental and unimportant part of the Grebe-Sanford method, as is recognized by the statement in the patent that "it is not necessary, however, to add the acid solution through the pump tube, as any other convenient way may be employed." No new function is performed by the pump tube that is not performed by the Frasch supply tube; both merely convey the acid to the bottom of the well hole. Any advantage in cost or simplicity which the use of the ordinary pump tube may give is the result of the use of an inhibitor in the acid rather than any intrinsic merit of the pump tube. It is elemental that the mere substitution of equivalents which do substantially the same thing in the same way, even though better results may be produced, is not such an invention as will sustain a patent. *Dunbar* v. *Myers,* 94 U. S. 187, 199; *Smith* v. *Nichols,* 21 Wall. 112, 119.

Finally, petitioner claims that the Grebe-Sanford process has filled a long felt want and has been a commercial success. But these considerations are relevant only in a close case where all other proof leaves the question of invention in doubt. *Smith* v. *Hall,* 301 U. S. 216, 233; *McClain* v. *Ortmayer,* 141 U. S. 419, 428, 429. Here the lack of invention is beyond doubt and cannot be outweighed by such factors. Moreover, there is an absence in this case of any long felt want or of any recognized problem that had baffled the contemporary art. There is no evidence that any one with knowledge of the Frasch method and with knowledge of the use of inhibitors in hydrochloric acid ever tried unsuccessfully to use the Frasch method with inhibited hydrochloric acid. Nor is there any proof of fruitless demands and efforts to prevent corrosion while acidizing oil wells. Whenever the need arose to prevent corrosion in the use of hydrochloric acid, whether for purposes of pickling, scale removal or oil

well acidizing, the addition of inhibitors was suggested immediately and without effort. The great fund of public knowledge was simply drawn upon the first time the problem was considered, resulting in the obvious process described in the Grebe-Sanford patent.

Since we conclude that the Grebe-Sanford patent is invalid for want of invention, we need not consider respondent's cross-petition raising questions as to whether respondent's process infringed the patent.

Affirmed.

COMMISSIONER OF INTERNAL REVENUE *v.* COURT HOLDING CO.

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

No. 581. Argued February 26, 1945.—Decided March 12, 1945.

1. There was evidence to support the finding of the Tax Court that the transaction in question—formally a sale by stockholders of property conveyed to them as a "liquidating dividend"—was a sale by the corporation rather than by the stockholders, which finding must therefore be accepted by the courts; and the Tax Court's conclusion that, under § 22 of the Internal Revenue Code, the corporation was taxable on the gain from the sale is sustained. P. 333.
2. That the corporation never executed a written agreement, and that an oral agreement for the sale of realty was unenforcible under the state law, does not require a different result, in view of the Tax Court's finding that the executed sale was in substance a sale by the corporation. P. 334.

143 F. 2d 823, reversed.

CERTIORARI, 323 U. S. 702, to review the reversal of a decision of the Tax Court, 2 T. C. 531, sustaining the Commissioner's determination of a deficiency in income tax.

Assistant Attorney General Samuel O. Clark, Jr., with whom *Solicitor General Fahy, Messrs. Sewall Key, Harry Baum*, and *Miss Helen R. Carloss* were on the brief, for petitioner.

Mr. Maurice Kay, with whom *Mr. Charles M. Trammell* was on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

An apartment house, which was the sole asset of the respondent corporation, was transferred in the form of a liquidating dividend to the corporation's two shareholders. They in turn formally conveyed it to a purchaser who had originally negotiated for the purchase from the corporation. The question is whether the Circuit Court of Appeals properly reversed [1] the Tax Court's conclusion [2] that the corporation was taxable under § 22 of the Internal Revenue Code [3] for the gain which accrued from the sale. The answer depends upon whether the findings of the Tax Court that the whole transaction showed a sale by the corporation rather than by the stockholders were final and binding upon the Circuit Court of Appeals.

It is unnecessary to set out in detail the evidence introduced before the Tax Court or its findings. Despite conflicting evidence, the following findings of the Tax Court are supported by the record:

The respondent corporation was organized in 1934 solely to buy and hold the apartment building which was the only property ever owned by it. All of its outstanding stock was owned by Minnie Miller and her husband.

---

[1] 143 F. 2d 823.

[2] 2 T. C. 531.

[3] Profits from the sale of property are taxable as income under § 22 (a) of the Internal Revenue Code, 26 U. S. C. 22. The Treasury Regulations have long provided that gains accruing from the sales of a corporation's assets, in whole or in part, constitute income to it, but that a corporation realizes no taxable gain by a mere distribution of its assets in kind, in partial or in complete liquidation, however much they may have appreciated in value since acquisition. §§ 19.22 (a)–19, 19.22 (a)–21, Treasury Regulations 103.

Between October 1, 1939 and February, 1940, while the corporation still had legal title to the property, negotiations for its sale took place. These negotiations were between the corporation and the lessees of the property, together with a sister and brother-in-law. An oral agreement was reached as to the terms and conditions of sale, and on February 22, 1940, the parties met to reduce the agreement to writing. The purchaser was then advised by the corporation's attorney that the sale could not be consummated because it would result in the imposition of a large income tax on the corporation. The next day, the corporation declared a "liquidating dividend," which involved complete liquidation of its assets, and surrender of all outstanding stock. Mrs. Miller and her husband surrendered their stock, and the building was deeded to them. A sale contract was then drawn, naming the Millers individually as vendors, and the lessees' sister as vendee, which embodied substantially the same terms and conditions previously agreed upon. One thousand dollars, which a month and a half earlier had been paid to the corporation by the lessees, was applied in part payment of the purchase price. Three days later, the property was conveyed to the lessees' sister.

The Tax Court concluded from these facts that, despite the declaration of a "liquidating dividend" followed by the transfers of legal title, the corporation had not abandoned the sales negotiations; that these were mere formalities designed "to make the transaction appear to be other than what it was" in order to avoid tax liability. The Circuit Court of Appeals drawing different inferences from the record, held that the corporation had "called off" the sale, and treated the stockholders' sale as unrelated to the prior negotiations.

There was evidence to support the findings of the Tax Court, and its findings must therefore be accepted by the

courts. *Dobson* v. *Commissioner,* 320 U. S. 489; *Commissioner* v. *Heininger,* 320 U. S. 467; *Commissioner* v. *Scottish American Investment Co.,* 323 U. S. 119. On the basis of these findings, the Tax Court was justified in attributing the gain from the sale to respondent corporation. The incidence of taxation depends upon the substance of a transaction. The tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title. Rather, the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant. A sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title.[4] To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress.

It is urged that respondent corporation never executed a written agreement, and that an oral agreement to sell land cannot be enforced in Florida because of the Statute of Frauds, Comp. Gen. Laws of Florida, 1927, vol. 3, § 5779. But the fact that respondent corporation itself never executed a written contract is unimportant, since the Tax Court found from the facts of the entire transaction that the executed sale was in substance the sale of the corporation. The decision of the Circuit Court of Appeals is reversed, and that of the Tax Court affirmed.

It is so ordered.

---

[4] *Gregory* v. *Helvering,* 293 U. S. 465; *Minnesota Tea Co.* v. *Helvering,* 302 U. S. 609; *Griffiths* v. *Commissioner,* 308 U. S. 355; *Higgins* v. *Smith,* 308 U. S. 473.

Syllabus.

NORTHWESTERN BANDS OF SHOSHONE INDIANS *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 63. Argued November 10, 13, 1944.—Decided March 12, 1945.

1. The treaty of July 30, 1863 with the Northwestern Bands of the Shoshone Indians was not a recognition or acknowledgment by the United States of the Indian title to the lands therein mentioned; therefore a claim to compensation for the taking of the lands is not one "arising under or growing out of" the treaty, within the meaning of the special jurisdictional Act of February 28, 1929, and no recovery upon such claim can be had under that Act. Pp. 340, 354.

(a) The finding of the Court of Claims that the United States did not by the treaty intend to recognize or acknowledge Indian title to the lands, which finding was the basis of that court's decision, places the burden on petitioners to overthrow the judgment of the Court of Claims. P. 346.

(b) Recognition of the Indian title is not to be implied from the grant by the Indians of permission for travel or mining and for the maintenance of communication and transportation facilities. P. 348.

(c) That Indian title was recognized by the Fort Laramie treaty does not require the conclusion that Indian title was recognized by the treaty of July 30, 1863. P. 349.

(d) Use in the treaty of the word "claim" or the phrase "country claimed," though designating the area over which the Indians asserted Indian title, did not constitute acknowledgment by the United States of such title. P. 350.

(e) The Senate amendment to the treaty—"Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof"—was not intended to give recognition to Indian titles but only to avoid further complications in the Mexican Cession title situation. P. 351.

2. Indian treaties are to be construed according to their tenor; and their terms are not to be varied by construction in order to avoid alleged injustices. P. 353.

100 Ct. Cls. 455, affirmed.

CERTIORARI, 322 U. S. 721, to review the dismissal of a proceeding brought in the Court of Claims pursuant to a special jurisdictional Act.

Mr. Ernest L. Wilkinson, with whom *Messrs. Joseph Chez, John W. Cragun, Herman J. Galloway, Frank K. Nebeker, Charles J. Kappler,* and *Clinton D. Vernon* were on the brief, for petitioners.

Mr. Robert E. Mulroney, with whom *Solicitor General Fahy, Assistant Attorney General Littell* and *Mr. Norman MacDonald* were on the brief, for the United States.

Messrs. Bert H. Miller, Attorney General of Idaho, and *Grover A. Giles,* Attorney General of Utah, filed a brief on behalf of the States of Idaho and Utah, as *amici curiae,* supporting petitioners.

MR. JUSTICE REED delivered the opinion of the Court.

The Northwestern Bands of Shoshone Indians, petitioners here, seek to recover from the United States damages estimated at fifteen million dollars for the taking of some fifteen million acres of the lands held by these Indians by aboriginal or immemorial title. This title was alleged by the Indians to have been recognized by the United States by the treaty between the petitioners and the United States at Box Elder, Utah Territory, July 30, 1863.

The suit was begun in the Court of Claims against the United States by the bands pursuant to a special jurisdictional act of Congress of February 28, 1929, 45 Stat. 1407. The Act consented to suit and recovery against the United States upon the following conditions:

"That jurisdiction be, and hereby is, conferred upon the Court of Claims, notwithstanding lapse of time or statutes of limitations, to hear, adjudicate, and render judgment in any and all claims which the northwestern bands of Shoshone Indians may have against the United States arising under or growing out of the treaty of July 2, 1863 (Eighteenth Statutes, page 685—2 Kappler, 848); treaty of July 30, 1863 (Thirteenth Statutes, page 863 [663]—2 Kappler, 850); Act of Congress approved December 15, 1874 (Eighteenth Statutes, page 291), and any subsequent treaty Act of Congress, or Executive order, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States." [1]

This Court has jurisdiction to grant certiorari under the jurisdictional act and § 3 (b), Act of February 13, 1925, 43 Stat. 939, as amended by Act of May 22, 1939, 53 Stat. 752; see *Colgate* v. *United States,* 280 U. S. 43. Certiorari was granted in view of the importance of the question in Indian affairs.

The suit is based upon the unlawful taking after the alleged recognition of the Indian title by the Box Elder treaty. We do not read the petition as claiming any right to compensation for the extinguishment of an Indian aboriginal title, which was unrecognized or unacknowledged by the Box Elder treaty. Under the words of the jurisdictional act, "arising under or growing out of the treaty," suit is authorized only for rights acknowledged by the treaty. The act does not authorize a suit for loss of Indian tribal rights arising from any other acts of the United States. If the treaty recognized the aboriginal

[1] The other sections of the jurisdictional act are routine and not here involved. They provide for the employment of attorneys for the Indians, for set-offs to the United States, for review in this Court, process, service on and appearance by the Attorney General and the disposition of sums recovered.

or Indian title, the authority to sue for the taking under the jurisdictional act is not questioned.[2] No claim is brought forward by petitioners arising under or growing out of the other treaties, acts or orders which are referred to in the jurisdictional act. See *Northwestern Bands of Shoshone Indians* v. *United States,* 95 Ct. Cls. 642, 680.[3]

The Court of Claims determined that the claim for the taking of land sued upon by petitioners did not grow out of the Box Elder treaty. Certiorari was sought and granted to determine whether there was "recognition" or "acknowledgment" of the Indian title by this treaty through the language employed or by the act of entering into a treaty with the Indians as to the use by the United States of lands which were claimed by the petitioners.

Even where a reservation is created for the maintenance of Indians, their right amounts to nothing more than a treaty right of occupancy. *Shoshone Tribe* v. *United States,* 299 U. S. 476, 496. Prior to the creation of any such area, formally acknowledged by the United States as subject to such right of Indian occupancy, a certain nation, tribe or band of Indians may have claimed the right because of immemorial occupancy to roam certain territory to the exclusion of any other Indians and in contradistinction to the custom of the early nomads to

---

[2] The claim upon which the Indian Affairs Committee of the House based its recommendation for the passage of an identical jurisdictional act was a claim for the taking of this aboriginal title which the Committee said was recognized by the Box Elder treaty. H. Rep. No. 1030, 70th Cong., 1st Sess.; cf. *United States* v. *Creek Nation,* 295 U. S. 103, 108.

[3] In a similar jurisdictional act for the benefit of the Eastern Shoshone the question of whether their claim arose under or grew out of a certain treaty was not involved. That treaty, Fort Bridger, July 3, 1868, specifically recognized and set apart a reservation for the Eastern Shoshone. Art. II, 15 Stat. 673; 44 Stat. 1349; *Shoshone Tribe* v. *United States,* 299 U. S. 476.

wander at will in the search for food. *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 345. This claim has come to be known as Indian title and is likewise often spoken of as the right of occupancy. To distinguish from a recognized right of occupancy, we shall refer to the aboriginal usage without definite recognition of the right by the United States as Indian title.

Since *Johnson* v. *M'Intosh,* 8 Wheat. 543, decided in 1823, gave rationalization to the appropriation of Indian lands by the white man's government, the extinguishment of Indian title by that sovereignty has proceeded, as a political matter, without any admitted legal responsibility in the sovereign to compensate the Indian for his loss. Exclusive title to the lands passed to the white discoverers, subject to the Indian title with power in the white sovereign alone to extinguish that right by "purchase or conquest." 8 Wheat. at 574, 585–88. The whites enforced their claims by the sword and occupied the lands as the Indians abandoned them.[4] Congress has authorized suits on the original Indian title but no recovery has as yet been obtained on that ground. See *Coos Bay Indian Tribe* v. *United States,* 87 Ct. Cls. 143; cf. *Wichita Indians* v. *United States,* 89 Ct. Cls. 378, 413, 414. In this case, however, the success of the claim depends not upon proof of the Indian title, which may be admitted, 95 Ct. Cls. at 690, but upon recognition of that title by the Box Elder treaty. It is quite understandable from the point of view of both petitioners and Congress that the Government should limit its submission to suits to claims under the boundaries if acknowledged by the treaty rather than to consent to judicial examination of claims for tak-

[4] *Beecher* v. *Wetherby,* 95 U. S. 517, 525; *Buttz* v. *Northern Pacific R. Co.*, 119 U. S. 55, 70; *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 564; *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 347.

ing the unknown area of their possible Indian title.[5] The Shoshone Indian title was in Indian country (Act to regulate trade and intercourse with the Indian tribes, 4 Stat. 729; *Bates* v. *Clark,* 95 U. S. 204, 206–208) and as a consequence subject to all the uncertainties of definition of boundaries and difficulties of proof to establish aboriginal title for tribes with a shifting habitat.

The decisive question in this case is whether it was intended by the Northwestern Shoshone or Box Elder Treaty of July 30, 1863, to recognize or acknowledge by implication the Indian title to the lands mentioned in that treaty. *United States* v. *Santa Fe Pacific R. Co.,* 314 U. S. 339, 347. From such recognition or acknowledgment by this treaty would flow a right of occupancy which would be compensable under the jurisdictional act.

Full findings of fact appear with the opinion below in *Northwestern Bands of Shoshone Indians* v. *United States,* 95 Ct. Cls. 642. These findings show that petitioners here, the Northwestern bands, were at the time of the treaty a part of the Shoshone tribe, a nomadic Indian nation of less than ten thousand people which roamed over eighty million acres of prairie, forest and mountain in the present states of Wyoming, Colorado, Utah, Idaho and Nevada. The group with which we are concerned was comprised of some fifteen or eighteen hundred persons and claimed, by the treaty, Indian title to some ten million acres and now claim compensation for over six million additional acres.

---

[5] Letter of Commissioner Doty, transmitted by Message of the President, January, 1864, Executive K, L, M, N, O, 38th Cong., 1st Sess., p. 17:

"As none of the Indians of this country have permanent places of abode, in their hunting excursions they wander over an immense region, extending from the fisheries at and below Salmon falls, on the Shoshonee river, near the Oregon line, to the sources of that stream, and to the buffalo country beyond."

After the discovery of gold in California, white travelers and settlers began to traverse and people the Shoshone domain with the result that the Indians' game disappeared from their hunting grounds. Racial relations degenerated to the point that Indian depredations interfered with travel and settlement, the overland mails and the new telegraph lines. By the time of the outbreak of the Civil War the Commissioner of Indian Affairs, the agents and superintendents of the Shoshone territory were aware of the misery of the Shoshones, the dangers to the emigrant trains and need for peace to enable travel and settlement in the area. Word had reached the Commissioner from his superintendent in Utah that the Shoshone were inclined toward accepting support on limited reservations and were willing in return to cede their other lands to the United States.

On July 5, 1862, 12 Stat. 512, 529, Congress appropriated $20,000 for defraying the expenses of negotiating a treaty with the Shoshones. The appropriation followed a letter from the Secretary of the Interior to the chairman of the House Committee on Indian Affairs expressing the view that the lands owned by the Indians of Utah were largely unfit for cultivation and that it was "not probable that any considerable portion of them will be required for settlement for many years." A special commission was promptly appointed and instructed that it was not expected that the proposed treaty would extinguish Indian title to the lands but only secure freedom from molestation for the routes of travel and "also a definite acknowledgment as well of the boundaries of the entire country they claim as of the limits within which they will confine themselves, which limits it is hardly necessary to state should be as remote from said routes as practicable."

As the distances made it impracticable to gather the Shoshone Nation into one council for treaty purposes, the commissioners made five treaties in an endeavor to clear

up the difficulties in the Shoshone country. These are set out in full in the report below. 95 Ct. Cls. 642. Four will be found also in 13 Stat. 663, 681, and 18 Stat. 685, 689. The fifth or Mixed Band treaty was not proclaimed. It is at 5 Kappler 693. It is sufficient here to say that by the treaties the Indians agreed not to molest travelers, stage coaches, telegraph lines or projected railroads.[6] All

[6] Articles II and III from the Fort Bridger treaty of July 2, 1863, the one first made, will illustrate the type of agreement:

"ARTICLE II. The several routes of travel through the Shoshonee country, now or hereafter used by white men, shall be and remain forever free and safe for the use of the Government of the United States, and of all emigrants and travellers under its authority and protection, without molestation or injury from any of the people of said nation. And if depredations should at any time be committed by bad men of their nation, the offenders shall be immediately seized and delivered up to the proper officers of the United States, to be punished as their offences shall deserve; and the safety of all travellers passing peaceably over said routes is hereby guaranteed by said nation. Military agricultural settlements and military posts may be established by the President of the United States along said routes; ferries may be maintained over the rivers wherever they may be required; and houses erected and settlements formed at such points as may be necessary for the comfort and convenience of travellers.

"ARTICLE III. The telegraph and overland stage lines having been established and operated through a part of the Shoshonee country, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of said nation; and that their property, and the lives of passengers in the stages, and of the employees of the respective companies, shall be protected by them.

"And further, it being understood that provision has been made by the Government of the United States for the construction of a railway from the plains west to the Pacific ocean, it is stipulated by said nation that said railway, or its branches, may be located, constructed, and operated, without molestation from them, through any portion of the country claimed by them."

Article IV relating to boundaries in this Fort Bridger treaty reads as follows:

"It is understood the boundaries of the Shoshonee country, as defined and described by said nation, is as follows: On the north, by

the Shoshone treaties were similar in form. They show that the boundaries claimed, as petitioner points out, covered the entire Shoshone country. After all five were negotiated Commissioner Doty was able to trace a rough map of the Shoshone country to show the Commissioner of Indian Affairs "the exterior boundaries of the territories claimed by the *Shoshonees* in their recent treaties, as also the lines of the country occupied by different portions of the tribe indicated upon it as correctly as the map will allow." He had asked Indian Affairs for the map upon which this information was traced "to show the boundaries of the country ceded by the Shoshones."

Petitioners' treaty, the Northwestern Shoshone Treaty, needs to be set out in full for ready examination. It reads as follows:

"Articles of agreement made at Box Elder, in Utah Territory, this 30th day of July, A. D., 1863, by and between the United States of America, represented by Brigadier-General P. Edward Connor, commanding the military district of Utah, and James Duane Doty, commissioner, and the northwestern bands of the Shoshonee Indians, represented by their chiefs and warriors:

ARTICLE I. It is agreed that friendly and amicable relations shall be reestablished between the bands of the Shoshonee Nation, parties hereto, and the United States; and it is declared that a firm and perpetual peace shall be henceforth maintained between the said bands and the United States.

---

the mountains on the north side of the valley of Shoshonee or Snake River; on the east, by the Wind River mountains, Peenahpah river, the north fork of Platte or Koo-chin-agah, and the north Park or Buffalo House; and on the south, by Yampah river and the Uintah mountains. The western boundary is left undefined, there being no Shoshonees from that district of country present; but the bands now present claim that their own country is bounded on the west by Salt Lake." 18 Stat. 685–6.

ARTICLE II. The treaty concluded at Fort Bridger on the 2nd day of July, 1863, between the United States and the Shoshonee Nation, being read and fully interpreted and explained to the said chiefs and warriors, they do hereby give their full and free assent to all of the provisions of said treaty, and the same are hereby adopted as a part of this agreement, and the same shall be binding upon the parties hereto.

ARTICLE III. In consideration of the stipulations in the preceding articles, the United States agree to increase the annuity to the Shoshonee nation five thousand dollars, to be paid in the manner provided in said treaty. And the said northwestern bands hereby acknowledge to have received of the United States, at the signing of these articles, provisions and goods to the amount of two thousand dollars, to relieve their immediate necessities, the said bands having been reduced by the war to a state of utter destitution.

ARTICLE IV. The country claimed by Pokatello, for himself and his people, is bounded on the west by Raft River and on the east by the Porteneuf Mountains." 13 Stat. 663.

Before it or the other treaties were ratified by the Senate an additional article was added to each and, except for one treaty not further involved here, accepted by the Indians. The addition reads as follows:

"Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof."

The portions of the Fort Bridger treaty of July 2, 1863, of any possible effect will be found in note 6, *supra*.

Subsequent to the ratification of the treaties, an act of Congress was passed on February 23, 1865, 13 Stat. 432,

for the extinction of Indian title to lands in Utah territory; and another act on July 20, 1867, 15 Stat. 17, for dealing with hostile Indians and choosing reservations for Indians dwelling east of the Rocky Mountains. None of the Shoshones entered into treaties under either of these acts except the Eastern Shoshones who had signed the Fort Bridger treaty of July 2, 1863. On July 3, 1868, they relinquished all claim to United States territory except a reservation in Wyoming of 3,047,730 acres. 15 Stat. 673. No other treaty or other formal arrangement has been made between petitioners and the United States dealing with their lands.[7]

---

[7] The Court of Claims summarized the history of the petitioner bands, subsequent to the Box Elder treaty, in this way:

"After the making of the treaty of July 30, 1863, the plaintiff bands became widely scattered over northern Utah and Nevada, and southern Idaho. In 1873 the Commissioner of Indian Affairs appointed a commission to investigate all tribes and bands in this region and to ascertain their number and the probability of gathering them upon one or more reservations where they could be more immediately under the care of the Government. The commission made an exhaustive investigation into the matters entrusted to it and reported that it had no trustworthy information as to the number of bands of the Northwestern Shoshone Indians. The commission further reported that a part of the Northwestern Shoshones under Pocatello (who signed the treaty of July 30, 1863) had already gone to the Fort Hall (Idaho) Reservation in southeast Idaho, and that Chief Tav-i-wun-shea, with his small band, had gone to the Wind River (Wyoming) Reservation created and set apart under the treaty with the Eastern Shoshones in 1868. Toomontso (who had signed the Northwestern Treaty of July 30) and his band at about this time took up their abode on the Fort Hall Indian Reservation and an indefinite number of Indians of this band had gone to the Wind River Reservation. Eventually the remnants of the bands of Indians under San Pitz (a signer of the Northwestern Shoshone treaty of July 30), and Saigwits, also a party to the treaty, were induced by the commission to remove to the Fort Hall Indian Reservation, thus making a total of 400 Northwestern Shoshone Indians on the Fort Hall Reservation. The commission further reported that a careful enumeration disclosed that there were 400 North-

Without seeking any cession or relinquishment of claim from the Shoshone, except the Eastern Shoshone relinquishment of July 3, 1868, just referred to, the United States has treated the rest of the Shoshone territory as a part of the public domain. School lands were granted. 13 Stat. 32; 26 Stat. 216; 28 Stat. 109. National forests were freely created. 33 Stat. 2307; 34 Stat. 3099, 3198, 3206, 3247, 3251; 37 Stat. 1678. The lands were opened to public settlement under the homestead laws. Report of the Commissioner of the General Land Office (1868), pp. 55, 59, 63; Report of the Commissioner of the General Land Office (1869), pp. 163, 168, 177. Thus we have administration of this territory by the United States proceeding as though no Indian land titles were involved.

The Court of Claims examined the evidence adduced before it and reached the conclusion as a finding of fact that the United States "did not intend that it [the treaty] should be a stipulation of recognition and acknowledgement of any exclusive use and occupancy right or title of the Indians, parties thereto. . . . The treaty was intended to be, and was, a treaty of peace and amity with stipulated annuities for the purposes of accomplishing those objects and achieving that end." 95 Ct. Cls. at 676. This finding molded the opinion and judgment below. Whether the issue as to acknowledgment by a treaty of Indian title to land is treated as a question of fact, like

---

western Shoshone Indians in southern Idaho. In 1873 a number of Northwestern Shoshone Indians had gathered in northeastern Nevada and were assigned by the Indian Agent in Nevada to a small area in that section as a home. On May 10, 1877, this tract, by order of the President, was withdrawn from sale or settlement and set apart as a reservation for the Northwestern Shoshone Indians. However, in 1879, all the Indians thereon, numbering about 300, were removed to the Western Shoshone Indian Reservation known as the Duck Valley Indian Reservation in southwestern Idaho and northern Nevada." 95 Ct. Cls. at 677.

Indian right to occupancy itself, *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 345; 53 Stat. 752, or as a matter of inference to be drawn by the trier of fact from the treaty and surrounding circumstances or as a conclusion of law to be reviewed by this Court upon the record, this finding places the burden on petitioners to overthrow the judgment of the Court of Claims. In reaching its conclusion, the lower court pointed out in its opinion that nothing in the legislation or official documents, communications or instructions which brought about the treaty indicated any purpose to recognize Indian title to the territory over which the Shoshone roamed and hunted. The commissioners were instructed specifically on July 22, 1862, that they were not expected to negotiate for the extinction of the Indian title but for the security of routes over the lands and "a definite acknowledgment as well of the boundaries of the entire country they [the Indians] claim." The letter shows uncertainty as to the location of the bands. The Commissioner of Indian Affairs wrote of the Shoshone nation as roaming Utah and Eastern Washington but the very indefiniteness of the information required a statement from the Indians of their claims. 95 Ct. Cls. at 690. The Commissioner learned from the treaties that the Shoshones claimed territory in Colorado, Wyoming, Idaho, and Nevada aggregating several times the acreage in Utah. There apparently was no claim to Washington land. Commissioner Doty's letter transmitting the map describing the territories claimed by the Shoshones and telling of the negotiations has nothing that indicates the possibility of an acknowledgment by the United States of the Indian title to any of the lands. See note 5, *supra.*

An examination of the text of the Northwestern Shoshone Treaty and the others which were entered into with the other Shoshone tribes, 95 Ct. Cls. 642, shows the commissioners carefully followed their instructions. In the

Eastern Shoshone treaty, the boundaries are spoken of "as defined and described by said nation," note 6, *supra*. In the Northwestern Shoshone Treaty the land is described as "The country claimed by Pokatello, for himself and his people." In the Western Shoshone treaty permission was given for mineral prospecting and extracting and the boundaries are said to define "the country claimed and occupied." The same language is used as to the boundaries in the Shoshonee-Goship Treaty. This treaty also permitted prospecting for and the working of mines. The Mixed Bands treaty described a country "claimed by the said bands" and "as described by them." Nowhere in any of the series of treaties is there a specific acknowledgment of Indian title or right of occupancy. It seems to us a reasonable inference that had either the Indians or the United States understood that the treaties recognized the Indian title to these domains, such purpose would have been clearly and definitely expressed by instruction, by treaty text or by the reports of the treaty commissioners, to their superiors or in the transmission of the treaties to the Senate for ratification.

Petitioners argue that the permission from the Indians for travel or mining and for the maintenance of communication and transportation facilities by the United States for its citizens imply a recognition by the United States of the Indian title. They quote, as persuasive, these words from an early Indian case: "The acceptance of these cessions is an acknowledgment of the right of the Cherokees to make or withold them." *Worcester* v. *Georgia*, 6 Pet. 515, 556. An examination of the circumstances under which this Court made the just-quoted statement illustrates how inapposite its use by petitioners is to the present question. The quotation was written in explanation of rights of passage which were granted by the Cherokees through lands which by other articles of the treaty had been specifically set apart and solemnly guaranteed to the Cherokees. 7 Stat. 39. No such specific recognition is in

the Box Elder treaty. But we see nothing inconsistent with non-recognition of the Indian title and the insertion of these provisions against molestation of structures, travelers or exploiters of mineral deposits within the territories. The United States undoubtedly might have asserted, at the time of the treaty, its purpose to extinguish Indian title or it might have recognized Indian title or it might, as the Court of Claims held, have sought only freedom from hostile acts from roving bands by the commitments for supplies. The treaties were made in the midst of civil war and before the outcome of that conflict was clear.

Petitioners urge that recognition of the Indian title was inferred from the language of the Fort Laramie treaty of September 17, 1851, 11 Stat. 749, *Fort Berthold Indians* v. *United States,* 71 Ct. Cls. 308; *Assiniboine Indian Tribe* v. *United States,* 77 Ct. Cls. 347, 370; *Crow Nation* v. *United States,* 81 Ct. Cls. 238, 272, and that a different inference in the present case is inconsistent with those holdings. Apart from the fact that different treaties are involved, the circumstances surrounding the execution of the Fort Laramie treaty indicate a purpose to recognize the Indian title to the lands described in the Fort Laramie treaty, which may well have induced the Court of Claims to reach one conclusion in those cases and another in this. For example, the instructions to the commissioners for the Fort Laramie negotiations contained this direction:

"It is important, if practicable, to establish for each tribe some fixed boundaries within which they should stipulate generally to reside, and each should agree not to intrude within the limits assigned to another tribe without its consent." 71 Ct. Cls. 312.

Further in reporting the treaty, it was said:

"The laying off of the country into geographical, or rather national domains, I regard as a very important measure, inasmuch as it will take away a great cause of quarrel among themselves, and at the same time enable the Government to ascertain who are the depredators,

should depredations hereafter be committed." 71 Ct. Cls. 313.

Furthermore, the words of the Fort Laramie treaty are more apt to express recognition of Indian title than those of Box Elder. Article 5 says:

"The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, viz: . . ." 71 Ct. Cls. 315. In consideration of the treaty stipulations the United States bound itself to furnish supplies and to protect the Indian nations against depredations by its citizens. Such distinctions may quite justifiably have led the Court of Claims to different conclusions than it reached from consideration of the Northwestern Shoshone treaty.[8]

Petitioners point out that the word "claim" or the phrase "country claimed" was often used on the frontier

---

[8] We note but consider unimportant, because this issue was not involved, casual references by this and other courts that the Shoshone treaties recognized Indian title in the Shoshones. *Shoshone Tribe* v. *United States*, 299 U. S. 476, 485; *United States* v. *Shoshone Tribe*, 304 U. S. 111, 113; *Shoshone Indians* v. *United States*, 85 Ct. Cls. 331, 335; *United States* v. *Board of Comm'rs*, 145 F. 2d 329.

We do not consider the references of the administrators in routine communications called for in the preparation of this case before the Court of Claims to the "Shoshoni Indian Reservation (Northwestern Band)" to the fact that the territory of the Shoshones "was recognized by the United States" or "set apart for the Shoshone Indians" of any more weight. Nothing in these statements shows that the attention of the administrators was focused on the problem of recognition or that they reflected a contemporaneous interpretation.

It does not seem important to determine whether the Court of Claims abused its discretion in refusing admission to such administrative letters written in 1939, relating to preparation for this suit, of maps of the territory. We have examined the tendered evidence. It was also seen by the Court of Claims and if it had been admitted it would have been merely cumulative and could not have changed the conclusion below.

to indicate title or right. We know this meaning in mining law and in entries for land patents. The meaning of the word or phrase depends upon its use. In these treaties it seems clearly to designate the boundaries over which the Indians asserted Indian title but that falls short of acknowledgment of such right by the United States.

Reliance is also placed by petitioners upon the Senate's amendment to the Treaty [9] as a limitation of the treaty's recognition of Indian title to the described lands. This limitation, petitioners argue, demonstrates that no other limitation was intended. Petitioners take the position that there was no need for this limitation "if the treaty recognized no rights." While such a limitation would not have been needed if the Senate of that day were positive, on weighing the issue as we now do, that the treaty was ineffective to give any additional color to Indian titles within or without the Mexican Cession, it is unlikely that the ratifying body could or did appraise the several possibilities which are now presented. The Senate was well acquainted with the complications of Mexican land titles in the Cession. A portion of the lands lay within the boundaries of the former Mexican state of Alta California. The Senate was familiar, too, with the legal position of Indian titles in the Shoshone country outside the Mexican Cession.[10] Such titles were subject to the same rules as similar titles in all Indian country. 4 Stat. 729. The

[9] "Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof."

[10] Spanish claims north of the 42nd parallel of latitude, then the northern line of Mexico, were ceded to the United States in 1821, Treaties and Other International Acts of the United States, Vol. 3, p. 3, and Art. 8; Russian claims south of 54°40′ north latitude in 1824, *op. cit.* p. 151 and Art. 3; and the British claims south of north latitude 49° in 1846, *op. cit.*, Vol. 5, p. 3 and Art. III.

status of Indian titles within the Mexican Cession of 1848, however, had not then been judicially determined.[11] The treaty of Guadalupe Hidalgo guaranteed the property rights of Mexicans in the Cession.[12] Controversies over these rights had caused the rejection by the Senate of Article X of the treaty as submitted.[13] The rejection was followed by the protocol of Queretaro of 1848 in which our commissioners for the exchange of ratifications undertook to make explanation to Mexico of the rejection of Article X.[14] The protocol itself was a subject of House and Senate debate and of extensive diplomatic correspondence.[15] There had been, also, the Act of March 3, 1851, 9 Stat. 631,

---

[11] *Barker* v. *Harvey*, 181 U. S. 481, *Cramer* v. *United States*, 261 U. S. 219; *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339.

[12] 5 Treaties *op. cit., supra*, 207, Art. VIII and IX. *United States* v. *O'Donnell*, 303 U. S. 501, 504.

[13] Treaties and Other International Acts of the United States, Vol. 5, pp. 242, 245:

"Article X. All grants of land made by the Mexican Government or by the competent authorities, in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States, shall be respected as valid, to the same extent that the same grants would be valid, if the said territories had remained within the limits of Mexico. . . ."

[14] The explanation in the second article of the protocol was as follows:

"Second. The American Government by suppressing the Xth article of the Treaty of Guadalupe did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the article of the Treaty, preserve the legal value which they may possess; and the grantees may cause their legitimate titles to be acknowledged before the American tribunals.

"Conformably to the law of the United States, legitimate titles to every description of property personal and real, existing in the ceded territories, are those which were legitimate titles under the Mexican law in California and New Mexico up to the 13th of May 1846, and in Texas up to the 2d March 1836." Treaties, *id.*, vol. 5, p. 381.

[15] See Treaties, *id.*, vol. 5, pp. 380–406, particularly p. 387.

to settle the private land claims in California, after its admission as a state. Litigation over land titles in the Mexican Cession had already reached this Court. *United States* v. *Nye,* 21 How. 408; *United States* v. *Bassett,* 21 How. 412; *United States* v. *Rose,* 23 How. 262. We do not think that the amendment indicates more than an intention to be sure the new treaty did not add to the complexities of the Mexican Cession title situation. Cf. *Barker* v. *Harvey,* 181 U. S. 481, 491; *United States* v. *Title Ins. Co.,* 265 U. S. 472, 484.

Petitioners suggest that in the construction of Indian treaties we, as a self-respecting nation, hesitate to construe language, which is selected by us as guardian of the Indians, to our ward's prejudice. "All doubts," say petitioners, "must be resolved in their [the Indians'] favor." Mr. Justice McLean, concurring in *Worcester* v. *Georgia,* 6 Pet. 515 at 582, said, "The language used in treaties with the Indians should never be construed to their prejudice." But the context shows that the Justice meant no more than that the language should be construed in accordance with the tenor of the treaty.[16] That, we think, is the rule which this Court has applied consistently to Indian treaties. We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress.[17]

---

[16] This is the meaning of the other cases which are cited by petitioners upon this point, *Jones* v. *Meehan,* 175 U. S. 1, 10–12; *United States* v. *Winans,* 198 U. S. 371, 380; *Marlin* v. *Lewallen,* 276 U. S. 58, 64; *United States* v. *Payne,* 264 U. S. 446, 448–49; *Northern Pacific R. Co.* v. *United States,* 227 U. S. 355, 366; *Seufert Bros. Co.* v. *United States,* 249 U. S. 194, 198; *United States* v. *Shoshone Tribe,* 304 U. S. 111, 116; see also *Tulee* v. *Washington,* 315 U. S. 681, 684.

[17] *United States* v. *Choctaw Nation,* 179 U. S. 494, 534–36; *Choctaw Nation* v. *United States,* 318 U. S. 423, 432.

It seems to us clear from the circumstances leading up to and following the execution of the Box Elder Treaty that the parties did not intend to recognize or acknowledge by that treaty the Indian title to the lands in question. Whether the lands were in fact held by the Shoshones by Indian title from occupancy or otherwise or what rights flow to the Indians from such title is not involved. Since the rights, if any the Shoshones have, did not arise under or grow out of the Box Elder treaty, no recovery may be had under the jurisdictional act.

Affirmed.

MR. JUSTICE ROBERTS is of the view that the judgment should be reversed.

MR. JUSTICE JACKSON, concurring.

MR. JUSTICE BLACK and I think it may be desirable to state some of the difficulties which underlie efforts to leave such an Indian grievance as this to settlement by a lawsuit.

It is hard to see how any judicial decision under such a jurisdictional act can much advance solution of the problem of the Shoshones. Any judgment that we may render gives to these Indians neither their lands nor money. The jurisdictional act provides that the proceeds above attorneys' fees shall "be deposited in the Treasury of the United States to the credit of the Indians" at 4 per cent interest and "shall be subject to appropriation by Congress only for the health, education, and industrial advancement of said Indians." The only cash payment is attorneys' fees. Section 7 provides that the Court of Claims shall determine a reasonable fee, not to exceed 10 per cent of the recovery, together with expenses, to be paid to the attorneys for the Northwestern Bands out of the sums found due. After counsel are thus paid, not a cent is put into the reach of the Indians; all that is done for them by a judgment is to earmark some funds in the

Treasury from which Congress may as it sees fit from time to time make appropriations "for the health, education, and industrial advancement of said Indians." Congress could do this, of course, without any judgment or earmarking of funds, as it often has done. Congress, even after judgment, still must decide the amount and times of payment to the Indians according to their needs.

We would not be second to any other in recognizing that—judgment or no judgment—a moral obligation of a high order rests upon this country to provide for decent shelter, clothing, education, and industrial advancement of the Indian. Nothing is gained by dwelling upon the unhappy conflicts that have prevailed between the Shoshones and the whites—conflicts which sometimes leaves one in doubt which side could make the better claim to be civilized. The generation of Indians who suffered the privations, indignities, and brutalities of the westward march of the whites have gone to the Happy Hunting Ground, and nothing that we can do can square the account with them. Whatever survives is a moral obligation resting on the descendants of the whites to do for the descendants of the Indians what in the conditions of this twentieth century is the decent thing.

It is most unfortunate to try to measure this moral duty in terms of legal obligations and ask the Court to spell out Indian legal rights from written instruments made and probably broken long ago and to put our moral duty in figures as legal damages. The Indian problem is essentially a sociological problem, not a legal one. We can make only a pretense of adjudication of such claims, and that only by indulging the most unrealistic and fictional assumptions.

Here we are asked to go back over three quarters of a century to spell out the meaning of a most ambiguous writing made in 1863. One of the parties did not keep, or know how to keep, written records of negotiations.

Written evidence bearing on intention is only that which the whites chose to make. It does not take a particularly discerning eye to see that these records, written usually by Indian agents, are quite apt to speak well of the writer's virtue and good intention. Evidence from the memory of man is no longer available. Even if both parties to these agreements were of our own stock, we being a record-keeping people, a court would still have the gravest difficulty determining what their motives and intentions and meanings were. Statutes of limitations cut off most such inquiries, not because a claim becomes less just the longer it is denied, but because another policy intervenes—the policy to leave in repose matters which can no longer be the subject of intelligent adjudication.

Even if the handicap of time could be overcome, we could not satisfactorily apply legal techniques to interpretation of this treaty. The Indian parties to the treaty were a band of simple, relatively peaceful, and extremely primitive men. The population of the band was only about 1,500, and the territories claimed to have been occupied as their home consisted of over 15,000,000 acres of land in Idaho, Utah, and Nevada—about 10,000 acres for every individual in the band. Of course so few could not patrol and defend so vast a territory against inroads by the more aggressive and efficient whites. The white was a better killer. The game disappeared, the lands were not productive, and in peace the Indians became destitute. Desperation stimulated or perhaps produced predatory tendencies and they began to fall upon the overland caravans and to steal and rob. The whites brought forth their armies and reduced the Indians to submission. Then the whites "negotiated" a treaty.

We realize that for over a century it has been a judicial practice to construe these "agreements" with Indians, as if they were contracts between white men. In some cases, where the provisions are simple and definite and deal with

concrete lands or matters, this may be practicable. But despite antiquity of the custom, to apply the litigation process to such a problem as we have here seems far-fetched. The most elemental condition of a bargain was not present, for there was nothing like equality of bargaining power. On one side were dominant, powerful, shrewd, and educated whites, who knew exactly what they wanted. On the other side were destitute, illiterate Indians who primarily wanted to be let alone and who wanted by some means to continue to live their own accustomed lives. Here we are asked to decide whether their intent was to relinquish titles or make reservations of titles or recognition of titles. The Indian parties did not know what titles were, had no such concept as that of individual land title, and had no sense of property in land. Here we are asked to attribute legal meanings to subscribers of a written instrument who had no written language of their own in which to express any meaning. We doubt if any interpreter could intelligently translate the contents of a writing that deals with the property concept, for the Indians did not have a word for it. People do not have words to fit ideas that have never occurred to them. Ownership meant no more to them than to roam the land as a great common, and to possess and enjoy it in the same way that they possessed and enjoyed sunlight and the west wind and the feel of spring in the air. Acquisitiveness, which develops a law of real property, is an accomplishment only of the "civilized."

Of course the Indians may have had some vague idea that thereafter they were to stay off certain lands and the white men in return were to stay off certain other land. But we do not think it is possible now to reduce such a nebulous accord to terms of common-law contract and conveyancing. The treaty was a political document. It was intended to pacify the Indians and to let the whites travel in peace a route they somehow were going to travel anyway.

How should we turn into money's worth the rights, if any, of which the Indians have been deprived? Should we measure it in terms of what was lost to a people who needed 10,000 acres apiece to sustain themselves through hunting and nomadic living, who had no system or standard of exchange, and whose representatives in making the treaty appear to have been softened for the job by gifts of blankets and trinkets? Should we measure it in terms of what was gained to our people, who sustain themselves in large numbers on few acres by greater efficiency and utilization? Of course amends can be made only to progeny in terms of their present needs as the jurisdictional Act recognizes will ultimately be done. The Indians' grievance calls for sympathetic, intelligent, and generous help in developing the latent talents and aspirations of the living generation, and there is little enlightenment for that task from endless and pointless lawsuits over the negotiation of generations long gone to their rest.

We agree with MR. JUSTICE REED that no legal rights are today to be recognized in the Shoshones by reason of this treaty. We agree with MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY as to their moral deserts. We do not mean to leave the impression that the two have any relation to each other. The finding that the treaty creates no legal obligations does not restrict Congress from such appropriations as its judgment dictates "for the health, education, and industrial advancement of said Indians," which is the position in which Congress would find itself if we found that it did create legal obligations and tried to put a value on them.

MR. JUSTICE DOUGLAS, dissenting.

I think the claims which these Indians assert are claims "arising under or growing out of the treaty of July 30, 1863."

He who comes to my abode and bargains for free transit or a right of way across the land on which I live and which I proclaim to be my own certainly recognizes that I have a claim to it. That and more was done here. Routes of travel through this Shoshone country, the establishment of military agricultural settlements and military posts, the maintenance of ferries over the rivers, the erection of houses and settlements, the location, construction, and operation of a railroad, the maintenance of telegraph and overland stage lines were all negotiated. These provisions alone constitute plain recognition by the United States that it was dealing with people who had the power to grant these rights of travel and settlement. The United States, of course, did not need to follow that course. It could have invaded this Indian country and extinguished Indian title by the sword or by appropriation. *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 347, and cases cited. But it did not choose that course. It chose to negotiate a treaty. And through the medium of the treaty it obtained from these Indians rights of way, rights to settle, rights of transit. It was stated in *Worcester* v. *Georgia*, 6 Pet. 515, 556, that "The acceptance of these cessions is an acknowledgment of the right of the Cherokees to make or withhold them." That is good law. It is as applicable here as it was in that early case. There, to be sure, lands had been specifically set apart for the Cherokees. But that is not a material difference. Indian title is the right to occupancy based on aboriginal possession. *United States* v. *Santa Fe Pacific R. Co., supra.* It has been the policy of the United States from the beginning to respect that right of occupancy. *Id.*, p. 345. As stated in *Mitchel* v. *United States*, 9 Pet. 711, 746, the Indian "right of occupancy is considered as sacred as the fee simple of the whites." Thus we may not say that because these Indians had only Indian title this case can

be distinguished from *Worcester* v. *Georgia, supra.* When the United States obtained these cessions it acknowledged whatever claim to the land these Indians had. The Indians ask no more now.

Moreover, the Senate in ratifying the treaty made clear that it construed the treaty as recognizing the title or claim of these Indians to this land. The amendment added in the Senate provided: "Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof." That should put beyond dispute that the Senate understood the treaty to accord recognition of the title which the Indians had under Mexican law. To say it gives no recognition to any claim is to erase this provision from the treaty.

But if there is still any doubt as to the meaning of the treaty it should be wholly removed by another of its provisions. The treaty stated that "The country claimed by Pokatello, for himself and his people, is bounded on the west by Raft River and on the east by the Porteneuf Mountains."

That is now brushed aside as irrelevant. But we should remember that no counsel sat at the elbow of Pokatello when the treaty was drafted. It was written in a language foreign to him. He was not a conveyancer. He was not cognizant of distinctions in title. He neither had nor gave deeds to his land. There was no recording office. But he knew the land where he lived and for which he would fight. If the standards of the frontier are to govern, his assertion of ownership and its recognition by the United States could hardly have been plainer.

We should remember the admonition in *Jones* v. *Meehan,* 175 U. S. 1, 11, that in construing a treaty between the United States and an Indian tribe it must always be

borne in mind "that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

When the standard is not observed, what these Indians did not lose to the railroads and to the land companies they lose in the fine web of legal niceties.

As stated by the Attorneys General of Idaho and Utah who appear here as *amici curiae:* "The result is that a peaceful and friendly people, lulled into a sense of security by the proffers of the United States of peace and amity, have been reduced from a nation able to wrest their living from their primitive ancestral home to a nondescript, homeless, and poverty-stricken aggregation of bands of Indians, without the means to compete in the modern civilization which had disseised them. Until the treaty with petitioners, petitioners were so strong and formidable that the trouble and expense of taking their lands by war—leaving out of account the dishonor that would have been involved in proceeding against a nation which had given no cause for war—would have far outweighed the expense of settling with them for their lands at whatever the cost in money. But the United States did neither. Congress

felt it could not at that time afford to extinguish petitioners' title by purchase. Consequently, for a meager consideration, the petitioners granted respondent certain valuable rights in those lands. For respondent, under these circumstances, to attempt to deny petitioners' title is unworthy of our country. The faith of this nation having been pledged in the treaties, the honor of the nation demands, and the jurisdictional act requires, that these long-unsettled grievances be settled by this court in simple justice to a downtrodden people."

The story has been told before. Chester Fee, Chief Joseph (1936); Howard Fast, The Last Frontier (1944).

MR. JUSTICE FRANKFURTER and MR. JUSTICE MURPHY join in this dissent.

MR. JUSTICE MURPHY, dissenting.

It is a well-settled rule that in the interpretation of Indian treaties all ambiguities are to be resolved in favor of the Indians. *Worcester* v. *Georgia,* 6 Pet. 515, 582; *Winters* v. *United States,* 207 U. S. 564, 576; *Carpenter* v. *Shaw,* 280 U. S. 363, 367. While this principle does not justify ignoring the plain meaning of words in order to prevent what appears to be an injustice to the Indians, it does mean that a court is bound to give to doubtful expressions that meaning least prejudicial to the interests of the Indians, giving full weight to the conditions under which the treaty was drawn. The application of this principle to the facts of this case makes manifest the error of the Court of Claims.

The issue here centers about the meaning of the Box Elder Treaty of July 30, 1863, 13 Stat. 663, entered into between the United States and the Northwestern Bands of Shoshone Indians. Did the United States by that treaty acknowledge or recognize the claim of the Indians to the land in question so as to make it a claim "arising under or growing out of" the treaty for purposes of the

jurisdictional act of February 28, 1929, 45 Stat. 1407? An affirmative answer to this question is dictated by both the treaty provisions and the circumstances surrounding the making of the treaty.

1. *Events preceding the Box Elder Treaty.* The great westward surge of the white men from 1849 to 1863 through the country claimed by the various Shoshone tribes aroused resentment and hostility among the Indians. Game was driven away and vegetation destroyed, forcing the Indians to steal or starve. Telegraph and overland daily mail lines were established through their territory in complete disregard of any rights they might have. The Government did little or nothing to supply the Indians with food or supplies during this period. White emigrants and the Government were caused considerable trouble by depredations and warlike acts of these oppressed Indians. Some agreement whereby white emigrants could travel and the Government could maintain a communication system through the Shoshone area was imperative.

Little was done before 1861, when the Commissioner of Indian Affairs recommended that a treaty be negotiated with the Shoshone Indians which would grant them annuities "in consideration of a right-of-way across their country." In the same year the Superintendent of Indian Affairs for the Utah Territory also recommended the negotiation of a treaty, stating that the Shoshones "express their willingness to cede to the United States all the lands they claim in this territory," with certain reservations.

In February, 1862, the Secretary of the Interior in a letter to the chairman of the House Committee on Indian Affairs acknowledged that the lands were "owned by the Indians" but reported that little was fit for cultivation and would probably not be "required for settlement for many years." He thus did not recommend the purchase of the land. In light of this letter, the House Committee on Indian Affairs recommended to Congress that it au-

thorize the negotiation of a treaty for passageways over the land claimed by the Shoshones and not try to purchase the land.

Accordingly on July 5, 1862, Congress authorized the appointment of a treaty commission to negotiate such a treaty. 12 Stat. 512, 529. On July 22 the Commissioner of Indian Affairs instructed the treaty commissioners who had been appointed that the Government did not have sufficient knowledge to state definitely the boundaries of the country inhabited and claimed by the Shoshones but that it was understood that they inhabited "the country in the northern part of Utah and eastern portion of Washington Territories, through which lies the route of the overland mail, and the emigrant route through Utah and into Washington Territory and it is mainly to secure the safety of the travel along these routes that a treaty is desirable." He further told them that it was not expected that the treaty would be negotiated "with a view to the extinguishment of the Indian title to the land." They were told that the United States' assurances of amicable relations and the contemplated payment of $20,000 in annuities should enable them to procure from the Indians an agreement for the security of the overland mail and emigrant routes, in addition to a "definite acknowledgment as well of the boundaries of the entire country they claim, as of the limits within which they will confine themselves."

Thus prior to the actual negotiation of the treaty, the United States recognized that the Shoshone tribes claimed and inhabited certain territory, the exact boundaries of which were uncertain. The fact that the United States thought it necessary to make a treaty concerning rights of way and the fact that the United States expressly did not desire to negotiate "with a view to the extinguishment of the Indian title to the land" strongly indicate that the United States considered the Indians as the owners of this

ill-defined area of land. The securing of rights of way, which was the main purpose of the treaty, would have been a needless formality had title to the underlying land been thought to be in the name of the United States. And the securing of an acknowledgment of the boundaries of the land claimed by the Shoshones, which was a subsidiary purpose of the treaty, would likewise have been unnecessary if the United States considered itself the owner of all the land. The stage was thus set for a delineation of the Shoshone land to which the United States was prepared to acknowledge Indian title.

2. *The negotiations for and the contents of the Box Elder Treaty.* The treaty commissioners found it impossible to assemble all the Shoshone tribes at one time. They thus negotiated five separate treaties with the five Shoshone Nations. They met first with the Eastern Shoshones at Ft. Bridger, Wyoming, where they negotiated the treaty of July 2, 1863, 18 Stat. 685. This treaty pledged peace between the United States and the Indians and pledged the United States to pay annual annuities. The Shoshones in turn agreed that routes of travel through "Shoshone country" should remain forever free and safe for the use of the United States and its emigrants and travellers. They also agreed that the United States might establish military agricultural establishments and military posts along said routes, maintain ferries over rivers, erect houses and settlements wherever necessary for the comfort of the travellers, operate and maintain existing telegraph and overland stage coach lines, and operate a transcontinental railway "through any portion of the country claimed by" the Shoshones. The treaty further set forth a description of "the Shoshonee country, as defined and described by said nation," leaving the western boundary undefined since there were no Shoshones present from that area.

On July 30, 1863, the commissioners met with the Northwestern Bands of Shoshone Indians at Box Elder, Utah.

The resulting treaty also stipulated for peace and friendship and then incorporated by reference all the pertinent provisions of the Ft. Bridger Treaty. The Northwestern Bands thus granted the same rights of way and easements over their lands as the Eastern Bands had granted. The Box Elder Treaty did not purport to describe all the land of the Northwestern Bands, but only the "country claimed by Pokatello [one of their chiefs] for himself and his people." This area was described as being bounded on the west by the Raft River and on the east by the Porteneuf Mountains.

Similar treaties were entered into with the Western Shoshones on October 1, 1863, the Shoshonee-Goship Bands on October 12, 1863, and the Mixed Bands of Shoshone and Bannock Indians on October 14, 1863. All these treaties were substantially the same insofar as the granting of rights of way and easements were concerned. And each of them set forth "the boundaries of the country claimed and occupied by said bands."

Thus by these five treaties the United States secured (a) freedom of travel and communication through the Shoshone country and (b) definite acknowledgment of the areas claimed by the Shoshones. While the Box Elder Treaty did not define the boundaries of the Northwestern Shoshone lands completely, reference to and collocation of the territorial descriptions in the other four treaties, as well as reference to the map prepared at the time by the chairman of the treaty commission, supply the territorial boundaries of these lands.

The very acceptance in the Box Elder Treaty of these rights of way and easements constituted a recognition and acknowledgment by the United States that the Northwestern Bands had title to the land claimed. *Worcester* v. *Georgia*, 6 Pet. 515, 556; *Fort Berthold Indians* v. *United States*, 71 Ct. Cls. 308, 332. Such recognition and acknowledgment need not be indicated by any particular word or phrase. They may be implied as well as expressed.

That is the case here. The Box Elder Treaty and the four other treaties would have been meaningless had the United States not thereby recognized the Indian title to the land claimed. Without such title, the Indians would have lacked power to bargain concerning the right to travel and communicate over the land. Recognition of this power to bargain and acceptance of the fruits of that bargaining implied recognition of the underlying Indian title to the land. Otherwise there would have been no reason for the United States bothering to negotiate. Unilateral assertion of rights would have been resorted to had the United States not recognized Indian title to these lands. This is true whether the Indians held title based on aboriginal possession or whether they held lands specifically set aside for them. It is likewise immaterial that the main purpose of the treaties was to secure rights in the land rather than to acknowledge or secure title. The securing of those rights necessarily presupposes Indian title and necessarily recognizes such title.

Thus by its action in negotiating for and securing rights of passage and communication, the United States indicated its recognition and acknowledgment of Indian title to the land. The descriptions of the lands claimed by the various tribes were inserted merely to give the United States knowledge of the precise boundaries to the land held by the Indians. The fact that these treaties and the Box Elder Treaty in particular speak in terms of land "claimed" by the Indians does not negate recognition of title to the land so claimed. In the context of these treaties and in light of the ignorance of the Indians of legal niceties, the term "claim" need not be taken to mean bare assertion to title. It must be remembered that these Indians held title by aboriginal possession and that the United States was in no position to bargain as to the scope of the land so held. A bona fide Indian claim of this type is synonymous with ownership unless it conflicts with some other ownership or unless such an Indian title is

unrecognized in law. Here, however, the United States did recognize this type of ownership and was anxious merely to ascertain the scope of the land so claimed or owned. The placing of these descriptions in a bilateral treaty is at least consistent with the conclusion that the United States recognized title to the extent of the lands claimed. And under the rule that ambiguities are to be resolved in favor of the Indians, we must adopt that conclusion.

3. *Events subsequent to the Box Elder Treaty.* Any doubt as to whether the United States by these treaties recognized and acknowledged Indian title to the land claimed is removed by actions and statements of the Government subsequent to the making of these treaties.

The Senate ratified each of the treaties. To four of them, including the Box Elder Treaty, the Senate added an amendment providing that nothing in the treaty should be construed to admit "any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof." See 13 Stat. 664. Whatever may have been the complexities of the Mexican cession title situation as described in the opinion of this Court, the Senate by this amendment clearly indicated that it understood each treaty to constitute a recognition of Indian title to the land claimed, at least as to lands outside the Mexican cession. Had the Senate been under the impression that no title rights were involved in the treaties it would have been meaningless to add this amendment. Resolving any doubts on this score in favor of the Indians compels us to interpret this amendment as another recognition of Indian title.

In 1863 the Commissioner of Indian Affairs recommended that further treaties with the Shoshones be nego-

tiated to extinguish their title to the soil. And Congress in 1865 authorized the President to enter into treaties with Indians in the Utah Territory for the surrender to the United States of their possessory right to all agricultural and mineral land and for their segregation on reservations. 13 Stat. 432. Accordingly a treaty was made with the Eastern Shoshones in 1868 whereby they gave up the territory claimed by them in the Ft. Bridger Treaty in exchange for other lands. 15 Stat. 673. Here again is clear proof that the United States considered title to the land to belong to the Indians, making even more compelling the conclusion that the 1863 treaties constituted a necessary recognition of that title.

And as late as 1934 the Secretary of the Interior admitted that the territory of the Shoshones "was recognized by the United States as belonging to the various bands of Shoshone Indians" by the 1863 treaties and that the "Government recognized all the land as belonging to the Northwestern bands of Shoshones." Such statements are more than justified by the history and contents of the treaties.

One final matter remains. It is said that any money recovered by the Indians in this suit would have to be deposited in the Treasury of the United States, subject to appropriation by Congress for their benefit, and that the only possible cash payment involves attorney fees. That may be true. But it does not justify ignoring the rights of the Shoshone Indians recognized under solemn treaties entered into with the United States. It does not command us to overthrow the moral obligation of the United States to fulfill its treaty obligations. And it does not warrant the application of narrow principles of construction to the injury of the Indians' interests. If Congress desires to place in the Treasury any money that might be recovered by the Indians in this suit that is the business of Congress, not ours. Our function here is at an end

when we have determined if the Northwestern Bands have any claim "arising under or growing out of" the Box Elder Treaty. Because I believe they have such a claim I would reverse the judgment below.

MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS concur in this opinion.

SPECIAL EQUIPMENT CO. *v.* COE, COMMISSIONER OF PATENTS.

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

No. 469. Argued March 2, 5, 1945.—Decided March 26, 1945.

1. In this suit in equity under R. S. § 4915 to compel the Commissioner of Patents to issue a patent upon an application for a subcombination of the elements of a machine, assumed to be a useful invention, for which the claimant had previously filed a patent application, the record fails to establish that the claimant intended to misuse the patent on the subcombination or to make no use of the alleged invention, and the decision of the court below refusing on that ground to order issuance of the patent was therefore erroneous. Pp. 374, 380.
2. A subcombination patent may legitimately be used as a means of preventing appropriation by others of a combination invention which the claimant is using, where there is absent any purpose to enlarge the patent monopoly of either invention. P. 376.

   A patent on a combination embodied in an inventor's complete machine, without allowance of subcombination claims, would not prevent free use of the subcombination. Hence denial of a patent on the subcombination would deprive the inventor of the benefit of the exclusive right to use the subcombination in the ways specified by the patent laws. It would also leave the public free to use, and thus to appropriate a part, however important, of the inventor's complete machine, even though patented.
3. The statutes permit, and it is the settled practice of the Patent Office to allow, subcombination as well as combination claims. P. 377.
4. The patent grant is not of a right to the patentee to use the invention, but of the right to exclude others from using it. P. 378.
5. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, lends no support to the contention that a patentee may not use his patent as a

protection against misappropriation of his invention, even though the invention is not used. P. 379.

6. Petitioner's intended use of the subcombination patent to prevent others from appropriating the alleged invention and by that means from appropriating an essential part of the complete machine is in no way inconsistent with petitioner's making other permissible uses of the subcombination patent. P. 379.

144 F. 2d 497, reversed.

CERTIORARI, 323 U. S. 697, to review the affirmance of a judgment dismissing the complaint in a suit under R. S. § 4915 to compel the Commissioner of Patents to issue a patent.

Messrs. Clarence J. Loftus and *Curtis F. Prangley,* with whom *Messrs. James Ballard Moore* and *James M. Graves* were on the brief, for petitioner.

Assistant Attorney General Shea, with whom *Solicitor General Fahy, Messrs. Robert L. Stern* and *Abraham J. Harris* were on the brief, for respondent.

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

This is a suit in equity, brought in the District Court of the District of Columbia, under R. S. § 4915, to compel respondent, the Commissioner of Patents, to issue a patent upon an application for a subcombination of the elements of a machine for which the inventor had previously filed a patent application. The district court gave judgment for respondent. The Court of Appeals for the District affirmed, 144 F. 2d 497, and we granted certiorari, 323 U. S. 697. The question is whether the Court of Appeals correctly rested its decision upon the ground that petitioner did not intend to make or use the invention and that the purpose of seeking the patent was to exploit and protect the combination invention embodied in the complete machine, of which the subcombination is a part.

Ewald, the plaintiff in the district court in whose stead petitioner, his assignee, was later substituted as a party, made application for a patent on a "fruit-treating apparatus" embracing the combination embodied in his complete machine. Certain claims of his application were allowed October 27, 1938, but a patent has not yet issued. The following year he made a renewed application for the subcombination, with which the present suit is concerned. The specifications of the original application disclosed mechanisms for automatically performing the successive operations of bobbing (cutting off the stems), splitting, paring, and coring pears, in preparation for canning or other processing.

The original application specified and claimed an apparatus consisting of two spaced, horizontally mounted turrets or turntables, combined with means for continuously, but intermittently, rotating both in the same direction. Fixed upon and rotatable with the table of the first turret are a plurality of pear receiving and clamping means, spaced upon the upper surface of the turntable, adapted to receive and clamp either a pre-split or a whole pear. At the first intermittent stop a swinging knife shears off (bobs) the stem of the fruit, which extends beyond the clamps. At the next intermittent stop, overhead traveling jaws or clamps grasp the fruit concurrently with its release from the first clamp and carry the fruit longitudinally to a point over the second turntable.

As the pear is thus carried from the first turret to a position over the second, it is split by a fixed vertically positioned knife straddled by the overhead traveling clamps. As the clamps force the pear against and past the knife, it cleaves the pear into substantially equal half sections. The pear sections are then automatically, successively deposited in spaced cups fixed on the second revolving turntable. At the next stop of that turntable the pear section resting in its cup is peeled by an automatically

operated paring knife. At the next successive stop the core is removed from the pear section by an automatically operated coring device. After completing the coring, the mechanism automatically separates the pear section from the core and the peeling and discharges them and the pear section into appropriate receptacles.

In the operation of the machine whole or split pears may be fed by hand to the holding and clamping devices on the first turret where the pears are bobbed. The whole pear is then split as it is carried by the overhanging jaws from the first turret to the second. The peeling and coring of both pre-split and whole pears are then carried through by the operation of the second turret.

The patent application for the complete machine discloses a highly ingenious device, which is said to have achieved a great advance in the art by increasing the speed and skill with which pears are prepared for canning, and to result in a great saving of manpower. The renewed application for the subcombination specifies and claims the apparatus which we have described but without the splitting knife. In the operation of the device thus claimed the pears are pre-split by hand. The split sections are placed face to face in the receiving and clamping means upon the first turntable, after which the operation, except the splitting by the splitting knife, proceeds in exactly the same way and accomplishes the same result as when the splitting knife is present.

Additional claims, which are those sued on, covering all the elements of the combination except the splitting knife, were duly presented to the Patent Office. There they were rejected as incomplete, broader than the invention disclosed by the petitioner in his application, and misleading, and as covering constructions not contemplated by petitioner's application. Respondent Commissioner, alleging no prior art against the allowance of the claims, set up these objections in his answer in the district court as the

sole grounds of defense to the suit. The district court sustained the Commissioner on the grounds assigned by him for rejection of the claims, and for the further reason that the subcombination claims did not "combine to produce any useful result."

The Court of Appeals, after observing the operation of petitioner's subcombination without the cutting knife, as shown by moving pictures, concluded that the device was far more useful in its operation than the old method of preparing fruit by hand, and, without deciding the point, added that it was plausible to say "that two distinct inventions are disclosed in the application."

Without further examination of the issues raised by the pleadings, it affirmed the judgment of the district court upon the new and independent ground that a patent on the subcombination should not be granted because of "the dangers of approving a principle which permits a patent monopoly to be extended by granting claims on distinct inventions, which the applicant has no intention of exploiting as distinct inventions." It said: "The record shows that it [the subcombination patent] is to be used to exploit and protect the patent monopoly of another related invention, to-wit: the complete machine. There is no intention to make or license others to make the partial machine because, although it is possible to use it without the cutting knife, it is not designed for such independent use." It thought that the grant of a patent which the patentee has no intention of exploiting as a distinct invention "for the purpose of blocking the development of machines which might be constructed by others," is inconsistent with the constitutional requirement that the patent grant must "promote the Progress of Science and useful Arts."

We are pointed to no factual basis in the record for the assertion that petitioner contemplates either the misuse or non-use of the combination patent, other than that

suggested in the court's opinion that the complete machine does the work better than the subcombination, without the knife, can do it and that there would be no reason to manufacture the partial machine when the complete machine was available. A separate opinion in which all the judges concurred also states that petitioner "admitted, both on argument and in its brief in the present case, that its purpose in filing the disputed claims was to 'protect' the main invention and that it had no intention of manufacturing the subcombination machine." The reference, as agreed by counsel on the argument before us, is to a statement in petitioner's brief in the court below that: "The claims in issue are sought purely to prevent appropriation of the . . . machine by the obvious expedient of eliminating the splitting mechanism." It will be observed that this statement of petitioner is not of a purpose either to suppress the use of the patented invention or to use it or the patent to exploit or enlarge the patent monopoly of the complete machine.

The court below found support for its conclusion in our decisions holding that a patentee may not enlarge the monopoly of his patent by licensing his invention on terms or conditions which tie to its use the use of material or devices which the licensed invention does not embrace, whether they are patented, *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 459; *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, or unpatented, *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.,* 243 U. S. 502; *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451; *Carbice Corporation* v. *American Patents Corp.,* 283 U. S. 27; *Leitch Manufacturing Co.* v. *Barber Co.,* 302 U. S. 458.

It is clear that no such case is presented here. We find nothing in the statement quoted from petitioner's brief in the court below or in the record to indicate that petitioner proposes to make any such use of the patent which

it now seeks, either by the method of licensing it or otherwise. The statement expresses only a purpose to prevent appropriation of the complete machine by the appropriation of a part of it embodied in the subcombination for which the patent is asked. There is nothing to suggest any purpose or reason for a purpose to enlarge the monopoly either of the subcombination or of the complete machine by tying together their uses. Control of a part could not be used as a means of enlarging an already acquired control of the whole. And, obviously, licensing the subcombination, which is less useful than the whole, would not, in any circumstances disclosed by the record, be a practical means of enlarging the use of the whole. Failure to acquire control of the whole would be a legitimate reason for wishing to acquire and retain control of a part, if it involves a patentable invention. And we think it plainly is legitimate to use a patent on the subcombination as a means of preventing appropriation by others of petitioner's more important complete invention which he is using, where there is absent, as there is here, any purpose to enlarge the monopoly of either invention.

A patent on the combination embodied in the complete machine, without the allowance of the subcombination claims, would not, as the court below thought, prevent the free use of the subcombination. *Corn-Planter Patent,* 23 Wall. 181, 224; *Schumacher* v. *Cornell,* 96 U. S. 549, 554; *Rowell* v. *Lindsay,* 113 U. S. 97, 101; *Mercoid Corp.* v. *Mid-Continent Co.,* 320 U. S. 661, 668. Hence denial of a patent on the subcombination would deprive the inventor of the benefit of the exclusive right to use the subcombination in the ways specified by the patent laws. It would also leave the public free to use, and thus to appropriate a part, however important, of the inventor's complete machine, even though patented.

If, as we must assume, petitioner has two inventions, both of which are useful and one of which includes the other in its entirety, it is evident that the value of the former would be greatly impaired if the subcombination invention could be freely used by others. See *Deering* v. *Winona Harvester Works,* 155 U. S. 286, 302. But such appropriation or impairment of the value of the full combination could be achieved only by appropriation of the unpatented subcombination which is by hypothesis also a useful invention, entitled to claim the benefit and protection of the patent laws.

The statutes permit, and it is the settled practice of the Patent Office, many times sustained by this Court, to allow, claims to a combination and also its subcombinations. *Philadelphia, W. & B. R. Co.* v. *Dubois,* 12 Wall. 47, 60; *Deering* v. *Winona Harvester Works, supra; Leeds & Catlin Co.* v. *Victor Talking Machine Co.,* 213 U. S. 301, 318; *Altoona Theatres* v. *Tri-Ergon Corp.,* 294 U. S. 477, 487; *Mercoid Corp.* v. *Mid-Continent Co., supra,* 667. The question then is whether, without more, the use of the subcombination patent to prevent appropriation of the complete machine so infringes any provisions or principles of the patent laws, or is so contrary to principles governing the award of equitable relief, as to permit the court to refuse the judgment, which the statute authorizes, directing that the patent issue.

In answering it the court below assumed that such purpose to protect the whole invention was to be achieved by complete suppression of the use of the subcombination invention and that the suppression for the protection of the complete machine would invalidate the patent because it would be contrary to the constitutional purpose and to the spirit if not the letter of the patent laws. We think both assumptions are unwarranted. Section 4886 of the Revised Statutes authorizes "any person who has in-

vented . . . any new and useful . . . machine" to "obtain a patent." The patent grant is not of a right to the patentee to use the invention, for that he already possesses. It is a grant of the right to exclude others from using it. As the statute, R. S. § 4884, provides, the grant is of the "exclusive right to make, use, and vend" the invention, and this includes the exclusive right to license others to make, use and vend it. By the very terms of the statute the grant is nothing more than a means of preventing others, except under license from the patentee, from appropriating his invention.

It by no means follows that such a grant is an inconsistent or inappropriate exercise of the constitutional authority of Congress "to promote the Progress of Science and useful Arts" by securing to inventors "the exclusive Right to their . . . Discoveries." Congress, in the choice of means of promoting the useful arts by patent grants, could have provided that the grant should be conditioned upon the use of the patented invention, as in fact it did provide by the Act of 1832 (4 Stat. 577) authorizing the issue of patents to aliens conditioned upon the use of the invention, which provision was later repealed (5 Stat. 117, 125). But Congress was aware that an unpatented invention could be suppressed and the public thus deprived of all knowledge or benefit of it. It could have concluded that the useful arts would be best promoted by compliance with the conditions of the statutes which it did enact, which require that patents be granted only for a limited term upon an application fully disclosing the invention and the manner of making and using it. It thus gave to the inventor limited opportunity to gather material rewards for his invention and secured to the public the benefits of full knowledge of the invention and the right to use it upon the expiration of the patent.

This Court has consistently held that failure of the patentee to make use of a patented invention does not affect

the validity of the patent. *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405; *Crown Die & Tool Co.* v. *Nye Tool Works*, 261 U. S. 24, 34; *Woodbridge* v. *United States*, 263 U. S. 50, 55; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 127; *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 433. No question of non-use was involved in *Ethyl Gasoline Corp.* v. *United States*, *supra*, 459, on which the court below relied, and it lends no support to the contention that a patentee may not rightly use his patent as a protection against misappropriation of his invention, even though it is not used. There it was held only that the monopoly of a patent afforded no defense for violations of the Sherman Act which the patentee had effected by using his patent to enlarge the patent monopoly beyond the grant and as a means of increasing the use of an independent patented invention.

Congress has frequently been asked to change the policy of the statutes as interpreted by this Court by imposing a forfeiture [1] or providing for compulsory licensing [2] if the patent is not used within a specified time, but has not done so.

We have no occasion to consider here whether a better rule governing the grant of patents could be devised than that prescribed by Congress, as this Court has interpreted it; or whether the courts on equitable principles should decline to enjoin patent infringements or decline to compel the issue of a patent if and when it appears that the patentee or inventor intends to make no use of the invention. The record neither calls upon nor permits us to decide any of these questions, for it fails to establish that petitioner has any such intention. Petitioner's intended use of the patent to prevent others from appropriating it and by that means from appropriating an essential part of

[1] See *Hartford-Empire Co.* v. *United States*, *supra*, 433, n. 26.

[2] See *Hartford-Empire Co.* v. *United States*, *supra*, n. 27.

his complete machine is in no way inconsistent with petitioner's making other permissible uses of the subcombination patent. In fact, he does use the subcombination as a part of his completed machine and proposes to continue to use it. Execution of his declared purpose to prevent appropriation of either of his inventions, whether used separately or together, would not prevent his licensing others to make, use and vend the subcombination, on terms which would adequately protect the value of the monopoly of both his inventions to which he is entitled by the patent laws. And we cannot say that others, who could not secure a license to use the complete machine, would not find it profitable to secure, or that petitioner would not find it profitable to grant, licenses to use the subcombination which the court below has found to be a useful device which has advanced the art.

The record establishes no intention by petitioner not to use his invention, and no proposed use of it disclosed or suggested by the record affords any basis for withholding the grant of the patent. The judgment below must therefore be reversed, and the cause remanded to the Court of Appeals for further proceedings in conformity to this opinion to enable it to consider and decide the issues raised by the pleadings. See *Bates* v. *United States,* 323 U. S. 15, 17 and cases cited.

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE MURPHY concur, dissenting.

The right of suppression of a patent came into the law over a century after the first patent act was passed. In 1886 Judge Blodgett had ruled that a patentee "is bound either to use the patent himself or allow others to use it on reasonable or equitable terms." *Hoe* v. *Knap,* 27 F. 204, 212. In 1896 that rule was repudiated by the Circuit

Court of Appeals for the Sixth Circuit in *Heaton-Peninsular Button-Fastener Co.* v. *Eureka Specialty Co.*, 77 F. 288, 295, where the court stated that a patentee's "title is exclusive, and so clearly within the constitutional provisions in respect of private property that he is neither bound to use his discovery himself, nor permit others to use it." That theory was adopted by this Court in *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405, decided in 1908. That was an infringement suit. One defense was that the patentee had suppressed the patent. The Court held, Mr. Justice Harlan dissenting, that suppression of the patent was no defense; that the patentee's "right can only retain its attribute of exclusiveness by a prevention of its violation." *Id.*, p. 430.

I think it is time to be rid of that rule. It is inconsistent with the Constitution and the patent legislation which Congress has enacted.

Article I, § 8 of the Constitution grants Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Of the various enumerated powers it is the only one which states the purpose of the authority granted Congress. "The Congress is given no general power to issue letters patent or to reward inventors as it will. An experience with grants of monopoly in England was fresh in the minds of the Fathers; the lesson had been underlined in recent differences with the Crown." Hamilton, Patents and Free Enterprise (1941), p. 152, Temporary National Economic Committee, Monograph No. 31, 76th Cong., 3d Sess. The purpose "to promote the progress of science and useful arts" accordingly provides the standards for the exercise of the power and sets the limits beyond which it may not go. That purpose also provides

the guide for the interpretation of patent laws enacted pursuant to that power.

It is a mistake therefore to conceive of a patent as but another form of private property. The patent is a privilege "conditioned by a public purpose." *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661, 666. The public purpose is "to promote the progress of science and useful arts." The exclusive right of the inventor is but the means to that end. That was early recognized by this Court. See *Pennock* v. *Dialogue*, 2 Pet. 1, 19; *Kendall* v. *Winsor*, 21 How. 322, 327–328; *Seymour* v. *Osborne*, 11 Wall. 516, 533–534. But the *Paper Bag* case marked a radical departure from that theory. It treated the "exclusive" right of the inventor as something akin to an "absolute" right. It subordinated the public purpose of the grant to the self-interest of the patentee.

The result is that suppression of patents has become commonplace. Patents are multiplied to protect an economic barony or empire, not to put new discoveries to use for the common good.[1] "It is common practice to make an invention and to secure a patent to block off a competitor's progress. By studying his ware and developing an improvement upon it, a concern may 'fence in' its rival; by a series of such moves, it may pin the trade enemy within a technology which rapidly becomes obsolete. As often as not such maneuvers retard, rather than promote, the progress of the useful arts. Invariably their effect is to enlarge and to prolong personal privilege within the public domain." Hamilton, *op. cit., supra*, p. 161. One patent is used merely to protect another. The use of a new patent is suppressed so as to preclude experimentation which

[1] For illustrations see Investigation of Concentration of Economic Power, Hearings, Temporary National Economic Committee, Pt. 2 (1939), pp. 345, 776; Hamilton, *op. cit., supra*, pp. 46–47, 59.

might result in further invention by competitors.[2] A whole technology is blocked off. The result is a clog to our economic machine and a barrier to an economy of abundance.

It is difficult to see how that use of patents can be reconciled with the purpose of the Constitution "to promote the progress of science and the useful arts." Can the suppression of patents which arrests the progress of technology be said to promote that progress? It is likewise difficult to see how suppression of patents can be reconciled with the provision of the statute which authorizes a grant of the "exclusive right to make, use, and vend the invention or discovery." Rev. Stat. § 4884, 35 U. S. C. § 40. How may the words "to make, use, and vend" be read to mean "not to make, not to use, and not to vend"? Take the case of an invention or discovery which unlocks the doors of science and reveals the secrets of a dread disease. Is it possible that a patentee could be permitted to suppress that invention for seventeen years (the term of the letters patent) and withhold from humanity the benefits of the cure? But there is no difference in principle between that case and any case where a patent is suppressed because of some immediate advantage to the patentee.

I think it is time to return to the earlier, and I think the true, philosophy of the patent system. We should not pass on to Congress the duty to remove the private perquisites which we have engrafted on the patent laws. This Court

[2] The vice is the same as the practice, consistently condemned by this Court, of writing into the claims broad, general specifications. As stated by Mr. Justice Bradley in *Carlton* v. *Bokee*, 17 Wall. 463, 471–472, "We think it proper to reiterate our disapprobation of these ingenious attempts to expand a simple invention of a distinct device into an all-embracing claim, calculated by its wide generalizations and ambiguous language to discourage further invention in the same department of industry . . ."

was responsible for their creation. This Court should take the responsibility for their removal. I would adopt the view of *Hoe* v. *Knap, supra.* In a case like the present (*Butterworth* v. *Hoe,* 112 U. S. 50, 61), as in infringement suits (*Morton Salt Co.* v. *Suppiger Co.,* 314 U. S. 488, 492–494), the Court sits as a court of equity. It should withhold its aid from a patentee who has employed or plans to employ the patent not to exploit the invention but to suppress it in order to protect another patent or otherwise.[3] Cf. *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 459. If that purpose were clear, a patent should not issue in the first instance. If it has been issued and not cancelled and the patent has been suppressed, any one should be permitted to use it at least on payment of reasonable royalties. In that way the constitutional objective will be more nearly realized—the product of the inventive genius of the human mind will be put to work in the economy.

MR. JUSTICE RUTLEDGE, dissenting.

I would affirm the judgment. But I do not reach the interesting and important questions debated by the Court's opinion and my dissenting brethren. They are of such a character that, in my opinion, they should not be determined in the absence of a record presenting facts and issues making this necessary. In this case the facts do not so clearly present the issues of "fencing" and "blocking" that decision upon them is required or appropriate.

Those issues were not raised or considered until the case reached the Court of Appeals. Evidence concerning intent to suppress was not received in the District Court and

[3] These situations are to be distinguished from the case of the inventor who though he has an expectation of exploiting the patent has not yet arranged the necessary financing, or, for other reasons, has not yet been able to go into production.

petitioner is entitled to its day in court upon that question, unless it has conceded it. The record, as this Court's opinion indicates, is not clear that the concession has been made with the effect of admitting that petitioner had no intention to exploit the patent. If, as the trial court found, the machine without the splitting knife would not "produce any useful result," this fact together with the assertion of the claims relating to the full combination, or with it and the concessions apparently made in the Court of Appeals, might be sufficient to sustain that court's conclusion that the only purpose of the alleged invention was to "fence" or "block." But the Court of Appeals expressly rejected the trial court's finding in this respect; and a showing of motion pictures here, such as took place in the Court of Appeals, appeared to demonstrate conclusively that the machine not only works without the cutting knife, but produces a highly useful result if the pears are split before being placed in the machine for bobbing, peeling and coring. Whatever foundation might have been found, therefore, to support the conclusion of intent to fence or block, in the machine's lack of capacity to produce any useful result, disappears from the case.

The record, however, discloses another ground which was considered in the Patent Office and the District Court, wholly sufficient to dispose of the case and requiring affirmance of the judgment. This was that the claims in issue are too broad to cover the invention. No one of the claims specifies or indicates that the pears must be presplit in order for the invention to be used or to produce a useful result. With commendable candor, counsel conceded this in the argument here, and indeed the claims on their face require the concession. Patents are not to be granted upon claims which do not accurately describe the invention and all of its essential features. These claims are stated in language broad enough to include whole

pears. Admittedly the machine will not work, without the knife, as to them. In my judgment therefore the claims are too broad. The Patent Office and the District Court so found. The question is open and was presented in the Court of Appeals and here. Accordingly I would affirm the judgment.

UNITED STATES *v.* COMMODORE PARK, INC.

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

No. 495. Argued February 9, 1945.—Decided March 26, 1945.

1. An owner of land in the bed of a navigable stream between high and low water mark, though his title is recognized by the State, is not entitled to compensation from the United States for a decrease in the value of the land resulting from operations by the United States for the improvement of navigation. P. 390.
2. A riparian owner whose fast lands were not invaded is not entitled to compensation from the United States for a decrease, resulting from operations by the United States for the improvement of navigation, in such value as his lands may have had by reason of their proximity to navigable waters. P. 390.
3. A project pursuant to which a navigable water was dredged and the dredged material was deposited in a connecting navigable water, though originated for the improvement of shore facilities and though navigation of the connecting water was thereby blocked, was an integrated project which bore a substantial relation to commerce or navigation, and the rule of governmental non-liability was applicable. P. 391.
4. The constitutional power of the federal government to regulate commerce may be exercised to block navigation at one place in order to aid it at another. P. 393.

143 F. 2d 720, reversed.

CERTIORARI, 323 U. S. 698, to review the affirmance of a judgment for the plaintiff in a suit against the United States under the Tucker Act.

Solicitor General Fahy, with whom *Messrs. J. Edward Williams, Chester T. Lane* and *Vernon L. Wilkinson* were on the brief, for the United States.

Mr. W. R. Ashburn for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The United States dredged a tidewater navigable bay and deposited the dredged materials in a navigable arm of the bay called Mason Creek, thereby destroying its navigability, and impairing certain benefits alleged to inhere in the proximity of the land to a navigable tidewater creek. The broad question presented is whether the Fifth Amendment requires the government to compensate an owner of residential property contiguous to the creek, whose fast lands, though not physically invaded, were decreased in market value.

Commodore Park, Inc., an owner of lands on the creek about a mile away from the filled-in segment, brought this suit in the District Court under the Tucker Act, 24 Stat. 505, 28 U. S. C. 41 (20) for damages resulting from a "taking" by the government of its property for public use, in connection with a naval facilities expansion program. As the case comes to us,[1] the material findings,

[1] In the District Court respondent also claimed that mud and silt had been cast on his fast lands. This part of the claim was denied by the District Court, and we need not consider it. With reference to it the Circuit Court of Appeals said: "This relief dredging gave rise to the additional claim on the part of the plaintiff that mud and silt had been deposited on its land, not only between high and low water mark but also above high water mark. But the District Judge disallowed this part of the claim as he found that no material damage had been suffered in excess of the benefit which the plaintiff had derived from the partial filling of low marshes, inlets and coves on its property. No appeal was taken by the plaintiff." *United States* v. *Commodore Park*, 143 F. 2d 720, 722.

which we accept, are that the government (1) caused mud and silt to settle on that part of the land in question lying in the bed of what had been a navigable tidewater creek before the project was completed, and (2) destroyed the navigability of the creek, thereby depriving respondent of that part of the market value of its fast land attributable to its proximity and accessibility to a fresh tidewater creek in its natural and navigable state. The government's answer, so far as material to our decision, is that respondent's alleged ownership of the land between high and low water marks and its "riparian rights" of access to the navigable waters both were subordinate to the government's plenary authority over navigable waters of the United States, that its program was effectuated pursuant to that authority, and that consequently there had been no "taking" of "private property" within the meaning of the Fifth Amendment.

The District Court held that the entire project had no substantial relation to navigation or commerce, and found that the market value of the land lying between high and low water marks had been decreased by the mud and silt deposits, and that respondent's fast land had been reduced in value because of the loss of the riparian rights of access for navigation, fishing, boating, and the like. It accordingly rendered judgment for respondent "for the damages it . . . sustained as a result of the taking of its riparian rights and lands . . ." The Circuit Court of Appeals unanimously agreed that the dredging operation was done in furtherance of navigation and commerce, but a majority held that the depositing of the dredged material in the creek was not in aid of navigation, and therefore affirmed the District Court. 143 F. 2d 720. Because it is important that the government's power to engage in projects in aid of navigation and commerce be clearly defined, we granted certiorari, 323 U. S. 698.

A few additional facts drawn from the record will serve to clarify the issues.

In 1940, the respondent owned a residential real estate development in Norfolk, Virginia, located on the east side of Mason Creek, a navigable tidewater which extended inland about four or five miles from the navigable waters of Willoughby Bay. West of Mason Creek, and adjacent to Willoughby Bay, was located the Hampton Roads Naval Operating Base, which maintained a Naval Air Station with shore facilities for seaplanes. It was this station which, under the authority of Congress,[2] the Navy Department enlarged and improved. In order to provide suitable waters for the operation of large seaplanes, the Navy, acting in conjunction with the War Department, 30 Stat. 1121, 1151–1155, dredged Willoughby Bay to a depth of 10 to 15 feet below mean low water. Additional lands, adjacent to the base, were bought or condemned by the government, on both the east and west sides of Mason Creek. The materials dredged from the bay were in part deposited in Mason Creek between the shores of lands owned by the government adjacent to the bay. By this process, the bed of Mason Creek was at that point raised to the level of its shores, thereby becoming incorporated as an integral and useful part of the Naval Operating Base. This fill, reinforced by bulwarks, dykes and retaining walls, cut off the remainder of Mason Creek, along which respondent's land bordered, from any navigable outlet to Willoughby Bay and the sea. It also blocked off the tidal movements which previously had provided an element of freshness in Mason Creek's waters, thereby resulting in a standing and stagnant pool. This condition, at the request of property owners, was later alleviated by digging a channel in the stream's bed, and

[2] 48 Stat. 957; 53 Stat. 590–592; 53 Stat. 757, 772–773.

connecting it with the bay by a culvert, much smaller in area than the original bed. An iron grate, placed where the culvert emptied its waters into the bay, closed it to navigation. We must take it from the findings below that the size and construction of the culvert were inadequate to afford a completely free tidal movement, and that as a result, the waters of Mason Creek became "semi-stagnant," depriving them of the same freshness they had possessed before the work was done.

First. The judgment for respondent involves no physical invasion of its fast lands. Its property was more than a mile from the fill made in Mason Creek. The only land for which compensation was awarded because of mud and silt deposits was that part of the creek's bed between high and low water marks. That Virginia recognizes respondent's title to such land [3] cannot give respondent a right to compensation if its market value is impaired as a result of work done by the United States in the interest of improvement of navigation. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 596–598, set at rest any remaining doubt concerning the dominant power of the government to control and regulate navigable waters in the interest of commerce,[4] without payment of compensation to one who under state law may hold "technical" legal title (as between himself and others than the government) to a part of the navigable stream's bed.

Second. Nor does a riparian owner acquire a unique private right distinct from that held by all others, to have access to and enjoyment of navigable waters and to recover compensation from the government because deprived of that privilege by an authorized governmental

---

[3] *Scott* v. *Doughty*, 124 Va. 358, 97 S. E. 802; *Hite* v. *Town of Luray*, 175 Va. 218, 8 S. E. 2d 369.

[4] *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 60, 62, 68, 72; *Scranton* v. *Wheeler*, 179 U. S. 141, 163.

change in a stream.[5] Respondent's property was always subject to a dominant servitude; it did not have a vested right to have this navigable stream remain fixed and unaltered simply because of the consequent reflected additional market value to adjacent lands. Whatever market value of riparian lands may be attributable to their closeness to navigable waters, does not detract from the government's "absolute" power,[6] in the interests of commerce, to make necessary changes in a stream. In short, as against the demands of commerce, an owner of land adjacent to navigable waters, whose fast lands are left uninvaded, has no private riparian rights of access to the waters to do such things as "fishing and boating and the like," for which rights the government must pay.[7] Riparian rights of access to navigable waters cannot, as against the government's power to control commerce, be bought and sold.

Third. It is argued that the foregoing rule of governmental non-liability is inapplicable to this case. Since the Navy Department originated this plan with a view to improvement of shore facilities, we are asked to hold that neither the dredging in Willoughby Bay nor the deposit of the dredged material in Mason Creek bore any real or substantial relation to commerce or navigation. Such a holding was the basis of the District Court's judgment. The Circuit Court held that the dredging in Willoughby Bay was, but the deposit in Mason Creek was not, related to commerce or navigation. We cannot agree. The "fact that purposes other than navigation will also be served could not invalidate the exercise of the authority con-

---

[5] *Scranton* v. *Wheeler, supra,* 159–160; *Stockton* v. *Baltimore & N. Y. R. Co.,* 32 F. 9, 20.

[6] *United States* v. *River Rouge Co.,* 269 U. S. 411, 419; *Gilman* v. *Philadelphia,* 3 Wall. 713, 724–5.

[7] *Gibson* v. *United States,* 166 U. S. 269; *Scranton* v. *Wheeler, supra.*

ferred, even if those other purposes would not alone have justified an exercise of Congressional power." *Arizona* v. *California*, 283 U. S. 423, 456.

All the waters affected were navigable. The Constitution entrusted to Congress the responsibility of determining what obstructions may, or may not, be placed in such waters.[8] This power Congress may exercise itself or through its duly authorized agents.[9] Here, the War Department, selected by Congress to pass upon when, and to what extent, navigable waters may be altered or obstructed, permitted, and actually supervised, the program accomplished. Even though cases might arise in which the courts would look behind the judgment of this specially authorized agency,[10] this is not such a case.

While this project touched two separate, although closely related, bodies of navigable waters, and looked to improvement of shore as well as water facilities, the entire program as to the waters was designed to achieve one closely integrated unit. That there were two bodies of navigable waters to which the one program related, does not detract from Congressional power as to either, for its powers are broad enough to justify one unified program for the connected body of waters to the end that commerce in general may be fostered.[11]

Thus, having power under the Commerce Clause to obstruct navigation by depositing the dredged soil in Wil-

---

[8] *United States* v. *Chandler-Dunbar Co., supra*, 62–67; *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421.

[9] *Union Bridge Co.* v. *United States*, 204 U. S. 364, 377–388; *Greenleaf-Johnson Lumber Co.* v. *Garrison*, 237 U. S. 251, 268; *South Carolina* v. *Georgia*, 93 U. S. 4, 13.

[10] See *Greenleaf-Johnson Lumber Co.* v. *Garrison, supra*, 268; *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 424; *Arizona* v. *California*, 283 U. S. 423, 456.

[11] *United States* v. *Appalachian Power Co., supra*, 426–437; *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 527–528.

loughby Bay, the government was likewise authorized to deposit in Mason Creek for the same purpose. There is power to block navigation at one place to foster it at another.[12] Whether this blocking be done by altering the stream's course, by lighthouses, jetties, piers, or a dam made of dredged material, the government's power is the same and in the instant case is derived from the same source—its authority to regulate commerce. Since the judgment awarded rested entirely upon the conclusion that respondent's property had been taken by "filling and closing Mason Creek," and since all of respondent's "riparian rights" were subordinate to the government's power to close the stream, the judgment is

Reversed.

MR. JUSTICE ROBERTS is of the opinion that the judgment should be affirmed for the reasons stated in the opinion of the Circuit Court of Appeals, 143 F. 2d 721.

ESTATE OF PUTNAM; GUARANTY TRUST CO., EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 534. Argued February 2, 1945.—Decided March 26, 1945.

1. Whether at the date of the death of a taxpayer a dividend has "accrued," within the meaning of § 42 of the Revenue Act of 1938, so as to be includible in computing income of the taxpayer, is a question of federal law. P. 395.
2. A dividend which was declared prior to the date of the death of a taxpayer (assumed to be on the cash receipts basis), but which by the terms of the declaration was payable to stockholders of record on a date subsequent to his death, was not at the date of the death

---

[12] *South Carolina* v. *Georgia, supra; Scranton* v. *Wheeler, supra; Arizona* v. *California, supra,* 451–452.

of the taxpayer "accrued," within the meaning of § 42 of the Revenue Act of 1938, and was not includible in computing net income of the taxpayer. P. 398.

144 F. 2d 756, reversed.

CERTIORARI, 323 U. S. 702, to review the reversal of two orders of the Board of Tax Appeals (45 B. T. A. 517) involving the income tax liability of a taxpayer and of his estate.

Mr. Wm. Dwight Whitney, with whom *Messrs. Robert T. Swaine, Roswell Magill* and *George G. Tyler* were on the brief, for petitioner.

Miss Helen R. Carloss, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Robert N. Anderson, Walter J. Cummings, Jr.* and *Miss Helen Goodner* were on the brief, for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

This case brings here for review a judgment which applies Section 42, Revenue Act of 1938,[1] so as to "accrue" corporate dividends on the date of their declaration rather than the later record or payment dates. The result is that the dividends are taxable as income to a decedent taxpayer instead of to his estate.

Certiorari was granted [2] because of a conflict in conclu-

[1] 52 Stat. 447, 473, § 42:

"The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period."

[2] 323 U. S. 702. Judicial Code, § 240 (a), as amended.

sion between *Tar Products Corp.* v. *Commissioner,* 130 F. 2d 866, and this case as to the date of accrual of corporate dividends. The resolution of this conflict is complicated by further conflicts between the decision below and those in other circuits as to whether the governing rule is to be drawn from federal or state law. *Helvering* v. *McGlue's Estate,* 119 F. 2d 167, 171; *Commissioner* v. *Cohen,* 121 F. 2d 348, 349.

The decedent, Henry W. Putnam, died on March 30, 1938. Prior to his death several corporations in which he owned stock declared dividends which by the resolutions were payable and were paid to stockholders of record on dates which were subsequent to his death. Each of these dividends, aggregating in all $24,051.75, was held by the Commissioner to constitute income to the decedent under the provisions of § 42. The Board of Tax Appeals decided that the time of accrual depends upon the varying state decisions as to when a corporate debt arises upon a declaration of dividend with a provision for its payment to stockholders of record on some future date. 45 B. T. A. 517. This resulted in an agreement in part with the Commissioner's determination.

The Circuit Court of Appeals was of the view that federal law controlled the disposition of the controversy and that the dividend accrued on its declaration. *Commissioner* v. *Guaranty Trust Co.,* 144 F. 2d 756.

We think the federal law controls. A federal revenue act applicable throughout the nation fixes liability on the decedent taxpayer under § 42 if the dividend is "accrued." The meaning of that word in this section should be uniform unless Congress has shown an intention to permit its meaning to be varied by state law. *Burnet* v. *Harmel,* 287 U. S. 103, 110; *Palmer* v. *Bender,* 287 U. S. 551, 555; *United States* v. *Pelzer,* 312 U. S. 399, 402–3. Section 42 lays down the test of accrual for the taxation of a decedent's income and the definition of the meaning and extent

of that test is a federal responsibility. The present problem is closely akin to that resolved in *Lyeth* v. *Hoey*, 305 U. S. 188, 193. In that case an heir received a sum in settlement of litigation over a will. Its taxability as income under the federal statute depended upon the meaning of the statutory exemption "acquired by inheritance." The law of the testator's domicile held sums paid as will compromises were not inheritances. Acting on the principle that, in the interest of uniformity, exemptions under federal statutes should be determined by federal courts, we reached a contrary federal rule. The same principle leads to our conclusion in this case.[3]

We recently examined the Congressional purpose in the enactment of § 42. *Helvering* v. *Enright*, 312 U. S. 636. That purpose was to cover into income the "accruals" theretofore unreported as income of a decedent

---

[3] The Government calls attention to the conflict in state decisions as to the event which vests title according to state law to a corporate dividend. Some specify the declaration and some compliance with the requirement of being a stockholder of record on a subsequent date.

Declaration date: *Ford* v. *Snook*, 205 App. Div. 194, 196, 199 N. Y. S. 630, aff'd 240 N. Y. 624, 148 N. E. 732; *Beattie* v. *Gedney*, 99 N. J. Eq. 207, 132 A. 652; *Western Securities Co.* v. *Silver King Mining Co.*, 57 Utah 88, 113, 192 P. 664; 27 Georgetown L. J. 74; 38 Harv. L. Rev. 245.

Record date: *Smith* v. *Taecker*, 133 Cal. App. 351, 24 P. 2d 182; *Richter & Co.* v. *Light*, 97 Conn. 364, 116 A. 600; *Ford* v. *Ford Manufacturing Co.*, 222 Ill. App. 76, 84; *Nutter* v. *Andrews*, 246 Mass. 224, 142 N. E. 67.

Accrual under § 42, however, is not dependent upon these varying concepts of when dividends vest. Despite possible difference between state and federal income taxation of dividend items, the presumed Congressional purpose to have the national revenue acts uniformly administered leads to a federal interpretation of accruals under § 42.

Such inconsistency would not occur if the federal accrual date under § 42 is held eventually to be the same for taxpayers on the accrued and cash basis. Cf. *Avery* v. *Commissioner*, 292 U. S. 210; *Tar Products Corp.* v. *Commissioner*, 130 F. 2d 866.

taxpayer who reported on a cash basis. By "accrual" the income so accrued became subject to income tax as decedent's income. These "accruals" had theretofore escaped taxation as the income of decedent, because no cash was received during decedent's life. Moreover, such payments were held not to be the income of decedent's estate on the theory that the "accrual" was a part of the corpus of the estate at death and therefore the estate's subsequent receipt of the "accruals" as cash was not income to the estate. *Helvering* v. *Enright, supra,* p. 639. In the instant case there is no avoidance of income taxes such as § 42 was designed to prevent. If the dividend does not "accrue" to decedent on the date of declaration so as to be taxable as income to him, it will appear as an item of income in the income tax return of the estate or of the stockholder who owns the stock on the record date.[4] Tax-

[4] Respondent argues for the judgment below on the ground that the dividends could not properly be treated as income of the estate when received, since the receipt of the dividends in cash by the estate was merely a conversion into money of one of the assets of the estate, citing *Vanderbilt* v. *Commissioner,* 11 B. T. A. 291; *Nichols* v. *United States,* 64 Ct. Cls. 241; 80 Treas. Reg., Art. 13. The truth or error of this position depends upon whether those dividends are income, by virtue of the accrual provision of § 42, to the decedent. If they are income to the decedent, they cannot be income also to the estate. If they are not income to the decedent, they are income to the estate. The Vanderbilt and Nichols cases were apparently decided on the theory that the items in controversy constituted income to the decedent and assets of the estate for estate tax purposes and therefore could not later be income to the estate. The regulation does not purport to direct the return as corpus of the estate of dividends declared but with a record date subsequent to the stockholder's death. Neither do the present regulations. 105 Treas. Reg., § 81.13; cf. *United States* v. *Phellis,* 257 U. S. 156, 171.

Congress has modified § 42 by an amendment which is inapplicable to this case. Revenue Act of 1942, § 134, 56 Stat. 798, 830; H. Rep. No. 2333, 77th Cong., 2d Sess., § 125, p. 83; S. Rep. 1631, 77th Cong., 2d Sess., § 135, p. 100.

wise, it may be important upon whom the tax falls as the sum assessed may vary according to the tax bracket of the taxpayer. This result, however, is apart from the purpose of Congress in enacting § 42 and is not significant in the interpretation of the section.[5]

We assume that decedent was a taxpayer on the cash receipts basis. Compare 144 F. 2d 756, 757.[6] Our inquiry leads us only to a decision as to whether a dividend accrues as income on its declaration with a subsequent record date, not to whether it accrues on its record date or its payment date. A declaration of a dividend to stockholders of record on the date of the resolution but payable in the future is not involved. This Court has suggested

---

[5] A reference to dividends appears in the legislative history but casts no light on the problem of the event which accrues a corporate dividend. See H. R. 7835, 73d Cong., 2d Sess., printed with Senate amendments, March 28 (Calendar day, April 13), 1934; I. R. B., C. B. 1939–1 (Part 2), p. 629, Amendment 27; § 43, Revenue Act of 1934, 48 Stat. 694; § 43, Revenue Act of 1938, 52 Stat. 473.

[6] Therefore the construction of accrued according to the taxpayer's method of accounting, which is directed in § 48 (c), 52 Stat. 476, is not of use. *Helvering* v. *Enright*, 312 U. S. 636, 644. *Avery* v. *Commissioner*, 292 U. S. 210, holds that dividends of a living taxpayer on the cash basis would not become his income on mere declaration but only when "received," that is, unqualifiedly made subject to the stockholder's demand as by check. "Received" in the section there under consideration was the word designating taxability as income of sums actually or constructively collected, including dividends, as it is in the section of the statute here involved. This rule has been continuously applied.

See *Mason* v. *Routzahn*, 275 U. S. 175, 178; 65 Treas. Reg., Art. 1541; 101 Treas. Reg., Art. 42–3; 111 Treas. Reg., § 29.42–3; 53 Harv. L. Rev. 853; 2 Mertens, Federal Income Taxation, 17.

See *Tar Products Corp.* v. *Commissioner*, 130 F. 2d 866, for an instance of the application of this rule to a taxpayer on the accrual basis. Compare 94 Treas. Reg., Art. 115–1 and 22 (a) (1) for appraisal of position of those regulations as to date when dividends are received by a taxpayer. *American Light & Traction Co.* v. *Commissioner*, 3 T. C. 1048.

that a tax be deemed to accrue as a charge against a taxpayer when events "occur which fix the amount of the tax and determine the liability of the taxpayer to pay it." *United States* v. *Anderson,* 269 U. S. 422, 441. It has said also that accrual imports "that it is the *right* to receive and not the actual receipt that determines the inclusion of the amount in gross income." *Spring City Co.* v. *Commissioner,* 292 U. S. 182, 184. The declaration of the dividends here in question fixes their amount but does not determine the distributee. He cannot be known with certainty until the record date. Nor does the stockholder have the right to receive payment upon the declaration. The words of the corporate resolution which arranges for the payment from the stock record of a certain day determine the earliest time for possible receipt.

Under the income tax acts no stockholder has a separate and divisible taxable interest in the assets of a corporation even though those assets have been increased by earnings. Earnings, before declaration of dividends, while increasing the value of his stock, have never been treated as an event to mark taxable income to the stockholder. Mere declaration of a dividend does not alter the stockholder's interest in the corporate assets. If no other factors were involved in value except earnings and dividends, the value of the stock would advance *pari passu* with earnings and the declaration of a dividend with a subsequent record date for payment would not affect the stock's value. *United States* v. *Phellis,* 257 U. S. 156, 171. See Schabacker, Stock Market, 353. The stockholder can acquire no interest in a dividend, amounting to an accrual under § 42, before the amount of the dividend and the distributee is determined.

In applying to the present dividends our description of accruals under § 42 as "assets of decedents, earned during their life and unreported as income, which on a cash re-

turn, would appear in the estate returns,"[7] the Court of Appeals may have treated the words "earned during" the decedent's life as though they included, prior to a declaration of dividends, the proportionate part of corporate earnings attributable to decedent's stock. If so, it is a more extended meaning than was intended, since stock does not earn an identifiable separate taxable share of corporate profits for its owner before the corporation makes those profits available to the stockholder. It is not the earnings of a corporation but the separation of those earnings by a completed dividend which assigns a part of those earnings to a stockholder. The price a stockholder would receive on a stock sale after declaration and before the record date would reflect corporate earnings but would not reflect the declaration or non-declaration of a dividend. As the same value would be in the stock with or without the declaration, the price would be the same. Only an ex-dividend sale would affect price.

For the earnings of a corporation to pass into the earnings of its stockholder, so as to be subject to accrual to the stockholder under § 42, something more than a declaration of dividends with a subsequent record date to identify the distributee is required. Such a declaration leaves the identity of the recipient at large. Such uncertainty destroys any conception of accrued as involving a right to receive or an obligation to pay, elements which we think are essential for accruals under our decisions.[8]

Reversed.

---

[7] 312 U. S. at 644–45; 144 F. 2d at 758.

[8] This accords with the original holding of the Board of Tax Appeals on this question in *Estate of McGlue*, 41 B. T. A. 1186, 1193. After that case was reversed on the law of New York, *Helvering* v. *McGlue's Estate*, 119 F. 2d 167, the Board followed the Circuit Court decision. *Estate of Ledyard*, 44 B. T. A. 1056, 1065. Recently the Tax Court has held that a taxpayer on the accrual basis should account for a dividend when received. *American Light & Traction Co.* v. *Commissioner*, 3 T. C. 1048.

Syllabus.

MALINSKI ET AL. *v.* NEW YORK.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 367. Argued December 4, 5, 1944.—Decided March 26, 1945.

1. Upon review of a state court judgment affirming convictions of co-defendants Malinski and Rudish on a charge of murder, denial of rights under the due process clause of the Fourteenth Amendment being claimed, the judgment against Malinski is reversed and that against Rudish is affirmed. Pp. 402, 412.
2. The case against the co-defendant Rudish, both as tried and as sustained on appeal, was not dependent on a subsequent confession of Malinski (though assumed to have been coerced); on the record, the questions raised involve matters of state procedure beyond the province of this Court to review; and the judgment against Rudish is therefore affirmed. *Anderson* v. *United States*, 318 U. S. 350, and *Ashcraft* v. *Tennessee*, 322 U. S. 143, distinguished. Pp. 410, 412.

Opinion of DOUGLAS, J., in which BLACK, MURPHY and RUTLEDGE, JJ., join:

3. The question whether there has been a violation of the due process clause of the Fourteenth Amendment by the introduction of an involuntary confession is one upon which this Court must make an independent determination on the undisputed evidence. P. 404.
4. If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant. P. 404.
5. A conviction obtained by use of a coerced confession will be set aside even though the evidence apart from the confession might have been sufficient to sustain the verdict. P. 404.
6. The evidence of the circumstances in which Malinski made the first of several confessions, together with the comments of the prosecutor in his summation to the jury, show that that confession was coerced; and, upon the record, the case must be considered as one in which a coerced confession was used to obtain a conviction. P. 406.
7. The judgment against Malinski, resting in part on a coerced confession, must be reversed. A majority of the Court do not reach the question whether the subsequent confessions were free from the infirmities of the first. P. 410.

292 N. Y. 360, 55 N. E. 2d 353, affirmed in part; reversed in part.

CERTIORARI, 323 U. S. 694, to review the affirmance of convictions of murder.

Messrs. John J. Fitzgerald and *David F. Price,* with whom *Mr. Joseph A. Solovei* was on the brief, for petitioners.

Mr. Solomon A. Klein, with whom *Messrs. Thomas Cradock Hughes* and *Henry J. Walsh* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Malinski and Rudish were convicted along with one Indovino of the murder of Leon Fox, a police officer who, late at night, was escorting a manager of a theatre to a bank depository. The details will be found in 292 N. Y. 360. There were no eye witnesses to the crime who could identify the robbers. Malinski was implicated by various witnesses—by Spielfogel, an old friend and a criminal serving a sentence of thirty to sixty years in Sing Sing; by Malinski's girl friend; by Malinski's brother-in-law. Each testified that Malinski confessed the crime to him or her. The confessions to the girl friend and to the brother-in-law were made a few hours after the crime and were merely that Malinski had shot a cop; but the confession to Spielfogel disclosed in detail the planning and execution of the crime. Malinski denied making these confessions. Yet as the New York Court of Appeals pointed out (292 N. Y. p. 370) those confessions and other evidence of the State were sufficient, if believed, to support the conviction, wholly apart from another confession around which the present controversy turns. But the circumstances under which the latter confession was obtained raised the substantial federal question which prompted us to grant the petition for a writ of certiorari.

I

Malinski was arrested while on his way to work on the morning of Friday, October 23, 1942. The police did not then arraign him but took him to a room in the Bossert Hotel in Brooklyn where he arrived about 8 A. M. He was immediately stripped and kept naked until about 11 A. M. At that time he was allowed to put on his shoes, socks and underwear and was given a blanket in which to wrap himself. He remained that way until about 6 P. M. Malinski claims he was beaten by the police during that period. The police denied this. There was no visible sign of any beating, such as bruises or scars; and Malinski made no complaint to the judge on arraignment nor to the jail authorities where he was later held. Sometime during Friday morning Spielfogel was brought to the hotel. He and Malinski were put alone together in a room sometime that afternoon. Shortly after their conference—apparently around 5:30 P. M. or 6:00 P. M.—Malinski confessed to the police. After it was made Malinski was allowed to dress. Malinski was kept at the hotel that night and the next three days. The record does not show exactly how long and frequent the questioning was after the first confession. But it is clear that Malinski was questioned in the early hours of Saturday, the 24th, and at other times during that day. He was further questioned on Sunday, the 25th, and taken with Spielfogel from the hotel to the scene of the crime where he identified several places which had a relationship to the commission of the crime and where he pointed out how the crime was executed. On Monday, the 26th, he was taken from the hotel to the police garage where he identified the automobile used in the robbery. At about 5:00 P. M. on Monday he was taken to a police station and questioned. On Tuesday morning, October 27th, about 2 A. M. he made a confession

at the police station. That confession was introduced at the trial. Shortly thereafter—about 4:00 A. M.—he was booked and put in a cell and soon arraigned.

The trial court held a preliminary hearing on the voluntary character of the confession of October 27th before allowing it to be introduced in evidence. There is a question in the case whether the confession of October 23rd as well as that of October 27th was submitted to the jury, a question to which we will return. It is sufficient here to note that the trial court charged the jury that a confession should not be considered by them unless they found beyond a reasonable doubt that it was voluntary. And they were told that although the delay in arraignment was not conclusive, they might consider it in passing on the question of voluntariness. The Court of Appeals sustained the judgment of conviction by a divided vote.[1] But the question whether there has been a violation of the due process clause of the Fourteenth Amendment by the introduction of an involuntary confession is one on which we must make an independent determination on the undisputed facts. *Chambers* v. *Florida,* 309 U. S. 227; *Lisenba* v. *California,* 314 U. S. 219; *Ashcraft* v. *Tennessee,* 322 U. S. 143.

If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant. *Ashcraft* v. *Tennessee, supra,* p. 154. And if it is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict. *Lyons* v. *Oklahoma,* 322 U. S. 596, 597.

If the evidence alone is considered, there is serious doubt whether the confession made on the late afternoon of Fri-

[1] The Court of Appeals did not divide on the issue which is before us. The dissenting judges thought (1) that Spielfogel was an accomplice and that the conviction of Rudish was not supported by corroborative evidence; and (2) that the instruction concerning the voluntary character of the confession was not adequate.

day, October 23rd (the first day of Malinski's detention) was admissible under the rule of *Chambers* v. *Florida, Lisenba* v. *California,* and *Ashcraft* v. *Tennessee, supra.* If the confession had been the product of persistent questioning while Malinski stood stripped and naked, we would have a clear case. But it was not. Malinski was stripped when he arrived at the hotel so that he might be examined for bullet wounds.[2] He remained in that condition several hours—much longer than any such physical examination could possibly justify. But it does not appear that he was subjected to more than occasional questioning during that period. No confession was obtained from him at that time. He said he was beaten; but that was disputed. And the assertion has such a dubious claim to veracity that we lay it aside. In any event, he soon had his shoes, socks, and underwear back on and a blanket in which to wrap himself. He complained of that treatment in his testimony. The police justified it with the dubious explanation that it was to make certain that Malinski did not escape. Yet the record does not show any persistent and incessant—let alone gruelling—questioning by the police while Malinski was only partially clothed. There are many gaps in the chronological narrative of what transpired that day. But several circumstances stand out. Malinski was held incommunicado; he was not allowed to see a lawyer, though he asked for one, and he was not allowed to see friends, with one exception.[3] That

[2] While the robbers were escaping, the wounded policeman fired several shots, some of which hit the car in which they made their escape.

[3] The matter was described by the prosecutor in a rather shocking manner:

"They hold men for several days. Are you satisfied with that? They are not going to let him go home, or let him get hold of a smart mouthpiece to preach about his rights and sue out writs. You want a District Attorney in this county that is worth his salt, not a powder-puff District Attorney. When you are trying a case of murder, especially murder of a police officer, you don't go over and give him a

exception was Spielfogel.[4] As we have noted, he and Malinski had a private conference that afternoon. Malinski was told that Spielfogel was there. Malinski asked to see him. Spielfogel's version of what transpired varies from Malinski's. The former says that Malinski told him the police knew so much that Malinski figured he "might as well go out there and tell them the rest." Malinski said that he asked Spielfogel, "What are you doing with me?"; and that Spielfogel replied, "don't let them hit you. You know you didn't do it. Go out and say I told you to tell the truth." Shortly thereafter Malinski made his confession of October 23rd. If that evidence alone is not sufficient to show that that confession was coerced, the comments of the prosecutor place it beyond doubt. For in his summation to the jury he made certain statements which the Court of Appeals said were "indefensible" (292 N. Y. p. 373) and which we think are sufficient to fill in any gaps on the record before us and to establish that this confession was not made voluntarily. He said that Malin-

---

pat on the back and say, 'Do you want anything? Do you want to have your lawyer or your wife or somebody else?' In fact after that they would not even let him see Mr. Math, an assistant in our office; they would not even let him talk to a rabbi. Do you think McNally, 17 years in the Police Department, is going to let this jerk from the East Side tell him his business?"

[4] As the Court of Appeals points out (292 N. Y. p. 375), Spielfogel and Malinski had an agreement that if either went to prison the one who was free would help take care of the other's family. After Spielfogel went to Sing Sing, Malinski contributed for a while to the support of Spielfogel's wife. When Malinski refused to pay any more, Spielfogel unburdened himself to two other convicts, Yellin and Kovner, "but with no intention of acting against Malinski for, curiously enough, testimony is in this record that, after knowledge of what had occurred in the shooting of Fox reached the police department and a lieutenant of police was sent to Sing Sing prison to interview Spielfogel, he refused to talk to the police officer. Even after that police officer had told him all that Spielfogel must have told to Yellin and Kovner he still evinced no interest in helping the police. It was only later that he consented to talk."

ski "was not hard to break"; that "He did not care what he did. He knew the cops were going to break him down." And he added:

"Why this talk about being undressed? Of course, they had a right to undress him to look for bullet scars, and keep the clothes off him. That was quite proper police procedure. That is some more psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get a shellacking."

If we take the prosecutor at his word, the confession of October 23rd was the product of fear—one on which we could not permit a person to stand convicted for a crime.

But it is said that this coerced confession was not introduced in evidence, that it was submitted to the jury only insofar as it threw light on the voluntary character of the subsequent confessions, and that under the rule of *Lyons* v. *Oklahoma, supra,* p. 601, the adequacy of that instruction to the jury is solely for the state courts to determine. We do not think, however, that *Lyons* v. *Oklahoma, supra,* fits this case.

The confession of October 23rd was oral. Its details were not put in evidence. But Spielfogel, a witness for the prosecution, adverted to it in his testimony, saying that Malinski told "everything" at that time. A police officer testified on behalf of the prosecution to the same effect. The prosecutor referred to it in his summation in language which we have already quoted. He added that "Six o'clock in the evening after he (Malinski) was picked up, he told the whole thing." When the confession of October 27th (which was a detailed confession taken down by a stenographer) was offered in evidence, a preliminary hearing was had. That hearing covered the voluntary character of the October 23rd confession as well as the October 27th confession. The trial court in its charge to the jury reviewed the events leading up to the confession

of October 23rd—the prosecutor's version, Malinski's version. It then referred to the delay in arraigning Malinski, stating that the police claimed they were willing to arraign Malinski on the day of his arrest but that Malinski preferred to stay at the hotel with Spielfogel. It then charged:

"Be that as it may, I charge you that it was the duty of the police to arraign the defendant before the nearest Magistrate without unnecessary delay, and, further, that if a police officer failed or refused to perform such duty, he is guilty of a misdemeanor.

"But, gentlemen, you will bear in mind that the police department is not on trial in this case. This testimony was adduced solely on the question as to whether or not the alleged confession later made was the result of the coercion, either direct or implied, which is prohibited by the statute, and which invalidates a confession if made. If you should find that the arraignment of the defendant was delayed, you may consider that on the question of the voluntariness of any confession made by Malinsky, including the one made in the early hours of October 27th at the Bath Beach station house.

"However, I am charging you that the failure to arraign, in and of itself, is not conclusive against the People, and does not in and of itself, standing alone, destroy the validity of the confession. Is that clear?

"On the question whether Malinski was coerced, you may consider that he made no complaint to the Magistrate when arraigned and did not seek the services of the jail physician. That evidence, if true, is not, however, conclusive against Malinski, but may be considered by the jury on the issue of the voluntariness of the confession."

Malinski made no objections to these references to his confession of October 23rd. And while he asked for a mistrial because of the prosecutor's comments, he made on this phase of the case no requests to charge which were

refused. The Court of Appeals, however, did not hold that Malinski was precluded from objecting[5] to the use made at the trial of his confession of October 23rd. It considered his objection that "it was error for the court to submit to the jury the confession made by Malinski orally on October 23rd" as well as the other three confessions made to the police. 292 N. Y. p. 370. And it made plain, when it held that Malinski's "confession" should not have been excluded as a matter of law, that it meant "not only the confession made orally to a police officer on the Friday night of the arrest but also the two automobile trips on Sunday and Monday, one to the police garage to permit Malinski to identify the automobile used in the crime and the other to Coney Island to revisit a restaurant and the scene of the crime, and the confession to the District Attorney which was taken stenographically in the early morning of Tuesday, October 27th." 292 N. Y. pp. 373–374. Its ruling was that none of the four confessions was involuntary as a matter of law. Thus as we read the opinion of the Court of Appeals, it reviewed the judgment of conviction on the basis that all four confessions to the police had been submitted to the jury. We find no indication that it construed the record to be like the one in *Lyons* v. *Oklahoma, supra,* where consideration of the first coerced confession was strictly limited to the voluntary character of subsequent confessions. Nor do we think that the record before us can be fairly construed in that manner.

There were repeated references at the trial to the confession of October 23rd. The prosecutor made emphatic references to it in his summation. On this record the fact

[5] New York has the rule that in capital cases a new trial may be ordered in the interests of justice though no exception was taken in the trial court. Gilbert's Anno. Criminal Code & Penal Law (1943) § 528; *People* v. *Jung Hing*, 212 N. Y. 393, 405, 106 N. E. 105; *People* v. *Lytton*, 257 N. Y. 310, 313, 178 N. E. 290.

that Malinski confessed to the crime shortly after he was arrested stands out in bold relief. The use made of the confession could hardly have been more effective had its details been put in evidence. It was not insulated from the trial. The part of the charge to the jury which we have quoted may possibly have been an effort in that direction. But it is more susceptible of the interpretation that the delay in arraignment, not the first confession, was to be considered "solely on the question as to whether or not the alleged confession later made was the result of the coercion." That seems to have been the interpretation given the charge by the Court of Appeals. 292 N. Y. p. 374. No more explicit charge was given. The jury at no time was admonished that it could not convict on the basis of the first confession nor consider it as evidence against Malinski. We must consider the case, therefore, as one in which a coerced confession was employed to obtain a conviction. Coerced confessions would find a way of corrupting the trial if we sanctioned the use made of the October 23rd confession in this case. Constitutional rights may suffer as much from subtle intrusions as from direct disregard.

It is thus apparent that the judgment before us rests in part on a confession obtained as a result of coercion. Accordingly a majority of the Court do not come to the question whether the subsequent confessions were free from the infirmities of the first one.[6]

II

We have not mentioned Rudish. He did not confess to the police. He was tried jointly with Malinski, his counsel electing not to ask for a severance. We are asked to reverse as to Rudish because the confession of October 27th which was introduced in evidence against Malinski

[6] MR. JUSTICE BLACK, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE join in Part I of this opinion.

was prejudicial to Rudish. It is argued that that course is indicated by *Anderson* v. *United States,* 318 U. S. 350. In that case we reversed a judgment of conviction against all the defendants though the confessions which had been introduced were the confessions of only some of them. But in that case we were reviewing a criminal proceeding in a federal District Court over which we have more control than we do over criminal trials in the state courts. *McNabb* v. *United States,* 318 U. S. 332. Moreover, in the *Anderson* case the jury was told that in considering the guilt or innocence of each defendant they could consider the whole proof made at the trial. And it appeared that the prosecution leaned heavily on the confessions to establish its case against all the defendants. The furthest we have gone in a comparable case from a state court is to vacate the judgment against the co-defendant who did not confess and remand the case to the state court for further consideration. Thus in *Ashcraft* v. *Tennessee,* 322 U. S. 143, 155, we followed that procedure, at the suggestion of the Attorney General of the State, where the judgment against the co-defendant who did not confess was sustained by the state court on the assumption that the confession which we held to be coerced was properly admitted and that the conviction of the defendant who did confess was valid.

We do not believe that procedure is appropriate in this case even though it be assumed *arguendo* that the confession of October 27th was involuntary. It is true that that confession referred both to Rudish and to Indovino. But before that confession was offered in evidence the trial court with the complete approval of counsel for Rudish worked out a procedure for protecting Rudish and Indovino. "X" was substituted for Rudish, "Y" for Indovino. The jury were plainly instructed that the confession was admitted against Malinski alone and that they were not to speculate concerning the identity of "X" or "Y." When it came to the charge, the trial court sub-

mitted the case against Rudish separately from the one against Malinski.[7] The Court of Appeals in sustaining the judgment against Rudish in no respect relied on any confession to the police which Malinski made. And when it turned to the comments of the prosecutor, which we have quoted, it noted that they concerned Malinski, not Rudish. 292 N. Y. p. 373.

On this record the questions raised by Rudish involve matters of state procedure beyond our province to review. *Barrington* v. *Missouri,* 205 U. S. 483. Since the case against him, both as tried and as sustained on review, was not dependent on Malinski's confession of October 27th, we think it inappropriate to vacate the judgment as we did in *Ashcraft* v. *Tennessee, supra,* though we assume that that confession was coerced. Whether our reversal of the judgment against Malinski would as a matter of state law affect the judgment against Rudish is not for us to say. In each case our mandate will provide for a remand to the Court of Appeals for proceedings not inconsistent with this opinion.

The judgment against Rudish is affirmed.

The judgment against Malinski is reversed.

It is so ordered.

MR. JUSTICE FRANKFURTER.

It is also my view that the judgment as to Malinski calls for reversal, leaving the disposition of Rudish's conviction in the light of such reversal to the New York Court of Appeals.

Apart from permitting Congress to use criminal sanctions as means for carrying into execution powers granted to it, the Constitution left the domain of criminal justice

---

[7] This treatment of the matter seems to have followed the procedure adopted in New York in case of joint trials. See *People* v. *Snyder,* 246 N. Y. 491, 497, 159 N. E. 408; *People* v. *Fisher,* 249 N. Y. 419, 424, 427, 164 N. E. 336.

to the States. The Constitution, including the Bill of Rights, placed no restriction upon the power of the States to consult solely their own notions of policy in formulating penal codes and in administering them, excepting only that they were forbidden to pass any "Bill of Attainder" or "ex post facto Law," Constitution of the United States, Art. I, § 10. This freedom of action remained with the States until 1868. The Fourteenth Amendment severely modified the situation. It did so not by changing the distribution of power as between the States and the central government. Criminal justice was not withdrawn from the States and made the business of federal lawmaking. The Fourteenth Amendment merely restricted the freedom theretofore possessed by the States in the making and the enforcement of their criminal laws.

Unlike the limitations of the Bill of Rights upon the use of criminal penalties by federal authority, the Fourteenth Amendment placed no specific restriction upon the administration of their criminal law by the States. Congress in proposing the Fourteenth Amendment and the States in ratifying it left to the States the freedom of action they had before that Amendment excepting only that after 1868 no State could "abridge the privileges or immunities of citizens of the United States" nor "deprive any person of life, liberty, or property, without due process of law," nor deny to any person the "equal protection of the laws." These are all phrases of large generalities. But they are not generalities of unillumined vagueness; they are generalities circumscribed by history and appropriate to the largeness of the problems of government with which they were concerned. "The privileges or immunities of citizens of the United States" derived from the two aspects of citizenship in our federal system. The safeguards of "due process of law" and "the equal protection of the laws" summarize the history of freedom of English-speaking peoples running back to Magna Carta and reflected in the constitutional development of our

people. The history of American freedom is, in no small measure, the history of procedure.

Here we are concerned with the requirement of "due process of law" in the enforcement of a state's criminal law. Experience has confirmed the wisdom of our predecessors in refusing to give a rigid scope to this phrase. It expresses a demand for civilized standards of law. It is thus not a stagnant formulation of what has been achieved in the past but a standard for judgment in the progressive evolution of the institutions of a free society. The suggestion that "due process of law," as guaranteed by the Fourteenth Amendment, is a compendious expression of the original federal Bill of Rights (Amendments I to VIII) has been rejected by this Court again and again and after impressive consideration. See, *e. g., Hurtado* v. *California,* 110 U. S. 516; *Twining* v. *New Jersey,* 211 U. S. 78; *Brown* v. *Mississippi,* 297 U. S. 278; *Palko* v. *Connecticut,* 302 U. S. 319.

In the Bill of Rights, Eighteenth-century statesmen formulated safeguards against the recurrence of well-defined historic grievances. Some of these safeguards, such as the right to trial by a jury of twelve and immunity from prosecution unless initiated by a grand jury, were built on experience of relative and limited validity. "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, supra,* at 325. Others, like the freedom of the press or the free exercise of religion or freedom from condemnation without a fair trial, express rights the denial of which is repugnant to the conscience of a free people. They express those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Hebert* v. *Louisiana,* 272 U. S. 312, 316, and are implied in the comprehensive concept of "due process of law."

The Due Process Clause of the Fourteenth Amendment thus has potency different from and independent of the

specific provisions contained in the Bill of Rights. Apart from all other considerations, how could it be otherwise without charging Madison and his great contemporaries in the framing and adoption of the Bill of Rights with writing into it a meaningless clause? The Fifth Amendment specifically prohibits prosecution of an "infamous crime" except by indictment; it forbids double jeopardy and self-incrimination, as well as deprivation of "life, liberty, or property, without due process of law." Not to attribute to due process of law an independent function but to consider it a shorthand statement of other specific clauses in the same Amendment is to charge those who secured the adoption of this Amendment with meretricious redundancy by indifference to a phrase—"due process of law"—which was one of the great instruments in the very arsenal of constitutional freedom which the Bill of Rights was to protect and strengthen. Of course the Due Process Clause of the Fourteenth Amendment has the same meaning. To suppose that "due process of law" meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.

A construction which gives due process no independent function but makes of it a summary of the specific provisions of the Bill of Rights would tear up by the roots much of the fabric of law in the several States. Thus, it would require all the States to prosecute serious crimes through the grand jury system long ago abandoned by many of them, see *Hurtado* v. *California, supra,* to try such crimes by a jury of twelve which some of the States have seen fit to modify or abandon, see *Maxwell* v. *Dow,* 176 U. S. 581, to enforce the privilege against self-incrimination with the technical requirements prevailing in the federal courts when States, consistently with fundamental notions of justice, have seen fit to make other arrangements, see *Twining* v. *New Jersey, supra,* and to have jury trials "In Suits at common law, where the value in controversy

shall exceed twenty dollars," a requirement which this Court has held over and over again for more than a hundred years does not apply to proceedings in state courts, see *Livingston* v. *Moore*, 7 Pet. 469, 551; *Walker* v. *Sauvinet*, 92 U. S. 90; *Pearson* v. *Yewdall*, 95 U. S. 294, 296. And we can hardly select one provision of the Bill of Rights and reject another, as for instance the provision of the Fourth Amendment against unreasonable search and seizure. Such a view would not only disregard the historic meaning of "due process." It leads inevitably to a warped construction of specific provisions of the Bill of Rights to bring within their scope conduct clearly condemned by due process but not easily fitting into the pigeonholes of the specific provisions. But for contrary suggestions, it would seem too late in the day to treat seriously the argument that a phrase so laden with historic meaning as is "due process of law" can be given an improvised content of some selected provision of the original Bill of Rights.

And so, when a conviction in a state court is properly here for review, under a claim that a right protected by the Fourteenth Amendment has been denied, the question is not whether the record can be found to disclose an infraction of one of the specific provisions of the first eight amendments. To come concretely to the present case, the question is not whether the record permits a finding, by a tenuous process of psychological assumptions and reasoning, that Malinski by means of a confession was forced to self-incrimination in defiance of the Fifth Amendment. The exact question is whether the criminal proceedings which resulted in his conviction deprived him of the due process of law by which he was constitutionally entitled to have his guilt determined. Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain

whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. The fact that judges among themselves may differ whether in a particular case a trial offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied. An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review. But there cannot be blind acceptance even of such weighty judgment without disregarding the historic function of civilized procedure in the progress of liberty.

And so, with every respect for the contrary views of the majority of the judges below and of some of my brethren here, I cannot escape agreement with the Chief Judge of the New York Court of Appeals and two of his associates that there was not in this case a fair trial of issues vital to the determination of guilt or innocence. Considering the circumstances of Malinski's detention, the long and continuous questioning, the willful and wrongful delay in his arraignment and the opportunity that that gives for securing, by extortion, confessions such as were here introduced in evidence,[1] the flagrant justification by the prosecutor of this illegality as a necessary police pro-

[1] It is suggested that "the New York Court of Appeals unanimously sustained the jury's verdict that the confessions were not coerced." I do not so interpret the views of the minority of that court. The

cedure, inevitably calculated to excite the jury—all these in combination are so below the standards by which the criminal law, especially in a capital case, should be enforced as to fall short of due process of law.

In reviewing a state criminal conviction we must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due humility our merely negative function in subjecting convictions from state courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes. On the other hand, in the discharge of that duty we must give no ear to the loose talk about society being "at war with the criminal" if by that it is implied that the decencies of procedure which have been enshrined in the Constitution must not be too fastidiously insisted upon in the case of wicked people. Despite the

---

opinion of Chief Judge Lehman, on behalf of the three dissenting judges, will speak for itself:

"Here we are agreed that a finding by the jury that the defendant's confession, though obtained while he was unlawfully detained without arraignment, is not against the weight of the evidence. The officers of the law deny that they beat the defendant or threatened him. Whatever may have been the motive of the police in taking Malinski to the Hotel Bossert instead of to a police station or jail, we find no basis for any inference that the police believed that the hotel was an appropriate place where a person could, without too much risk of discovery, be beaten in order to compel a confession. Nonetheless, in this case, as in *People* v. *Mummiani* (*supra* [258 N. Y. 394], pp. 399–400), 'the conclusion is inescapable' that the police delayed the arraignment of the defendant 'for the purpose of subjecting him to an inquisition impossible thereafter' at which he might be induced to make a confession by resort to what the Supreme Court of the United States has described as 'those reprehensible practices known as the "third degree" which, though universally rejected as indefensible, still find their way into use.' There can be no fair trial of the issue whether the confession is voluntary where the jury is not properly informed that the detention was unlawful and that they must take that fact into consideration. That has not been done in this case." *People* v. *Malinski*, 292 N. Y. 360, 387–388.

fact that English criminal justice has serious inadequacies and lags behind some of our penological advances, it is undeniable that on the whole it is much more effective than ours. Yet there can be no doubt, as English parliamentary proceedings and the reports of the English Court of Criminal Appeal amply prove, that practices such as this record reveals are not there tolerated. See, for instance, Inquiry in Regard to the Interrogation by the Police of Miss Savidge (1928), Cmd. 3147; 217 H. C. Deb. (5th ser. 1928), May 17, 1928, 1303 *et seq.* Whatever differences there may be between the situations in England and in this country in the task of law enforcement, it is intolerable to suggest that we cannot have effective law enforcement without conduct such as this record spreads before us. The notion that we must resort to such methods in order to check crime or to convict criminals has been rejected by those who have had most to do with the criminal law. After consideration of the problem, a committee of eminent lawyers reported this conclusion:

"The remedy for the ills which afflict the administration of criminal justice, whatever that remedy may be, will not be found in measures which violate law. Such expedients, so far from restoring health and vigor to the system, only aggravate and protract the disorder. Under our form of government the machinery of criminal justice depends for its force and efficiency upon the enlightened moral sense of the individuals to whom the public by their constitution and laws have temporarily entrusted its operation. And it is as unwise as it is unwarranted for these servants of the public to violate the constitution and laws in the vain hope of accomplishing useful or beneficial results." Yearbook (1928) Association of the Bar of the City of New York, 235, 255.

These were the views of three former United States Attorneys for the Southern District of New York and three

former District Attorneys for New York County whose experience and effectiveness as prosecutors would hardly countenance doctrinaire or sentimental views.

MR. JUSTICE RUTLEDGE, dissenting in part.

I concur in reversing the judgment against Malinski, but dissent from affirmance of the judgment against Rudish.

I agree that Malinski's oral confession of October 23, 1942, was coerced, was used in evidence against him and that this requires reversal of the judgment against him. I therefore join in the Court's opinion in so far as it relates to him. But I am unable to agree that we should stop with the ruling grounded upon the confession of October 23 alone. I think the subsequent confessions, including the written one of October 27, were vitiated with all the coercion which destroys admissibility of the first one. Accordingly their use in evidence also requires reversal of the judgment against Malinski. Furthermore, since the written confession also affected Rudish and in my opinion the devices employed were ineffective to prevent its influencing the verdict and the judgment against him, I think that judgment likewise should be reversed.

I

However great the proof against him otherwise may be, under our system no man should be punished pursuant to a judgment induced wholly or in part by a coerced confession. In my opinion the entire procedure, from the time Malinski was taken into custody until his written confession was obtained nearly five days later, was a single and continuous process of coercion of the type commonly known as "the third degree." I do not think the Constitution has room for this in company with all the protections it throws around the individual charged with crime.

The State's summation boldly admitted the case was of that character. It characterized Malinski's treatment as "quite proper police procedure." It was "some more psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get a shellacking." The Court of Appeals characterized "the remarks" as "indefensible." Not only the remarks, but also the conduct they accurately depict must bear that condemnation, as the record demonstrates.

The "psychology" got results. It produced a confession,[1] the first in a series. The Court of Appeals treated them as one, though its opinion expressly recognized there were three or more.[2] The first came at the end of ten hours of applied "psychology."[3] The others followed later in the course of and at the end of four days of illegal detention.

---

[1] The evidence is undisputed that Malinski arrived at the hotel at about 8:15 a. m., was immediately stripped, and was not given back his clothing, except his shorts, until after he confessed that evening. The summation added to the statement quoted above in the text: "McNally [a police officer] took one look at him and said, 'Come here'—just a little tough talk—'what do you know about it?' Six o'clock in the evening after he was picked up he told the whole thing."

[2] "Counsel have urged upon us, however, that it was error for the court to submit to the jury the confession made by Malinski orally on October 23rd, by word and deed on October 25th and 26th and to an Assistant District Attorney and a stenographer in the early morning hours of October 27th. . . .

"When we have spoken of Malinski's confession we include, of course, not only the confession made orally to a police officer on the Friday night of the arrest but also the two automobile trips on Sunday and Monday, one to the police garage to permit Malinski to identify the automobile used in the crime and the other to Coney Island to revisit a restaurant and the scene of the crime, and the confession to the District Attorney which was taken stenographically in the early morning of Tuesday, October 27th." 292 N. Y. 360, 370, 373–374.

[3] Cf. note 1.

By any test the first confession was "involuntary." It was unworthy of credence in any court. No other conclusion can be drawn on the record. The undisputed facts [4] bear out this view and the State's admission that it was obtained by threat of "shellacking." The evidence is in conflict on whether physical force was used.[5] There is no conflict that it was threatened. Nor is there room for inference that the threat did not bring about the confession. "Malinski was not hard to break." No conviction tainted with this confession's influence can stand.

Moreover, the first confession was used to secure the defendants' conviction. In more ways than one. In the first place, it was used directly in evidence against the accused, as the Court of Appeals expressly recognized when it sustained the trial court's action in submitting that confession, together with the later ones, to the jury,[6] and as we now hold. Further, we would be innocent indeed if we did not believe that "leads" furnished were followed and that the evidence thus procured and presented, as an immediate consequence of the initial coercion, had part in bringing about the verdict. The record bears out that belief. Else why was Malinski illegally detained, incommunicado, at the hotel for three days after he had told "the whole thing"? Whatever may be the rule as to the use of evidence secured by means merely unlawful,[7] in

---

[4] They are stated fully in the Court's opinion.

[5] Malinski testified to violence by two officers who contradicted him in this respect. The majority in the Court of Appeals characterized the testimony as to violence as being "not very strong."

[6] Cf. note 2.

[7] Compare *People* v. *Adams*, 176 N. Y. 351, 68 N. E. 636, aff'd *sub nom. Adams* v. *New York*, 192 U. S. 585; *People* v. *Defore*, 242 N. Y. 13, 150 N. E. 585, cert. denied, 270 U. S. 657; with *Boyd* v. *United States*, 116 U. S. 616; *Weeks* v. *United States*, 232 U. S. 383; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *Gouled* v. *United States*, 255 U. S. 298; dissenting opinions of Justices Holmes and Brandeis, *Olmstead* v. *United States*, 277 U. S. 438, 469, 471; *McNabb*

my judgment the Constitution does not tolerate the use of evidence obtained by unconstitutional methods, including coercive ones, to bring about a conviction for crime which is constitutional.[8] The Constitution does not thus nullify its own terms, setting them at war with each other. The "leads" thus secured in violation of both the fundamental law and the law of the State [9] led directly to the later confessions, including the written one, and vitiated them with every vice infecting the first. In my judgment, all that followed the first confession was the product of it and therefore of the initial coercion which induced it. Beyond this, the coercive influences themselves continued throughout the period between the first confession and the last, with the single exception that Malinski was given back his clothing.

This fact is highly material as showing the initial coercion. Without more, it belies the explanation that the prisoner was stripped and kept naked or partly so for ten hours because otherwise he might try to escape.[10] That danger, if it existed, continued as much after the first confession as before it. It continued throughout the whole

---

v. *United States,* 318 U. S. 332; *Anderson* v. *United States,* 318 U. S. 350. See Fraenkel, Recent Developments in the Law of Search and Seizure (1928) 13 Minn. L. Rev. 1; Atkinson, Admissibility of Evidence Obtained through Unreasonable Searches and Seizure (1925) 25 Col. L. Rev. 11; Chafee, Progress of the Law (1922) 35 Harv. L. Rev. 673, 694.

[8] Cf. *Boyd* v. *United States,* 116 U. S. 616; *Weeks* v. *United States,* 232 U. S. 383.

[9] This formed one of the chief grounds of the strong dissenting opinion, concurred in by three judges, in the Court of Appeals. 292 N. Y. 376. Cf. note 18 *infra.*

[10] The officers also "explained" their failure to take Malinski before a magistrate "without unnecessary delay" as the New York law requires (Code Crim. Proc. § 165) by saying that though he was seized on October 23rd he was not "arrested" until October 26th. Cf. the dissenting opinion of Lehman, Ch. J., 292 N. Y. at 381–382.

time he was detained at the hotel. Malinski was stripped and held naked or partly so, not to prevent his escape, but to do just what the prosecution says was intended, to "break" a man "who was not hard to break" by inducing the fear of a "shellacking."

But the fact that Malinski was given back his clothing, when and only when he confessed, does not show that the coercion ceased then or before the last confession was secured. It shows only that one of the coercive tactics used had become no longer necessary and therefore no longer was employed. Otherwise, why was Malinski not promptly booked and arraigned, as he was four nights later when the written confession was secured. Why was he detained illegally at the hotel for three days and four nights [11] after he admittedly had told "everything"? Why, further, was he held incommunicado during all this time, seeing only the police, the assistant prosecuting attorney, and Spielfogel? Why also was he subjected to examination, interrupted now and then it is true, in some instances because he fell asleep, but continuing throughout most of each day, including the time of the trips to the scene of the crime and the police garage, and to the early hours of each morning? [12]

---

[11] The fourth night was devoted to final interrogation at the Bath Beach Police Station.

[12] The questioning of the first day and evening, Friday, October 23, continued after the oral confession and was still in progress at 3:00 a. m. on Saturday, October 24. Ten to twelve persons were usually present and many participated in the questioning. Investigators stayed for a time and left to return later. One detective left the hotel at 10:00 or 11:00 p. m. on October 23 and, on his return at 3:00 a. m., found the questioning still continuing. The interrogation, on and off, had then proceeded for nineteen hours.

Throughout October 24, a police lieutenant testified, many of the detectives "continuously" examined and talked to Malinski. The latter said, "They kept questioning me all that day and night." Again on October 25 he was questioned "to clear up certain points," though

All this, the State asks us to believe, was consistent with Malinski's making a "clean breast" entirely voluntarily. All this comports with the view that the coercion had worn off and the written confession was the act of a man freed from the fears and the pressures which forced out the first one, or so a jury could find. Such is the claim made in the view that the first confession was not used in evidence against the accused.

I cannot accept this view. On the contrary, I think only one conclusion can be drawn from the facts, namely, that all the conditions which forced out Malinski's first confession continued in full effect until they extorted also the written one, excepting only that he was given back his clothing. That fact alone is not enough to show that the coercive conditions were wholly abated and the influences they generated had no part in bringing about the later confessions.

---

an officer denied that this "went on for hours and hours." On that day Malinski was taken on a tour of the scene of the crime. The assistant district attorney and a stenographer accompanied the party. Malinski testified without contradiction that he "was being questioned riding all the way back to the hotel," and that the questioning continued there until 2:00 a. m.

On Monday, October 26, ten or twelve detectives were still present with Malinski at the hotel. During the course of that day he was questioned and taken to a police garage to identify the automobile used in the crime. There is much confusion in the officers' testimony as to the time of this trip and whether it preceded or followed one to the Bath Beach Police Station. The weight of their evidence perhaps is that they went to the police garage first, then to the police station, arriving there about 5:00 p. m. The State's supplementary brief supports this view and the view that on arrival at the station questioning by the assistant district attorney and others began. There is every reason to believe that the final questioning of Malinski, leading to a written confession at 2:10 a. m., October 27, had proceeded for some nine hours. At the very least, we know that the questioning by a battery of investigators (eight police officers in addition to the assistant district attorney) was in progress at 7:00 p. m., October 26, and continued to midnight.

Taking away Malinski's clothes is not the controlling fact in this case. It was only one feature of the initial duress. The details of this need not be repeated here. Taken altogether, the first day's proceedings weave into a pattern typical of "third degree" method.

This pattern was not torn apart when it "broke" Malinski and he confessed for the first time. With that event he was not arraigned or released. His unlawful detention continued for three days and four nights. The questioning continued at frequent intervals each day and each night.[13] Spielfogel[14] continued to see him daily. No one else except his imprisoners was allowed to see him at any time. That he did not ask again to see counsel or others is but evidence that he had been "broken." He and Spielfogel were taken to the scene of the crime and to the police garage to identify the automobile used in the crime. These two incidents, I think, show conclusively that the coercion continued after, and did not abate with, the first confession. They were in themselves confessions, as the Court of Appeals recognized. In my view they were at once the products of the first confession and immediately connecting links between it and the written one. They were the consequence of continuing, though interrupted, examination extending from the time of the first confession to the last, and carried within themselves that confession's vice, transmitting it to the written one. They were the process, with all else that went on during the period, by which whatever had been obtained at the

[13] Cf. note 12 *supra*.

[14] Spielfogel was as much a tool to secure Malinski's confession as any member of the police. He was brought down from Sing Sing on October 14, 1942, by the assistant district attorney and others because of what he had revealed about the crime. He made a statement to the police before Malinski was taken into custody and was present at the hotel shortly after Malinski was brought there. He at first refused to discuss the case with the state officials. No satisfactory explanation is offered of his change in attitude.

first confession was checked, elaborated, verified and distilled until the final essence was separated and bottled in the written confession, a process typical of "third degree" procedure. That they brought forth strong corroborating evidence does not negative or nullify the existence of the coercive conditions which produced both the inducing original confession and the corroboration thus secured.[15] Finally when Malinski confessed the last time, it was in the early hours of the morning, after a night and a day of questioning. Only after this confession was obtained, but significantly very shortly thereafter, was Malinski booked, arraigned and taken to the jail.

All these facts stand undisputed on the record. With the facts of the first day's proceedings, they establish beyond question the pattern of the "third degree." They establish its application from the time of the arrest throughout the first day until the first confession. They prove with equal clarity, in my judgment, that every thread in that pattern but one, no longer needed, continued to hold through every moment from the first confession to the last. No single occurrence, not excluding the return of the clothing, took place which gives basis to conclude that the initial psychological pressures were relaxed or their coercive influence and effects were nullified.

If after the clothing was returned, Malinski no longer feared a "shellacking," an inference there is broad room to doubt, he knew there were other pressures to take the place of this threat, pressures made possible by its success in forcing from him the first confession. He knew that all of the subsequent examination, as it turned out through four nights and three days, would be founded on this confession and that he would be forced to square

[15] At the police garage, although Malinski had "confessed," he still sought to protect himself by using his handkerchief to open the car door because, he said at the trial, he "did not want to be framed" by leaving his fingerprints.

every statement, both in it and made later, not only with every other statement but also with every fact to the discovery of which any statement might lead. This in fact was what he was being required to do, among other incidents, at the scene of the crime and at the police garage. In short, he knew that he was "on the grill" and would continue so until he made whatever statement might satisfy the officials who had him in charge. Cf. *Chambers* v. *Florida,* 309 U. S. 227, 240.

To say that in such circumstances the coercive influences had ended before they produced the result at which the entire procedure was aimed and with which it stopped, is, in my opinion, a conclusion we cannot draw and the facts allow no room for permitting a jury to make such an inference.

Were the question wholly fresh, the conclusion would seem doubtful in any case that a later confession could be entirely voluntary and uncoerced, where an earlier one had been compelled. A man once broken in will does not readily, if ever, recover from the breaking. Cf. Mr. Justice Murphy, dissenting in *Lyons* v. *Oklahoma,* 322 U. S. 596, 606. No change in circumstances can wholly wipe out its effects upon himself or upon others. Thereafter he acts with knowledge that the damage has been done. Others do likewise. He is suspect by his own mouth and must continue so, whether he repudiates or confirms the confession. If he repudiates, he incurs the additional suspicion of lying, and his credibility as a witness in his own behalf is impaired, if not destroyed. If he confirms, he does so with the knowledge he has already confessed and any other course will bring upon him the suspicions and the burden of proof they entail.

For these reasons a stricter standard is necessary where the confession tendered follows a prior coerced one than in the case of a single confession asserted to have been coerced. It would seem consistent therefore with our con-

stitutional tradition that once a coerced confession has been obtained all later ones should be excluded from evidence, wherever there is evidence that the coerced one has been used to secure the later ones. In no other way can the effects of the coercion be wholly excluded from the trial. In no other way can one who has been subjected to use of force or coercive "psychology" be put upon an equal plane for the determination of his guilt or innocence with others who have escaped such unlawful action or be put back in the position he is entitled by law to occupy until his trial and a verdict of guilty, that of a man presumed to be innocent until the contrary is proved by legal means beyond a reasonable doubt. Cf. Lehman, Ch. J., dissenting in the Court of Appeals, 292 N. Y. at 383.

In any event, where there is a continuous process of coercion such as existed in this case, resulting in a series of confessions of which the first is the creative precursor of the later ones, and they moreover are obtained under identical circumstances except for relaxation in one of the initial pressures, there hardly can be room for saying, as was said in the *Lyons* case, that the latter confessions are not coerced.[16] Accordingly I think Malinski's conviction was

[16] That the written confession did not follow on the heels of the first, in the present circumstances, only aggravated the original coercion. The significant fact in *Lyons* v. *Oklahoma*, not present in this case, was that the second confession was made under auspices entirely different from those surrounding the first. The prisoner was in the custody of different officials, men shown by the record to be persons whom he had no reason to fear. And there was no evidence that they shared in or at any time applied the brutal methods by which it was charged, and denied, the first confession had been obtained. The principal question was whether the lapse of time between the two confessions, only some twelve hours, was sufficient so that the second could be taken as having been made free of the compulsions which induced the first, notwithstanding the change in officials having custody. A majority held that the difference in time

vitiated as much by admission of the latter confessions as by admitting the earlier oral one. If so, he should not be required to stand another trial at which those confessions may be used against him. Nor should the state officials be permitted to think they may be used again, though the first one must be excluded.

II

This is a capital case. Rudish has been sentenced to death. The written confession involved him. It was used in evidence against Malinski. The court and counsel attempted what I think is and proved to be the impossible, namely, to keep Rudish's identity as one of the persons mentioned in the confession from the jury by devices similar to those employed in *Anderson* v. *United States,* 318 U. S. 350, 356, with the same result. The devices were so obvious as perhaps to emphasize the identity of those they purported to conceal. True, the charge in the *Anderson* case was not meticulous as was the one given here to separate the defendants and apply the confession only against the one as to whom technically it was admitted. Nevertheless, I think the line too fine to draw, in capital cases at any rate, between that case and this one in this respect. There could be no valid basis for admitting this confession against Rudish in a separate trial. Due process does not permit one to be convicted upon his own coerced confession. It should not allow him to be convicted upon

---

was sufficient to permit the question to go to the jury. But the decision also took into account the change in custodians. 322 U. S. at 604. The Lyons case therefore is not authority for the view that the jury might have found the second confession voluntary, if there had been no such change. Nor does it rule that the coercing officials, by prolonging the period of coercion, though relaxing it in some of the tactics used, can escape its consequences and nullify its continuing effects.

a confession wrung from another by coercion.[17] A conviction supported only by such a confession could be but a variation of trial by ordeal. Cf. *Brown* v. *Mississippi,* 297 U. S. 278, 285; *Chambers* v. *Florida, supra,* at 236, 237. The effect is not different because the two, confessor and the person implicated, are tried together or because the torture is applied to other witnesses but not to the accused. Nor is it different, in this respect, because trial is in a state rather than a federal court. Accordingly I think the practice followed in the *Anderson* case and in *Ashcraft* v. *Tennessee,* 322 U. S. 143, should be followed in this one, and the judgment against Rudish should be reversed.

In *Lisenba* v. *California,* 314 U. S. 219, the Court stated: "Like the Supreme Court of California we disapprove the violations of law involved in the treatment of the petitioner, and we think it right to add that where a prisoner, held incommunicado, is subjected to questioning by officers for long periods, and deprived of the advice of counsel, we shall scrutinize the record with care to determine whether, by the use of his confession, he is deprived of liberty or life through tyrannical or oppressive means.

[17] The matter goes beyond and deeper than mere violation of the constitutional privilege against self-incrimination, to whatever extent this may have been applied to the states by adoption of the Fourteenth Amendment. Compare *Twining* v. *New Jersey,* 211 U. S. 78, and *Snyder* v. *Massachusetts,* 291 U. S. 97, with *Brown* v. *Mississippi,* 297 U. S. 278; cf. *Hysler* v. *Florida,* 315 U. S. 411, stating at 413: "However, if Florida through her responsible officials knowingly used false testimony which was extorted from a witness 'by violence and torture,' one convicted may claim the protection of the Due Process Clause against a conviction based upon such testimony." Although the majority thought the tender of proof insufficient to require a trial on a writ of error coram nobis, three dissenting justices deemed it irrelevant whether the state officials knew the coerced confessions were false, 315 U. S. at 424, and interpreted *Brown* v. *Mississippi, supra,* and *Chambers* v. *Florida, supra,* as barring "confessions wrung from the accused or his accomplices . . ." Cf. also *Mooney* v. *Holohan,* 294 U. S. 103, and *Pyle* v. *Kansas,* 317 U. S. 213.

Officers of the law must realize that if they indulge in such practices they may, in the end, defeat rather than further the ends of justice." 314 U. S. at 240.

The warning exactly fits this case, as do also the repeated warnings referred to by the dissenting opinion in the Court of Appeals.[18] I think they should be made effective. That can be done fully in this case only if the judgments against both of the petitioners are reversed.

MR. JUSTICE MURPHY joins in this opinion.

MR. JUSTICE MURPHY, dissenting in part.

As pointed out in the opinion of the Court, Malinski's oral confession of October 23 was involuntary in character and hence its admission invalidated his conviction. But it is equally clear to me that the pattern of mental fear continued until his arraignment on October 27, thereby voiding as well his confessions by word and deed on October 25 and 26 and the written confession made during the early hours of October 27. It is inconceivable, moreover, that the admission of these tainted confessions was without influence in the conviction of the co-defendant Rudish. Accordingly, I agree with Mr. Justice Rutledge that the judgment should be reversed also as to Rudish.

The subhuman psychology applied by the police to Malinski began soon after his arrest on October 23. He was stripped, humiliated and threatened with a shellacking. He was questioned throughout the day and was denied the benefit of counsel, relatives or friends. This succeeded in breaking Malinski's will, which the prosecu-

[18] "We cannot close our eyes to the fact that our frequently and solemnly repeated admonitions to law enforcement officers that they are not above the law and may not in their zeal to obtain convictions hold, without arraignment, persons suspected of crime in order to have opportunity to obtain confessions, are often unheeded." 292 N. Y. at 386.

tor boasted "was not hard to break," and the police were able to extract an oral confession from him. But this was not enough; the police wanted a written confession. So they continued to hold the "broken" Malinski until such a confession was forthcoming on October 27. During this period he was illegally held without being arraigned, was questioned at frequent intervals and saw no one save his questioners and Spielfogel. The only concession made to him was the privilege of wearing all his clothes.

There is an absence of any evidence that the "broken" Malinski regained his free independent will during the illegal detention or that the effects of the humiliation and threatened shellacking, which caused him to "break," wore off prior to the written confession on October 27. There was not even a twelve-hour interval between the interrogations or a change of interrogators which this Court in *Lyons* v. *Oklahoma,* 322 U. S. 596, thought sufficient to break the pattern of coercion. The reign of mental fear and terror here was continuous for four days and Malinski's will was in a shattered state on the occasion of making each confession. Such confessions cannot be dignified with the adjective "voluntary," however non-coercive may have been the immediate surrounding circumstances.

Once an atmosphere of coercion or fear is created, subsequent confessions should automatically be invalidated unless there is proof beyond all reasonable doubt that such an atmosphere has been dispelled and that the accused has completely regained his free individual will. Otherwise we might as well discard all pretense to a civilized and humane system of criminal justice and adopt without further ado the terroristic police practices of certain past and present tyrannies in other parts of the world. Since all the confessions here were made in a continuing background of threatened coercion, it follows that they all were void.

One other matter is worthy of comment. Malinski, as well as his co-defendant Rudish, is an American of Jewish

ancestry. The prosecutor made certain remarks in his statement to the jury that may have been intended and were indicative of a desire to appeal to racial and religious bigotry. He spoke of Malinsky as a "jerk from the East Side" and referred to his residence in "the lower east side of Manhattan, where your life is not worth a pretzel." This is a characterization of a territory containing a large proportion of Americans of like origin.

Those clothed with authority in court rooms of this nation have the duty to conduct and supervise proceedings so that an accused person may be adjudged solely according to the dictates of justice and reason. This duty is an especially high one in capital cases. Instead of an attitude of indifference and carelessness in such matters, judges and officers of the court should take the initiative to create an atmosphere free from undue passion and emotionalism. This necessarily requires the exclusion of attacks or appeals made by counsel tending to reflect upon the race, creed or color of the defendant. Here the defendants' very lives were at stake and it was of the utmost importance that the trial be conducted in surroundings free from poisonous and dangerous irrelevancies that might inflame the jury to the detriment of the defendants. Brazen appeals relating to their race or faith had no relevance whatever to the grave issue facing the jury and could only be designed to influence the jury unfairly; and subtle and indirect attacks were even more dangerous and effective. Statements of this character are the direct antithesis of every principle of American justice and fair play. They alone are enough to cast grave doubts upon the validity of the entire proceedings.

MR. CHIEF JUSTICE STONE.

MR. JUSTICE ROBERTS, MR. JUSTICE REED, MR. JUSTICE JACKSON and I think the judgment should be affirmed as to both petitioners.

Malinski, charged with murder, made several confessions of guilt, which were introduced in evidence at his trial. Two, made to the police, are alleged to have been coerced, the first on October 23rd and the other four days later on October 27th. During that time he admitted to the police other isolated facts which tended to fasten guilt upon him. Three friends of Malinski also testified that on several occasions shortly after the commission of the crime and long before his arrest, he voluntarily admitted to them and to his sister that he had committed the crime.

The testimony as to whether the first confession to the police was coerced was sharply conflicting. There was no evidence that petitioner was subjected to any coercion at or about the time of the second confession to the police, save as the jury could find that the coercion, if any, attending the first confession continued to operate so as to induce the second.

The trial court, after reviewing fully the evidence of petitioner's detention and the coercion by the police which is said to have attended his first confession, and of the delay in his arraignment, instructed the jury:

"This testimony was adduced solely on the question as to whether or not the alleged confession later made was the result of the coercion, either direct or implied, which is prohibited by the statute, and which invalidates a confession if made. If you should find that the arraignment of the defendant was delayed, you may consider that on the question of the voluntariness of any confession made by Malinski, including the one made in the early hours of October 27 . . ."

The trial court also correctly instructed the jury that petitioner's contention was that the confession of October 27 was tainted by the detention and coercion which had preceded it, and that "you must find beyond a reasonable doubt that this confession was a voluntary one before you would have the right to consider it." With respect to

this later confession, the jury was further instructed: "If you find beyond a reasonable doubt that the confession is a voluntary one, you will then determine whether or not the statements inculpating the defendant, therein contained, are true. If you shall have resolved both of these questions in favor of the prosecution, then and only then will you consider the confession in determining the guilt or innocence of the defendant . . ." There were no exceptions to these instructions and no requests for a further charge on this subject.

After a painstaking review of the facts, the New York Court of Appeals unanimously sustained the jury's verdict that the confessions were not coerced.[1] That court, on appeal from a judgment of death, has power, which we are not free to exercise in a case coming from a state court, to make new findings of fact, Art. 6, § 7 of the New York Constitution of 1939;[2] *People* v. *McGrath,* 202 N. Y. 445, 450; 96 N. E. 92, and also to give judgment without regard to technical errors, defects or exceptions not affecting substantial rights. N. Y. Code Crim. Proc., § 542.

It seems to be recognized by this Court that the question whether the second confession was coerced was properly submitted to the jury. But it holds that the first confession was coerced and was submitted to the jury as itself proof of guilt, and that for that reason the verdict must be set aside although the jury found under the instructions of the court, which we have quoted, that the second confession was not coerced.

Even though the first confession were the product of coercion, the trial court, as we have pointed out, instructed

[1] The chief judge and two others, dissenting, thought that the conviction should be reversed because of the insufficiency of the charge as to the delay in arraignment; they apparently relied on state grounds, and not on the federal constitution.

[2] The amendment to Art. 6, § 7, effective January 1, 1944, retains this power in the Court of Appeals.

the jury that the evidence with respect to the first confession was adduced only to show that the second was coerced. And the jury was instructed that it could consider the second confession, only if it found it voluntary, and that it could convict in that case. In view of these instructions, we cannot say that the first confession was submitted to the jury, or that, in the absence of any exception or request to charge more particularly, there was any error of which petitioner can complain. Hence the jury's verdict must be taken as conclusively establishing that the second confession was voluntary and was not induced by any coercion attending the first. *Lyons* v. *Oklahoma,* 322 U. S. 596.

But even if it could be said, as the Court of Appeals seems to have thought, that the jury's verdict was a determination that the first confession was not coerced, we perceive no ground on which that determination can be disregarded. This Court recognizes that if only the testimony submitted to the jury be considered, the question whether the first confession was coerced was for the jury. The Court sets aside the jury's verdict solely because of the interpretation it places upon the conflicting testimony in the light of certain remarks, which the opinion of Mr. Justice Douglas quotes, made by the prosecuting attorney in the course of his summation to the jury. But the prosecutor did not testify in the case, and it does not appear that he was present at any of the interviews of petitioner by the police, or had any knowledge of the alleged coercion. At most, his remarks were an ill-advised attempt at justification of the coercion which the defense had alleged. He added no word by way of proof or admission to the evidence already before the jury. The jury, acting within its province, could have concluded, as it evidently did, that the prosecutor's remarks did not tend to prove anything more than his own ineptitude. The

Court's decision thus sets aside the conviction by the process of re-weighing the conflicting testimony as to the alleged coercion, in the light of the arguments addressed to the jury.

It is not the function of this Court, in reviewing, on constitutional grounds, criminal convictions by state courts, to weigh the evidence on which the jury has pronounced its verdict, also in the light of the arguments of counsel, or to sit as a super-jury. We have, in appropriate cases, set aside state convictions as violating due process where we were able to say that the case was improperly submitted to the jury or that the unchallenged evidence plainly showed a violation of the constitutional rights of the accused. *Brown* v. *Mississippi*, 297 U. S. 278; *Chambers* v. *Florida*, 309 U. S. 227; *Ward* v. *Texas*, 316 U. S. 547. But we have not hitherto overturned the verdict of a state court jury by weighing the conflicting evidence on which it was based.

The rightful independence of the states in the administration of their own criminal laws in their own courts requires that in such cases we scrupulously avoid retrying the facts which have been submitted to the jury, except on a clear showing of error substantially affecting the constitutional rights of the accused. We agree that the controlling principles upon which this Court reviews on constitutional grounds a state court conviction for crime, are as stated in the opinion of Mr. Justice Frankfurter. But the due process clause of the Fourteenth Amendment is concerned with matters of substance. It cannot rightly be made the instrument of reform of the manners of state officials. And however reprehensible or even criminal the acts of state officials may be, in so far as the conduct of the trial is concerned, they do not infringe due process unless they result in the use against the accused of evi-

dence which is coerced or known to the State to be fraudulent or perjured, or unless they otherwise deny to him the substance of a fair trial, which is due process. See *Lisenba* v. *California,* 314 U. S. 219, 235–238; *Buchalter* v. *New York,* 319 U. S. 427, and authorities cited.

Judged by these standards, we think that there was no denial of due process in submitting petitioner Malinski's confession to the jury in the manner in which they were in fact submitted, and that there is no constitutional ground for setting aside the jury's verdict against him. We cannot say on this record that the jury was not rightly permitted to determine whether petitioner's confessions of guilt to the police were coerced, or that the verdict was without support in the evidence, or that the instruction that the jury could find the defendant guilty if it found that the second confession was not the result of the alleged coercion at the time of the first, was not properly given.

Petitioner Rudish has raised no substantial federal question reviewable here, and his conviction, as well as Malinski's, should be affirmed.

GEORGIA *v.* PENNSYLVANIA RAILROAD CO. ET AL.

ON MOTION FOR LEAVE TO FILE AMENDED BILL OF COMPLAINT.

No. 11, original. Argued January 2, 1945.—Decided March 26, 1945.

1. Leave is granted the State of Georgia to file in this Court against twenty railroads a bill of complaint in which the State, suing as *parens patriae* and in its proprietary capacity, and seeking injunctive relief, charges that the defendants have conspired to fix freight rates which discriminate against the State and that the northern roads use coercion on the southern roads in the fixing of joint through rates. Const., Art. III, § 2; 28 U. S. C. § 341; Clayton Act, § 16. Pp. 443, 452.
2. The bill states a justiciable controversy. *Massachusetts* v. *Mellon,* 262 U. S. 447, and *Florida* v. *Mellon,* 273 U. S. 12, distinguished. P. 445.

3. That the United States may bring criminal prosecutions or suits for injunctions under the antitrust laws does not preclude the State from maintaining the suit. P. 447.
4. In determining whether a State may invoke the original jurisdiction of this Court in a dispute which is justiciable, the interests of the State are not confined to those which are proprietary, but embrace also the so-called quasi-sovereign interests. P. 447.
5. The State may maintain the suit as *parens patriae* acting on behalf of its citizens, and the injury to the State in its proprietary capacity may be treated as makeweight. P. 450.
6. A State is a "person" entitled to sue for injunctive relief under § 16 of the Clayton Act. P. 452.
7. The State is not entitled to recover damages, even if the conspiracy be proved. *Keogh* v. *Chicago & N. W. R. Co.*, 260 U. S. 156. P. 453.
8. The injunctive relief sought by the State against the alleged rate-fixing combination and conspiracy among the defendant carriers is not a matter over which the Interstate Commerce Commission has jurisdiction, and the relief sought is therefore not such as is available under § 16 of the Clayton Act only in a suit brought by the United States. P. 454.
9. Rate-fixing combinations are not immune from the operation of the antitrust laws. P. 456.
10. There is no warrant in the Interstate Commerce Act and the Sherman Act for saying that the authority to fix joint through rates clothes with legality a conspiracy to discriminate against a State or a region, to use coercion in the fixing of rates, or to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier. P. 458.
11. The provision of § 16 of the Clayton Act, authorizing relief by injunction "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity," is here sufficiently satisfied to justify filing of the bill of complaint. P. 460.
12. That the rates which have been fixed by the alleged combination may or may not be held unlawful by the Interstate Commerce Commission is immaterial to the issue here presented. P. 460.
13. A combination to fix reasonable and non-discriminatory rates may nevertheless be illegal. P. 460.
14. Damage must be presumed to flow from a conspiracy to manipulate rates within that zone of reasonableness (between maxima and

minima) within which a carrier is ordinarily free to adjust its charges for itself. P. 461.

15. Construed as charging a conspiracy among the defendants to use coercion in the fixing of rates and to discriminate against Georgia in the rates which are fixed, the bill states a cause of action under the antitrust laws. P. 462.
16. The bill is here construed with that liberality accorded the complaint of a sovereign State as presenting a substantial question with sufficient clarity and specificity as to require a joinder of issues. P. 463.
17. A State may not invoke the original jurisdiction of this Court in a suit against one of its citizens. P. 463.
18. Since the two defendant corporations which claim to be citizens of Georgia are not indispensable parties to the suit, it is unnecessary at this stage of the proceedings to determine whether they are citizens of Georgia within the meaning of Art. III, § 2 of the Constitution. The citizenship of the two defendants in question may be challenged by a motion to strike; and, if they are stricken, this Court would not lose original jurisdiction over the controversy between Georgia and the other defendants. P. 463.
19. It does not necessarily follow from the grant of leave to file the bill of complaint that this Court must exercise its original jurisdiction. P. 464.
20. Clause 2 of § 2 of Article III of the Constitution, which confers on this Court jurisdiction of those cases *inter alia* "in which a State shall be Party," does not grant exclusive jurisdiction to this Court in the classes of cases enumerated, and the exercise of the jurisdiction is not mandatory in every case. P. 464.
21. This Court can not take judicial notice of the district or districts wherein all of the defendant railroads are "found" or "transact business," within the meaning of the venue provision of § 12 of the Clayton Act. P. 466.
22. No showing having been made here that all of the defendants can be "found" in some convenient forum, it can not be said that Georgia has a proper and adequate remedy apart from the original jurisdiction of this Court. Once a State makes out a case within the original jurisdiction of this Court, its right to come here is established; the Constitution does not require that the State go further and show that no other forum is available to it. P. 466.
23. Apart from specific exceptions created by Congress, the jurisdiction of the federal district courts is territorial. P. 467.

24. The provision of § 5 of the Sherman Act empowering the court before whom proceedings under § 4 are pending to bring in parties who reside outside the district is limited, as is § 4, to suits brought by the United States. P. 467.

25. In the exercise of its discretion this Court does not remit Georgia to the federal district courts for relief but grants leave to file the amended bill of complaint. P. 468.

Motion granted.

ON MOTION by the State of Georgia for leave to file an amended bill of complaint against twenty railroads.

Mr. Ellis Arnall, Governor of Georgia, with whom *Messrs. T. Grady Head,* Attorney General, *Marshall L. Allison* and *Claude Shaw,* Assistant Attorneys General, and *Edgar Watkins,* Deputy Assistant Attorney General, were on the brief, for complainant.

Mr. John Dickinson, with whom *Messrs. Anthony P. Donadio, K. L. Richmond, W. T. Pierson, Thomas P. Healy, D. Lynch Younger, E. Randolph Williams* and *Carleton S. Hadley* were on the brief, for the Pennsylvania Railroad Co. et al.; *Mr. George S. Leisure,* with whom *Messrs. Ralstone R. Irvine, Robert W. Purcell, James V. Hayes* and *Theodore S. Hope, Jr.* were on the brief, for the Chesapeake & Ohio Railway Co. et al.; *Mr. Sidney S. Alderman,* with whom *Messrs. Thomas W. Davis, J. H. McChord, Vernon W. Foster, Elmer A. Smith, J. N. Flowers, William H. Swiggart* and *S. R. Prince* were on the brief, for the Southern Railway Co. et al.; and *Mr. W. R. C. Cocke* submitted for the Seaboard Air Line Railway Co., defendants.

Attorney General Biddle, Solicitor General Fahy, Assistant Attorney General Berge, Messrs. Edward Dumbauld, Edward P. Hodges, Sigmund Timberg and *Arne C. Wiprud* filed a brief on behalf of the United States, as *amicus curiae,* supporting the complainant.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The State of Georgia by this motion for leave to file a bill of complaint [1] seeks to invoke the original jurisdiction of this Court under Art. III, § 2 of the Constitution. See Judicial Code § 233, 28 U. S. C. § 341. The defendants are some twenty railroad companies. On November 6, 1944, we issued a rule to show cause why Georgia should not be permitted to file its bill of complaint. Returns to the rule have been made and oral argument had.

Georgia sues in four capacities, only two of which we need mention: (1) in her capacity as a quasi-sovereign or as agent and protector of her people against a continuing wrong done to them; and (2) in her capacity as a proprietor to redress wrongs suffered by the State as the owner of a railroad and as the owner and operator of various institutions of the State.

The essence of the complaint is a charge of a conspiracy among the defendants in restraint of trade and commerce among the States. It alleges that they have fixed arbitrary and noncompetitive rates and charges for transportation of freight by railroad to and from Georgia so as to prefer the ports of other States over the ports of Georgia. It charges that some sixty rate bureaus, committees, conferences, associations and other private rate-fixing agencies have been utilized by defendants to fix these rates; that no road can change joint through rates without the approval of these private agencies; that this private rate-fixing machinery which is not sanctioned by the Interstate Commerce Act and which is prohibited by the anti-trust Acts has put the effective control of rates to

[1] The original bill of complaint dated June 12, 1944 was followed by an amended bill of complaint dated September 15, 1944. Our references throughout are to the amended bill.

and from Georgia in the hands of the defendants. The complaint alleges that these practices in purpose and effect give manufacturers, sellers and other shippers in the North an advantage over manufacturers, shippers and others in Georgia. It alleges that the rates so fixed are approximately 39 per cent higher than the rates and charges for transportation of like commodities for like distances between points in the North. It alleges that the defendants who have lines wholly or principally in the South are generally dominated and coerced by the defendants who have northern roads, and therefore that, even when the southern defendants desire, they cannot publish joint through rates between Georgia and the North when the northern carriers refuse to join in such rates.

It is alleged that the rates as a result of the conspiracy are so fixed as

"(a) to deny to many of Georgia's products equal access with those of other States to the national market;

(b) to limit in a general way the Georgia economy to staple agricultural products, to restrict and curtail opportunity in manufacturing, shipping and commerce, and to prevent the full and complete utilization of the natural wealth of the State;

(c) to frustrate and counteract the measures taken by the State to promote a well-rounded agricultural program, encourage manufacture and shipping, provide full employment, and promote the general progress and welfare of its people; and

(d) to hold the Georgia economy in a state of arrested development."

The complaint alleges that the defendants are not citizens of Georgia; that Georgia is without remedy in her own courts, as the defendants are outside her jurisdiction; that she has no administrative remedy, the Interstate Commerce Commission having no power to afford

relief against such a conspiracy; that the issues presented constitute a justiciable question.

The prayer is for damages and for injunctive relief.

We will return later to the cause of action which Georgia seeks to allege. It is sufficient at this point to say that for purposes of this motion for leave to file we construe the allegation that defendants have conspired to fix the rates so as to "prefer" the ports of other States over the ports of Georgia as a charge that defendants have conspired to fix rates so as to discriminate against Georgia. And we construe the allegation that the southern defendants are dominated and coerced by the northern roads and cannot publish joint through rates when the northern roads refuse to join as a charge that the northern roads use coercion on the southern roads in the fixing of joint through rates.

Defendants in their returns pray that the motion for leave to file be denied on three grounds: (1) that the complaint presents no justiciable controversy; (2) that the complaint fails to state a cause of action; and (3) that two of the defendants are citizens of Georgia. Leave to file should of course be denied if it is plain that no relief may be granted in the exercise of the original jurisdiction of this Court. See *Alabama* v. *Arizona,* 291 U. S. 286, 291–292; *Arizona* v. *California,* 298 U. S. 558, 572.

Justiciable Controversy. It is said that the bill does not set forth a justiciable controversy within the rule of *Massachusetts* v. *Mellon,* 262 U. S. 447, and *Florida* v. *Mellon,* 273 U. S. 12. We take the other view, for we are of the opinion that Georgia as *parens patriae* and as proprietor of various institutions asserts a claim within judicial cognizance. The complaint of Georgia in those respects is not of a political or governmental character. There is involved no question of distribution of powers between the State and the national government as in *Massachusetts* v. *Mellon* and in *Florida* v. *Mellon, supra.* And, as we shall de-

velop more fully when we turn to a consideration of the assertion that no cause of action has been stated, we are not asked to resolve a dispute which has been withdrawn from the judiciary or which by the charter of our government has been reposed in departments other than the judiciary. Cf. *Coleman* v. *Miller,* 307 U. S. 433, 456, 460. The complaint alleges a conspiracy to restrain trade and commerce through the fixing of rates. The history of restraints of trade makes it plain that these problems present judicial questions with which courts have long dealt.[2]

It is of course true that Georgia does not have a right to invoke the original jurisdiction of the Court merely because there may be involved a judicial question. It is not enough that a State is plaintiff. The original jurisdiction is confined to civil suits where damage has been inflicted or is threatened, not to the enforcement of penal statutes of a State. *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, 297–300. And though the suit is civil, leave to file will be denied where it appears that the suit brought in the name of the State is in reality for the benefit of particular individuals. *Oklahoma* v. *Atchison, T. & S. F. R. Co.,* 220 U. S. 277; *Oklahoma* v. *Cook,* 304 U. S. 387; *Jones* v. *Bowles,* 322 U. S. 707. Moreover, *Massachusetts* v. *Mellon* and *Florida* v. *Mellon, supra,* make plain that the United States, not the State, represents the citizens as *parens patriae* in their relations to the federal government.

The present controversy, however, does not fall within any of those categories. This is a civil, not a criminal, proceeding. Nor is this a situation where the United States rather than Georgia stands as *parens patriae* to the citizens of Georgia. This is not a suit like those in *Massachusetts* v. *Mellon,* and *Florida* v. *Mellon, supra,* where

[2] See McLaughlin, Cases on the Federal Anti-Trust Laws (1933), pp. 7–42; Thornton, Combinations in Restraint of Trade (1928), chs. II, III.

a State sought to protect her citizens from the operation of federal statutes. Here Georgia asserts rights based on the anti-trust laws. The fact that the United States may bring criminal prosecutions or suits for injunctions under those laws does not mean that Georgia may not maintain the present suit. As we have seen, Georgia sues as a proprietor to redress wrongs suffered by it as the owner of a railroad and as the owner and operator of various public institutions. Georgia, suing for her own injuries, is a "person" within the meaning of § 16 of the Clayton Act; she is authorized to maintain suits to restrain violations of the anti-trust laws or to recover damages by reason thereof. *Georgia* v. *Evans,* 316 U. S. 159. But Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, *parens patriae,* are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, has injured the economy of Georgia. Those rights are of course based on federal laws. The enforcement of the criminal sanctions of these acts has been entrusted exclusively to the federal government. See *Georgia* v. *Evans, supra,* p. 162. But when it came to other sanctions Congress followed a different course and authorized civil suits not only by the United States but by other persons as well. And we find no indication that, when Congress fashioned those civil remedies, it restricted the States to suits to protect their proprietary interests. Suits by a State, *parens patriae,* have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts.

In determining whether a State may invoke our original jurisdiction in a dispute which is justiciable (*Oklahoma* v. *Cook, supra,* p. 393) the interests of the State are not confined to those which are proprietary; they embrace the so-called "quasi-sovereign" interests which in the words of *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 237,

are "independent of and behind the titles of its citizens, in all the earth and air within its domain." In that case this Court enjoined manufacturing companies from discharging noxious gas from their works in Tennessee over Georgia's territory. It was pointed out that "It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source." 206 U. S. p. 238. That case followed *Missouri* v. *Illinois,* 180 U. S. 208, where Missouri was granted leave to file a bill seeking to enjoin the discharge of sewage into the Mississippi.[3] The Court observed that "if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them." 180 U. S. p. 241. And see *New York* v. *New Jersey,* 256 U. S. 296, 301–302. In *Kansas* v. *Colorado,* 206 U. S. 46, Kansas was allowed to sue to restrain the diversion of water from the Arkansas River, an interstate stream. The Court in upholding the right of Kansas to maintain the suit stated: "It is not acting directly and solely for the benefit of any individual citizen to protect his riparian rights. Beyond its property rights it has an interest as a State in this large tract of land bordering on the Arkansas River. Its prosperity affects the general welfare of the State. The controversy rises, therefore, above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint." 206 U. S. p. 99. And see *Colorado* v. *Kansas,* 320 U. S. 383; *North Dakota* v. *Minnesota,* 263

[3] And see *Missouri* v. *Illinois,* 200 U. S. 496; *Wisconsin* v. *Illinois,* 278 U. S. 367.

U. S. 365. In *Pennsylvania* v. *West Virginia,* 262 U. S. 553, Pennsylvania and Ohio were allowed to maintain suits which sought to enjoin West Virginia from interfering with the flow of natural gas from West Virginia to the other states. The Court said:

"The attitude of the complainant States is not that of mere volunteers attempting to vindicate the freedom of interstate commerce or to redress purely private grievances. Each sues to protect a two-fold interest—one as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will be similarly affected. Both interests are substantial and both are threatened with serious injury.

"Each State uses large amounts of the gas in her several institutions and schools,—the greater part in the discharge of duties which are relatively imperative. A break or cessation in the supply will embarrass her greatly in the discharge of those duties and expose thousands of dependents and school children to serious discomfort, if not more. To substitute another form of fuel will involve very large public expenditures.

"The private consumers in each State not only include most of the inhabitants of many urban communities but constitute a substantial portion of the State's population. Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest but one which is immediate and recognized by law." 262 U. S. pp. 591–592.

It seems to us clear that under the authority of these cases Georgia may maintain this suit as *parens patriae* acting on behalf of her citizens though here, as in *Georgia* v. *Tennessee Copper Co., supra,* p. 237, we treat the injury to the State as proprietor merely as a "makeweight." The original jurisdiction of this Court is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between States and between a State and citizens of another State. See *Missouri* v. *Illinois, supra,* pp. 219–224; *Virginia* v. *West Virginia,* 246 U. S. 565, 599. Trade barriers, recriminations, intense commercial rivalries had plagued the colonies.[4] The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war. Suit in this Court was provided as an alternative. *Missouri* v. *Illinois, supra,* p. 241; *Georgia* v. *Tennessee Copper Co., supra,* p. 237.

If the allegations of the bill are taken as true, the economy of Georgia and the welfare of her citizens have seriously suffered as the result of this alleged conspiracy. Discriminatory rates are but one form of trade barriers. They may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a State as profoundly as any diversion of waters from the rivers. They may stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a State or put it at a decided disadvantage in competitive markets. Such a charge at least equals in gravity the one which Pennsylvania and Ohio had with West Virginia over the curtailment of the flow of natural gas from the West Virginia

[4] See 1 Beveridge, The Life of John Marshall (1916), pp. 310–311; Bancroft, History of the Formation of the Constitution (1885), pp. 27, 130, 183, 187, 454.

fields. There are substitute fuels to which the economy of a State might be adjusted. But discriminatory rates fastened on a region have a more permanent and insidious quality. Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote; it is immediate. If we denied Georgia as *parens patriae* the right to invoke the original jurisdiction of the Court in a matter of that gravity, we would whittle the concept of justiciability down to the stature of minor or conventional controversies. There is no warrant for such a restriction.

Oklahoma v. *Atchison, T. & S. F. R. Co., supra,* is not opposed to this view. In that case, the defendant railroad company had obtained a grant from Congress to locate and maintain a railway line through the Indian Territory out of which the State of Oklahoma was later formed. The federal act provided certain maximum transportation rates which the company might charge. Oklahoma sued to cancel the grant, to have the property granted decreed to be in the State of Oklahoma as *cestui que trust,* to enjoin the defendant from operating a railroad in the State, and to enjoin *pendente lite* the exaction of greater rates than the maximum rates specified. The Court construed the Act of Congress as subjecting the rates to federal control until the territory became a part of a State, at which time the rates became subject to state control. The Court held that our original jurisdiction could not be invoked by a State merely because its citizens were injured. We adhere to that decision. It does not control the present one. This is no attempt to utilize our orig-

inal jurisdiction in substitution for the established methods of enforcing local law. This is not a suit in which a State is a mere nominal plaintiff, individual shippers being the real complainants. This is a suit in which Georgia asserts claims arising out of federal laws and the gravamen of which runs far beyond the claim of damage to individual shippers.

Since the claim which Georgia asserts as *parens patriae* as well as proprietor meets the standards of justiciability and since Georgia is a "person" entitled to enforce the civil sanctions of the anti-trust laws, the reasons which have been advanced for denying Georgia the opportunity to present her cause of action to this Court fail.

Cause of Action. It is argued that the complaint fails to state a cause of action. (1) It is pointed out that under the principle of the *Abilene* case no action for damages on the basis of unjust, unreasonable, or discriminatory railroad rates may be maintained without prior resort to the Interstate Commerce Commission. *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285. (2) It is said that an injunction may not be granted to restrain rates alleged to be unreasonable or discriminatory where there has been no prior determination of the matter by the Commission and that the only way a State or any other person may obtain a judicial determination of the legality of a rate is by review of the Commission's order. *Baltimore & Ohio R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *North Dakota* v. *Chicago & N. W. R. Co.*, 257 U. S. 485; *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158. (3) It is said that damages under the anti-trust laws may not be recovered against railroad carriers though the rates approved by the Commission were fixed pursuant to a conspiracy. *Keogh* v. *Chicago & N. W. R. Co.*, 260 U. S. 156. (4) It is said that persons other than the United States are barred from enjoining violations of the anti-

trust laws by virtue of § 16 of the Clayton Act. 38 Stat. 737, 15 U. S. C. § 26. See *Central Transfer Co.* v. *Terminal R. Assn.*, 288 U. S. 469, 473–475; *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U. S. 500, 513. (5) It is argued that Georgia cannot maintain an action on common law principles based upon a conspiracy among carriers to fix rates.

We think it is clear from the *Keogh* case alone that Georgia may not recover damages even if the conspiracy alleged were shown to exist. That was a suit for damages under § 7 of the Sherman Act. 26 Stat. 210. The Court recognized that although the rates fixed had been found reasonable and non-discriminatory by the Commission, the United States was not barred from enforcing the remedies of the Sherman Act. 260 U. S. pp. 161–162. It held, however, that for purposes of a suit for damages a rate was not necessarily illegal because it was the result of a conspiracy in restraint of trade. The legal rights of a shipper against a carrier in respect to a rate are to be measured by the published tariff. That rate until suspended or set aside was for all purposes the legal rate as between shipper and carrier and may not be varied or enlarged either by the contract or tort of the carrier. And it added: "This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. If a shipper could recover under § 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors." 260 U. S. p. 163. The reasoning and precedent of that case apply with full force here. But it does not dispose of the main prayer of the bill, stressed at the argument, which asks for relief by way of injunction.

637582°—46——33

It is clear that a suit could not be maintained here to review, annul, or set aside an order of the Interstate Commerce Commission. Congress has prescribed the method for obtaining that relief. It is exclusive of all other remedies, including a suit by a State in this Court. *North Dakota* v. *Chicago & N. W. R. Co., supra; Texas* v. *Interstate Commerce Commission, supra.* The same result obtains where the basis for attacking an order of the Commission is a violation of the anti-trust laws, save in the case where the United States is the complainant. For § 16 of the Clayton Act which gives relief by way of injunction against threatened loss or damage through violation of the anti-trust laws provides that no one except the United States shall be entitled to bring such suits against common carriers subject to the Interstate Commerce Act "in respect of any matter subject to the regulation, supervision, or other jurisdiction" of the Commission. *Central Transfer Co.* v. *Terminal R. Assn., supra,* indicates that if Georgia in the present proceeding sought to set aside the rates of the defendants, leave to file would have to be denied. In that case the Commission had approved certain rate schedules which entailed abandoning certain "off-track" stations and the employment by the carriers of a single transfer company to do interstation hauling. The carriers proceeded to make an agreement to carry out the program which had been submitted to the Commission and which was later approved by it. Suit was brought by a private company to enjoin performance of the contract on the ground that it created a monopoly in violation of the anti-trust laws. The Court held that the suit was barred by § 16 of the Clayton Act. The Court pointed out that the purpose of § 16 was "to preclude any interference by injunction with any business or transactions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the Commission, except when the suit is brought by the Government

itself." 288 U. S. p. 475. It added (p. 476): "True, a contract may precede and have existence apart from the several acts required to perform it, and conceivably all of those acts might be done if no contract or agreement to perform them had ever existed. But when they are done in performance of an agreement, there is no way by which the agreement itself can be assailed by injunction except by restraining acts done in performance of it. That, in this case, the statute forbids, not because the contract is within the jurisdiction of the Interstate Commerce Commission, but because the acts done in performance of it, which must necessarily be enjoined if any relief is given, are matters subject to the jurisdiction of the Commission." The policy behind these restrictions placed on suitors by the Congress was aptly stated in *Terminal Warehouse Co.* v. *Pennsylvania R. Co., supra,* p. 513, as follows: "If a sufferer from the discriminatory acts of carriers by rail or by water may sue for an injunction under the Clayton Act without resort in the first instance to the regulatory commission, the unity of the system of regulation breaks down beyond repair." We adhere to these decisions. But we do not believe they or the principles for which they stand are a barrier to the maintenance of this suit by Georgia.

The relief which Georgia seeks is not a matter subject to the jurisdiction of the Commission. Georgia in this proceeding is not seeking an injunction against the continuance of any tariff; nor does she seek to have any tariff provision cancelled. She merely asks that the alleged rate-fixing combination and conspiracy among the defendant-carriers be enjoined. As we shall see, that is a matter over which the Commission has no jurisdiction. And an injunction designed to put an end to the conspiracy need not enjoin operation under established rates as would have been the case had an injunction issued in *Central Transfer Co.* v. *Terminal R. Assn., supra.*

These carriers are subject to the anti-trust laws. *United States* v. *Southern Pacific Co.*, 259 U. S. 214. Conspiracies among carriers to fix rates were included in the broad sweep of the Sherman Act. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505. Congress by § 11 of the Clayton Act entrusted the Commission with authority to enforce compliance with certain of its provisions "where applicable to common carriers" under the Commission's jurisdiction.[5] It has the power to lift the ban of the anti-trust laws in favor of carriers who merge or consolidate (*New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 25–26) and the duty to give weight to the anti-trust policy of the nation before approving mergers and consolidations. *McLean Trucking Co.* v. *United States*, 321 U. S. 67. But Congress has not given the Commission comparable authority to remove rate-fixing combinations from the prohibitions contained in the anti-trust laws. It has not placed these combinations under the control and supervision of the Commission. Nor has it empowered the Commission to proceed against such combinations and through cease and desist orders or otherwise to put an end to their activities. Regulated industries are not *per se* exempt from the Sherman Act. *United States* v. *Borden Co.*, 308 U. S. 188, 198 *et seq.* It is true that the Commission's regulation of carriers has greatly expanded since the Sherman Act. See *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 385–386. But it is elementary that repeals by implication are not

[5] These provisions are those relating to discriminations in price, services, or facilities (§ 2); certain sales of goods, wares, merchandise and the like (§ 3); acquisition by one corporation of the stock of another (§ 7); interlocking directorates and officers (§ 8). See 15 U. S. C. §§ 13, 14, 18, and 19. The enforcement machinery is composed of cease and desist orders enforceable in the courts. 15 U. S. C. § 21.

favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy. *United States* v. *Borden, supra,* pp. 198, 199. None of the powers acquired by the Commission since the enactment of the Sherman Act relates to the regulation of rate-fixing combinations. Twice Congress has been tendered proposals to legalize rate-fixing combinations.[6] But it has not adopted them. In view of this history we can only conclude that they have no immunity from the anti-trust laws.

It is pointed out, however, that under § 1 (4) of the Interstate Commerce Act (54 Stat. 900, 49 U. S. C. § 1 (4)) it is "the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto." And it is noted that agreement among carriers is provided in the establishment of joint rates. § 6. That is true. But it would be a perversion of those sections to hold that they legalize a rate-fixing combination of the character alleged to exist here. The collaboration contemplated in the fixing of through and joint rates is of a restrictive nature. We do not stop at this stage of the proceedings to delineate the legitimate area in which that collaboration may operate. In the *Keogh* case (260 U. S. 156) the suit was one for damages under the Sherman Act. The charge was that the defendant carriers

[6] See (1) 51 Cong. Record, 63d Cong., 2d Sess., pp. 9582, 9583; (2) S. 942, 78th Cong., 1st Sess.; H. R. 2720, 78th Cong., 1st Sess. These latter proposals were designed (1) to make lawful the fixing of rates by carriers through rate bureaus, conferences, or associations; and (2) to put those group activities under the control of the Commission. The history and activities of rate bureaus are extensively reviewed in Hearings, Senate Committee on Interstate Commerce on S. 942, Regulation of Rate Bureaus, 78th Cong., 1st Sess.

had formed a rate bureau or committee to secure agreement in respect to freight rates among the constituent railroad companies which would otherwise be competing carriers. As we have seen, the Court held that damages could not be recovered. But Mr. Justice Brandeis speaking for a unanimous Court stated that a conspiracy to fix rates might be illegal though the rates fixed were reasonable and non-discriminatory. He said (260 U. S. pp. 161–162): "All the rates fixed were reasonable and non-discriminatory. That was settled by the proceedings before the Commission. . . . But under the Anti-Trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under § 3, by injunction under § 4, and by forfeiture under § 6. That was settled by *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, and *United States* v. *Joint Traffic Association,* 171 U. S. 505. The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government." The *Trans-Missouri Freight Assn.* case and the *Joint Traffic Assn.* case have been followed in other fields. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, and the cases which preceded it indicate the extent of the ban on price-fixing under the Sherman Act. But we need not at this juncture determine the full extent to which that principle is applicable in the fixing of joint through rates. It is sufficient here to note that we find no warrant in the Interstate Commerce Act and the Sherman Act for saying that the authority to fix joint through rates clothes with legality a conspiracy to discriminate against a State or a region, to use coercion in the fixing of rates, or to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier. The type of regulation which Congress chose did not eliminate the emphasis on competition and individual freedom of action in rate-

making. 1 Sharfman, The Interstate Commerce Commission (1931), p. 81. The Act was designed to preserve private initiative in rate-making as indicated by the duty of each common carrier to initiate its own rates. *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co., supra.* If a combination of the character described in this bill of complaint is immune from suit, that freedom of action disappears. The coercive and collusive influences of group action take its place.[7] A monopoly power is created under the aegis of private parties without Congressional sanction and without governmental supervision or control.

These considerations emphasize the irrelevancy to the present problem of the fact that the Commission has authority to remove discriminatory rates of the character alleged to exist here. Under § 3 (1) of the Act rates are declared unlawful which give "any undue or unreasonable preference or advantage" to any port, region, district, territory and the like. And the Commission has taken some action in that regard. See *Alabama* v. *New York C. R. Co.,* 235 I. C. C. 255; 237 I. C. C. 515; *Live Stock to and from the South,* 253 I. C. C. 241. The present bill does not seek to have the Court act in the place of the Commission. It seeks to remove from the field of rate-making the influences of a combination which exceed the limits of the collaboration authorized for the fixing of joint through

[7] We have considered the argument that Certificate No. 44, issued March 20, 1943 under § 12 of the Act of June 11, 1942 (56 Stat. 357) by the Chairman of the War Production Board (8 Fed. Reg. 3804) protects this alleged combination from the charges contained in the bill. That certificate approves joint action by common carriers through rate bureaus and the like in the initiation and establishment of rates. We do not stop to analyze it beyond observing that in no respect would it be a bar to the present action. It does not purport to be retroactive. It does not sanction the use of coercion. It does not authorize any combination to discriminate against a region in the establishment of rates. Moreover, legal means may be employed for an illegal end.

rates. It seeks to put an end to discriminatory and coercive practices. The aim is to make it possible for individual carriers to perform their duty under the Act, so that whatever tariffs may be continued in effect or superseded by new ones may be tariffs which are free from the restrictive, discriminatory, and coercive influences of the combination. That is not to undercut or impair the primary jurisdiction of the Commission over rates. It is to free the rate-making function of the influences of a conspiracy over which the Commission has no authority but which if proven to exist can only hinder the Commission in the tasks with which it is confronted.

What we have said disposes for the most part of the argument that recognized principles of equity prevent us from granting the relief which is asked. Sec. 16 of the Clayton Act provides for relief by injunction "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." Those requirements are sufficiently satisfied to justify a filing of this bill. It must be remembered that this is a suit to dissolve an illegal combination or to confine it to the legitimate area of collaboration. That relief cannot be obtained from the Commission for it has no supervisory authority over the combination. It is true that the injury to Georgia is not in the existence of the combination *per se* but in the rates which are fixed by the combination. The fact that the rates which have been fixed may or may not be held unlawful by the Commission is immaterial to the issue before us. The *Keogh* case indicates that even a combination to fix reasonable and non-discriminatory rates may be illegal. 260 U. S. p. 161. The reason is that the Interstate Commerce Act does not provide remedies for the correction of all the abuses of rate-making which might constitute violations of the anti-trust laws. Thus a "zone of reasonableness exists between maxima and

minima within which a carrier is ordinarily free to adjust its charges for itself." *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506. Within that zone the Commission lacks power to grant relief even though the rates are raised to the maxima by a conspiracy among carriers who employ unlawful tactics. If the rate-making function is freed from the unlawful restraints of the alleged conspiracy, the rates of the future will then be fixed in the manner envisioned by Congress when it enacted this legislation. Damage must be presumed to flow from a conspiracy to manipulate rates within that zone.

Moreover, the relief sought from this Court is not an uprooting of established rates. We are not asked for a decree which would be an idle gesture. We are not asked to enjoin what the Commission might later approve or condone. We are not asked to trench on the domain of the Commission; nor need any decree which may be ultimately entered in this cause have that effect. Georgia alleges, "No administrative proceeding directed against a particular schedule of rates would afford relief to the State of Georgia so long as the defendants remained free to promulgate rates by collusive agreement. Until the conspiracy is ended, the corrosion of new schedules, established by the collusive power of the defendant carriers acting in concert, would frustrate any action sought to be taken by administrative process to redress the grievances from which the State of Georgia suffers." Rate-making is a continuous process. Georgia is seeking a decree which will prevent in the future the kind of harmful conduct which has occurred in the past. Take the case of coercion. If it is shown that the alleged combination exists and uses coercion in the fixing of joint through rates, only an injunction aimed at future conduct of that character can give adequate relief. Indeed, so long as the collaboration which exists exceeds lawful limits and continues in operation, the only effective remedy lies in dissolving the

combination or in confining it within legitimate boundaries. Any decree which is entered would look to the future and would free tomorrow's rate-making from the coercive and collusive influences alleged to exist. It cannot of course be determined in advance what rates may be lawfully established. But coercion can be enjoined. And so can a combination which has as its purpose an invidious discrimination against a region or locality. Dissolution of illegal combinations or a restriction of their conduct to lawful channels is a conventional form of relief accorded in anti-trust suits. No more is envisaged here. If the alleged combination is shown to exist, the decree which can be entered will be no idle or futile gesture. It will restore that degree of competition envisaged by Congress when it enacted the Interstate Commerce Act. It will eliminate from rate-making the collusive practices which the anti-trust laws condemn and which are not sanctioned by the Interstate Commerce Act. It will supply an effective remedy without which there can be only an endless effort to rectify the continuous injury inflicted by the unlawful combination. The threatened injury is clear. The damage alleged is sufficient to satisfy the preliminary requirements of this motion to file. There is no administrative control over the combination. And no adequate or effective remedy other than this suit is suggested which Georgia can employ to eliminate from rate-making the influences of the unlawful conspiracy alleged to exist here.

As we have said, we construe the bill to charge a conspiracy among defendants to use coercion in the fixing of rates and to discriminate against Georgia in the rates which are fixed. We hold that under that construction of the bill a cause of action under the anti-trust laws is alleged.[8] We intimate no opinion whether the bill might

[8] We therefore do not reach the question whether an action based on common law principles could be maintained.

be construed to charge more than that or whether a rate-fixing combination would be legal under the Interstate Commerce Act and the Sherman Act but for the features of discrimination and coercion charged here. We are dealing with the case only in a preliminary manner. Cf. *Missouri* v. *Illinois,* 200 U. S. 496, 517, 518. The complaint may have to be amplified and clarified as respects the coercion and discrimination charged, the damage suffered, or otherwise. We do not test it against the various types of motions and pleadings which may be filed. We construe it with that liberality accorded the complaint of a sovereign State as presenting a substantial question with sufficient clarity and specificity as to require a joinder of issues.

Alleged Misjoinder of Parties Defendant. Two of the defendant-corporations claim to be citizens of Georgia. Georgia asserts they are not. That issue is an involved one. Georgia may not of course invoke the original jurisdiction of the Court in a suit against one of her citizens. If either of the defendants who assert this defense is a citizen of Georgia and is a necessary party, leave to file would have to be denied. *Pennsylvania* v. *Quicksilver Mining Co.,* 10 Wall. 553; *California* v. *Southern Pacific Co.,* 157 U. S. 229; *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199; *Louisiana* v. *Cummins,* 314 U. S. 577. We do not, however, have to decide at this stage of the proceedings whether the corporations in question are citizens of Georgia within the meaning of Art. III, § 2 of the Constitution. They are not indispensable parties. In a suit to enjoin a conspiracy not all the conspirators are necessary parties defendant.[9] It is averred and not challenged

[9] See *Waterman* v. *Canal-Louisiana Bank Co.,* 215 U. S. 33, 49; *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451, 456; *Hopkins* v. *Oxley Stave Co.,* 83 F. 912, 915–916; *Rocky Mountain Bell Tel. Co.* v. *Montana Federation of Labor,* 156 F. 809, 811–812. Cf. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 247.

that the other defendants are citizens of other States. The citizenship of the two defendants in question may be challenged by a motion to strike. *Louisiana* v. *Cummins,* 314 U. S. 580. But if they are stricken, the Court would not lose original jurisdiction over the controversy between Georgia and the other defendants.

Exercise of Original Jurisdiction. It does not necessarily follow that this Court must exercise its original jurisdiction. It has at times been held that this Court is not the appropriate tribunal in which to maintain suits brought by a State.

By Clause 1 of § 2 of Article III of the Constitution, the judicial power of the United States extends "to all Cases, in Law and Equity, arising under . . . the Laws of the United States" and "to Controversies . . . between a State and Citizens of another State." [10] Clause 2 of § 2 of Article III confers on this Court jurisdiction of those cases "in which a State shall be Party." But Clause 2 of § 2 merely distributes the jurisdiction conferred by Clause 1 of § 2. *Louisiana* v. *Texas,* 176 U. S. 1, 16; *Massachusetts* v. *Missouri,* 308 U. S. 1, 19. Clause 2 does not grant exclusive jurisdiction to this Court in the cases enumerated by it. *Ames* v. *Kansas,* 111 U. S. 449, 469; *Plaquemines Fruit Co.* v. *Henderson,* 170 U. S. 511. And it has been held that the exercise of that jurisdiction is not mandatory in every case. *North Dakota* v. *Chicago & N. W. R. Co., supra; Georgia* v. *Chattanooga,* 264 U. S. 472, 483; *Oklahoma* v. *Cook, supra,* p. 396; *Massachusetts* v. *Missouri, supra.* The Court in its discretion has withheld the exercise of its jurisdiction where there has been no want of another suitable forum to which the cause may be remitted in the interests of convenience, efficiency and jus-

[10] By reason of the Eleventh Amendment the judicial power of the United States does not extend to suits brought against a state by a citizen of another state.

tice. *Georgia* v. *Chattanooga, supra; Massachusetts* v. *Missouri, supra.*

There is some suggestion that the issues tendered by the bill of complaint present questions which a district court is quite competent to decide. It is pointed out that the remedy is one normally pursued in the district courts whose facilities and prescribed judicial duties are better adapted to the extended trial of issues of fact than are those of this Court. And it is said that no reason appears why the present suit may not conveniently proceed in the district court of the proper venue or why the convenience of the parties and witnesses, as well as of the courts, would be better served by a trial before a master appointed by this Court than by a trial in a district court with the customary appellate review.[11] The suggestion is that we deny the motion for leave to file, without prejudice to the maintenance of the suit in an appropriate district court. See *Massachusetts* v. *Missouri, supra,* pp. 17–18.

There is, however, a reason why we should not follow that procedure here though in other respects we assume it would be wholly appropriate. Sec. 16 of the Clayton Act (15 U. S. C. § 26), with the exceptions already noted, provides that "any person . . . shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws." Sec. 12 of the Clayton Act (15 U. S. C. § 22) provides that "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the

[11] In a proper case appellate review may be had directly in this Court by certiorari before judgment in the Circuit Court of Appeals. Judicial Code § 240 (a), 28 U. S. C. § 347 (a).

district of which it is an inhabitant, or wherever it may be found."

From these provisions it is apparent that Georgia might sue the defendants only in the judicial district where they are inhabitants or where they may be found or transact business. The bill of complaint, however, alleges and (with the exception of the two defendants already mentioned) it is not denied that "the parties defendant are not citizens of Georgia, or within the jurisdiction of its courts." If that allegation is taken as true, it is apparent that Georgia could not find all of the defendants in one of the judicial districts of Georgia so as to maintain a suit of this character against all of them in a district court in Georgia. Certainly we have no basis for assuming that all of the so-called northern roads, incorporated in such States as Pennsylvania, Maryland, Indiana, Ohio, New York and Illinois, are doing business in Georgia. It is said that most of the defendants can be found in Georgia, in the District of Columbia, or in other districts. But no such facts appear in the record before us. And we cannot take judicial notice of the district or districts wherein all of the defendants are "found" or "transact business." We would not be warranted in depriving Georgia of the original jurisdiction of this Court merely because each of the defendants could be found in some judicial district. Unless it were clear that all of them could be found in some convenient forum we could not say that Georgia had a "proper and adequate remedy" apart from the original jurisdiction of this Court. *Massachusetts* v. *Missouri, supra,* p. 19. No such showing has been made. Once a state makes out a case which comes within our original jurisdiction, its right to come here is established. There is no requirement in the Constitution that it go further and show that no other forum is available to it.

It is true that § 5 of the Sherman Act empowers the court before whom proceedings under § 4 are pending to

bring in parties who reside outside the district in which the court is held.[12] That procedure is available in civil suits brought by the United States. *Standard Oil Co.* v. *United States,* 221 U. S. 1, 46. But since § 4 is limited to suits brought by the United States, § 5 is similarly confined. See *Greer, Mills & Co.* v. *Stoller,* 77 F. 1; *Hansen Packing Co.* v. *Armour & Co.,* 16 F. Supp. 784, 787. Apart from specific exceptions created by Congress the jurisdiction of the district courts is territorial. As stated in *Robertson* v. *Railroad Labor Board,* 268 U. S. 619, 622–623:

"In a civil suit *in personam* jurisdiction over the defendant, as distinguished from venue, implies, among other things, either voluntary appearance by him or service of process upon him at a place where the officer serving it has authority to execute a writ of summons. Under the general provisions of law, a United States district court

---

[12] Sec. 4 reads:

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1–7 and 15 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

Sec. 5 reads:

"Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof."

cannot issue process beyond the limits of the district, *Harkness* v. *Hyde,* 98 U. S. 476; *Ex parte Graham,* 3 Wash. 456; and a defendant in a civil suit can be subjected to its jurisdiction *in personam* only by service within the district. *Toland* v. *Sprague,* 12 Pet. 300, 330. Such was the general rule established by the Judiciary Act of September 24, 1789, c. 20, § 11, 1 Stat. 73, 79, in accordance with the practice at the common law. *Piquet* v. *Swan,* 5 Mason 35, 39 *et seq.* And such has been the general rule ever since. *Munter* v. *Weil Corset Co.,* 261 U. S. 276, 279."

It follows that we should not in the exercise of our discretion remit Georgia to the federal district courts for relief against the injuries of which she complains.

The motion for leave to file the amended bill of complaint is granted.

It is so ordered.

MR. CHIEF JUSTICE STONE, dissenting.

MR. JUSTICE ROBERTS, MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON, and I think that the application of the State of Georgia for leave to file its amended bill of complaint in this Court should be denied (1) because in its judicial discretion, this Court should, without deciding the merits, leave the State to its remedy, if any, in the district court; (2) because the State lacks standing to present the only substantial issue in the case; and (3) because in the present posture of the case, the bill of complaint, for several reasons, fails to state a cause of action for which a court of equity can give effective relief.

As the Court concedes and for reasons which will presently be more fully considered, the State, under the rule laid down in *Keogh* v. *Chicago & Northwestern R. Co.,* 260 U. S. 156, cannot maintain its suit for damages resulting from the alleged conspiracy to fix unlawful interstate railroad freight rates. But the Court grants Georgia's application to file on the ground that its bill of complaint,

as now amended, states a cause of action under § 16 of the Clayton Act, c. 323, 38 Stat. 737, 15 U. S. C. § 26, for an injunction against a conspiracy in violation of the antitrust laws. The Court holds that such a suit is within the original jurisdiction of this Court, conferred by Article III, § 2, Cls. 1 and 2 of the Constitution. Clause 1 provides that the judicial power of the United States extends "to all Cases, in Law and Equity, arising under . . . the Laws of the United States" and "to Controversies . . . between a State and Citizens of another State. . . ." Clause 2 confers on this Court original jurisdiction of those cases or controversies "in which a State shall be Party."

The Court disregards the fainthearted and unconvincing assertion of the State that it has a "common law" cause of action entitling it, independently of the Clayton Act and the federal antitrust laws, to maintain the present suit to restrain the alleged conspiracy to fix and maintain rates or charges for the interstate transportation of freight. We do not stop to consider this contention, for we are of the opinion that the objections to the maintenance of the present suit are essentially the same, whether it be regarded as a suit upon a cause of action arising under the Clayton Act or as one maintainable upon the equitable principles generally applicable in the federal courts independently of the Clayton Act.

I

If it be assumed that the State may maintain this action, either as *parens patriae* or for the injury to itself as a shipper and consignee of interstate freight, the right sought to be established is in point of substance like that of a private corporation, and the remedy asked is one normally pursued in district courts whose facilities and prescribed judicial duties are better adapted to the trial

of issues of fact than are those of this Court. In an original suit, even when the case is first referred to a master, this Court has the duty of making an independent examination of the evidence, a time-consuming process which seriously interferes with the discharge of our ever-increasing appellate duties. No reason appears why the present suit may not be as conveniently proceeded with in the district court of the proper venue as in this Court, or why the convenience of the parties and witnesses, as well as of the courts concerned, would be better served by a trial before a master appointed by this Court than by a trial in the appropriate district court with the customary appellate review. The case seems preeminently one where this Court may and should, in the exercise of its discretion and in the interest of a more efficient administration of justice, decline to exercise its jurisdiction, and remit the parties to the appropriate district court for the proper disposition of the case there. *North Dakota* v. *Chicago & Northwestern R. Co.*, 257 U. S. 485; *Georgia* v. *Chattanooga*, 264 U. S. 472, 483; *Oklahoma ex rel. Johnson* v. *Cook*, 304 U. S. 387, 396; *Massachusetts* v. *Missouri*, 308 U. S. 1, 17–20.

It is said that Georgia should not be deprived of the jurisdiction of this Court unless it can bring suit against all the defendants in one convenient district; and that there is no reason for assuming that all the defendants are amenable to suit in any one judicial district. But this puts the shoe on the wrong foot. It is Georgia which seeks to invoke our equity jurisdiction to hear this case, and when the question of our discretionary power to remit the parties to an adequate remedy in some other court is raised, it is incumbent upon it to show that it will be unable to reach all the defendants in a convenient district. And Georgia, although invited on the argument of this motion to do so, has made no showing that the suit cannot be proceeded with in a district court as readily as in this

Court. It made no such allegation in the amended bill of complaint which it tenders.[1] Hence we can only conclude that there is no such obstacle.

Further, it may be readily determined from standard works of reference, such as The Official Guide of the Railways, Moody's Steam Railroads, railroad timetables, and telephone directories, that the supposed difficulty is not a real one. Under § 12 of the Clayton Act, 15 U. S. C. § 22, these defendants may be sued in any district in which they are "found" or "transact business." A corporation both is "found" and "transacts business" in a district in which it operates a railroad or in which it maintains an office for the solicitation of freight or passenger traffic. See *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U. S. 359, 370–374; *United States* v. *Univis Lens Co.*, 316 U. S. 241, 246. These facts may be ascertained readily from the sources we have mentioned. It appears from them that there are several districts which would be as convenient for a trial as Washington, D. C., where proceedings before this Court would be had, and in which Georgia may obtain service of process upon at least as many of the defendants named in the complaint, as it may sue in this Court. For Georgia, itself, as well as this Court, seems reconciled to the suit's continuing here with but eighteen of the twenty defendants, since two may be required to be dismissed from the suit as citizens of Georgia.[2]

---

[1] Some reliance is placed on an allegation of the proposed amended complaint, which, in its context, is that the matters of which complaint is made are not within the jurisdiction of the *state* courts of Georgia; but that has no bearing on the question whether they are within the competence of a federal district court in Georgia or in any other State.

[2] These two defendants are the Seaboard Air Line Railway Co., and the Nashville, Chattanooga & St. Louis Ry., two of the largest of the southern defendants.

Of the twenty defendants, at least 18, not including the New York, Chicago & St. Louis R. Co. and the Richmond, Fredericksburg & Potomac R. Co. (R. F. & P.), are within the jurisdiction of the Northern District of Georgia. Of these defendants, at least 19, all but the R. F. & P., transact business in the Northern District of Illinois and in the Southern District of New York. At least 18, not including the R. F. & P. and the Nashville, Chattanooga & St. Louis Ry., are amenable to suit in the Western District of Pennsylvania and in the Eastern District of Michigan. At least 18, all but the R. F. & P. and the Carolina, Clinchfield and Ohio Railway,[3] are suable in the Eastern District of Missouri. Thus, there is no want of a suitable forum in which Georgia can reach at least the same number of defendants as she may sue in this Court. And it may be that service can be had on the other defendants in the districts named.

II

If leave to file were denied, as we think it should be, without prejudice to a suit in a district court, it would be unnecessary at this stage of the proceedings to pass upon the question whether the suit is one which a court of equity could entertain. But in assuming jurisdiction of the case, the Court passes on that question. Hence it becomes necessary to state the reasons why, in the present posture of the case, the State does not state a case for relief within our original jurisdiction.

The gist of the cause of action asserted by the amended complaint is the injury visited upon the inhabitants of the State of Georgia by the alleged conspiracy among the defendant railroads to fix and maintain unlawfully excessive and discriminatory rates upon freight moving

[3] This defendant has been operating since 1924 as the Clinchfield Railroad Company, under lease to the Atlantic Coast Line R. Co. and the Louisville & Nashville R. Co.

by interstate rail transportation to and from Georgia. It is further alleged that the conspiracy violates the Sherman Act, and that its effect is to retard the economic growth of the State. To this is added what the Court concedes is a mere "makeweight" allegation of injury to the State in its capacity as an owner of a railroad, and as a shipper and consignee of freight.

But the inhabitants of the State who have suffered injury or who are threatened with injury by the unlawful practices alleged in the amended complaint are alone entitled to seek a legal remedy for their injury, and are the proper parties plaintiff in any suit to enforce their rights which are alleged to have been infringed. It has long been settled by the decisions of this Court that a State is without standing to maintain suit for injuries sustained by its citizens and inhabitants for which they may sue in their own behalf. *New Hampshire* v. *Louisiana,* 108 U. S. 76; *Louisiana* v. *Texas,* 176 U. S. 1; *Oklahoma* v. *Atchison, T. & S. F. R. Co.,* 220 U. S. 277, 289; *Oklahoma ex rel. Johnson* v. *Cook, supra,* 395–396; *Jones ex rel. Louisiana* v. *Bowles,* 322 U. S. 707. And many years ago it was established by decisions of this Court, whose authority has remained unimpaired until discarded by the opinion of the Court just announced, that a State does not stand in such relation to its citizens and inhabitants as to enable it to maintain an original suit in this Court to protect them by injunction from injuries to the State's economy resulting from the maintenance of unlawful interstate freight rates. *Oklahoma* v. *Atchison, T. & S. F. R. Co., supra;* cf. *Oklahoma* v. *Gulf, C. & S. F. R. Co.,* 220 U. S. 290, 301.

In the *Atchison Railway* case the plaintiff State alleged as the basis for its capacity to sue for relief, see 220 U. S. at 283–284, as does Georgia here, that the maintenance of the unlawful structure of freight rates on commodities widely used by inhabitants of the State was " 'a menace

to the future of said State' . . . [and] a hindrance to the growth of the State." This Court nevertheless held that the wrong was to the individuals of the State, and that the State was therefore not in a position to bring the suit as *parens patriae*.

The federal government is *parens patriae* with respect of the cause of action here alleged, and not the State. The federal government alone stands in such relationship to the citizens and inhabitants of the United States, as to permit the bringing of suit in their behalf, to protect them from the violation of federal laws relating to interstate commerce. See *Massachusetts* v. *Mellon*, 262 U. S. 447, 485–486; *Florida* v. *Mellon*, 273 U. S. 12, 18; *Jones ex rel. Louisiana* v. *Bowles, supra*. The Sherman Act, §§ 1–4, 15 U. S. C. §§ 1–4, recognized that it is the United States which is *parens patriae*, when it authorized the United States, not the individual States, to bring criminal prosecutions or suits for injunctions under the Act.

When the United States brings such a suit it is acting on behalf of the people of the United States, and in the national interest. The authority to bring such suits includes the discretionary authority not to bring them, if the responsible officers of the government are of the opinion that a suit is not warranted or would be of disservice to the national interest. To permit a State to bring a Sherman Act suit in behalf of the public is to fly in the face of the national policy established by Congress that the federal government should determine when such a suit is to be brought and how it should be prosecuted.

Thus the Sherman Act entrusted to the national government the duty to represent the people in the vindication of their rights under the antitrust laws. And this is confirmed by § 16 of the Clayton Act, which permits injunction suits by the United States against common carriers in respect of matters within the province of the Interstate Commerce Commission, while prohibiting such suits to all others, including a State.

III

But even if, as the Court decides, Georgia has standing to maintain this suit, either in its own right or as *parens patriae,* and this Court has jurisdiction of the suit and should, in the exercise of its discretion, entertain it rather than remit the parties to the district court, the more important question remains whether the present suit is one in which a court of equity can give any effective relief.

The suit, so far as the Court allows its prosecution, is in equity to restrain an alleged conspiracy by the defendant rail carriers to fix and maintain unjust, unlawful, excessive, and discriminatory freight rates in violation of the antitrust laws. Section 16 of the Clayton Act, 15 U. S. C. § 26, authorizes "any person" to maintain a suit to restrain violations of the antitrust laws, and the State of Georgia, suing for its own injuries, is a person within the meaning of that section. *Georgia* v. *Evans,* 316 U. S. 159. The section provides that the relief to be given is an injunction "against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . ." And even though, as asserted, the suit be maintainable in the federal courts independently of the Clayton Act, the controlling principles governing the maintenance of the suit are the same in either case. The plaintiff must show threatened injury, *Vicksburg Waterworks Co.* v. *Vicksburg,* 185 U. S. 65, 82; *Paine Lumber Co.* v. *Neal,* 244 U. S. 459, 471; *Duplex Co.* v. *Deering,* 254 U. S. 443, 464–465; compare *Texas* v. *Florida,* 306 U. S. 398, 406–412 with *Massachusetts* v. *Missouri, supra,* 15–16, for which he is without other adequate remedy, *Matthews* v. *Rodgers,* 284 U. S. 521, 525–526, and cases cited; *Schoenthal* v. *Irving Trust Co.,* 287 U. S. 92, 94; *Myers* v. *Bethlehem Corp.,* 303 U. S. 41, 50–52, and

cases cited, and for which a court of equity is able to provide a remedy.

Georgia is threatened with injury only as the alleged conspiracy will result in the defendants' charging freight rates other than those which would exist in the absence of the conspiracy. That is, Georgia is not injured unless other rates than those now in force would be charged if the alleged conspiracy were to cease. While threatened damage in that sense could be assumed in a free competitive market, freight rates are not, under the Interstate Commerce Act, arrived at by the processes of free competition. The requirements of the Act are, as we will see, that the rates be just and reasonable and that they accord with the national transportation policy; the determination, in the first instance, whether the rates conform to those standards is left by Congress to the Interstate Commerce Commission, not to the courts. And unless Georgia can show that the present rates are unlawful, or that some other rate structure, which could be substituted for that now in force, would be just and reasonable, which Georgia cannot do without prior resort to the Commission, it can not show that any other structure could lawfully exist or that any injury to it is threatened by the conspiracy.

It follows from this that the prerequisites to the maintenance of the present suit are lacking for the following reasons: First, the State has not availed itself of or exhausted the administrative remedies provided by the Interstate Commerce Act, which may afford an adequate remedy and which must in any case precede the institution of the present suit in equity. Second, the suit as now framed falls within the proviso of § 16 of the Clayton Act denying to any "person," except the United States, authority "to bring suit in equity for injunctive relief against any common carrier subject to the provisions of" the Interstate Commerce Act, "in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." And

third, in the absence of a determination by the Commission of the unlawfulness of the interstate freight tariffs filed or proposed to be filed by the several defendant carriers, no court of equity could, within the scope of its authority, frame a decree effectively enjoining an agreement or "conspiracy" to file tariffs establishing interstate freight rates.

First. The fact that a State may constitutionally invoke the jurisdiction of this Court in a suit brought by it against citizens of another State, does not dispense with the further requisite that if equitable relief is sought, the bill of complaint must state a cause of action cognizable in equity, of such a nature that the Court can give relief. *Texas* v. *Florida, supra,* 405. It is, as we have said, a familiar principle governing the exercise of equity jurisdiction of federal courts that equitable relief may be invoked only when the plaintiff is without other adequate remedy. And it is a corollary of this that a suitor may not seek such relief until he has exhausted his available administrative remedies. *Myers* v. *Bethlehem Corp., supra,* 51, n. 9, and cases cited; *Natural Gas Co.* v. *Slattery,* 302 U. S. 300, 310–311.

Here, by the terms of § 16 of the Clayton Act, as well as the principles generally governing equitable relief in the federal courts, the State, in order to secure the aid of equity, must show injury caused or threatened by the alleged unlawful acts of which it complains. Since the wrongful acts relied upon are a conspiracy to adopt and maintain unjust, unlawful, excessive or discriminatory freight rates, the only threatened injury to the State or its inhabitants, resulting from the conspiracy, is that which is or may be caused by such unlawful rates.

But the Interstate Commerce Act requires all interstate rail carriers, before putting into effect rates or charges for interstate transportation to adopt and file with the Commission just and reasonable rates. §§ 1 (4) (5) (6), 6 (1) (3), 49 U. S. C. §§ 1 (4) (5) (6), 6 (1) (3). It confers on

the Commission exclusive jurisdiction to determine the lawfulness of all rates appearing in the filed tariffs, and authority to suspend rates, and to order the railroad to cease and desist from charging other than the lawful rates. §§ 15 (1) (7), 49 U. S. C. § 15 (1) (7). The Commission's determination is to be in accordance with the "national transportation policy," to develop and preserve a national transportation system, see *Wisconsin Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 585; *New England Divisions Case*, 261 U. S. 184, 189–190; *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, 341–342, and to establish and maintain "reasonable charges . . ., without . . . unfair or destructive competitive practices . . ." Transportation Act of 1940, c. 722, 54 Stat. 899, § 1.

The Commission is directed to consider the effect of rates on the movement of traffic, and the need of adequate and efficient railway transportation service at low cost, as well as the carriers' need of revenues sufficient to enable them to provide that service. Interstate Commerce Act, as amended, § 15a, 49 U. S. C. § 15a. In fixing rates or divisions, the Commission's determination may take account of the financial needs of the weaker carriers, by giving them a larger share of divisions, or by a general rate increase.[4] *New England Divisions Case, supra*, 189–

[4] Under the recapture clause of the Transportation Act of 1920, c. 91, 41 Stat. 488, § 422, adding § 15a to the Interstate Commerce Act, profits of carriers in excess of a fair return were held in trust for purposes of improving railroad service. *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456. The recapture clause was repealed by the Act of June 16, 1933, c. 91, 48 Stat. 220, § 205. But its underlying purpose to permit rates sufficient to provide an adequate and efficient transportation system was reaffirmed by the declaration of a "National Transportation Policy" which the Commission is commanded to observe, by the Transportation Act of 1940, c. 722, 54 Stat. 899, § 1.

195; *Beaumont, S. L. & W. R. Co.* v. *United States,* 282 U. S. 74; cf. *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658. It may fix minimum as well as maximum rates, § 15, 49 U. S. C. § 15, thus permitting it to prevent cut-throat competition and to protect weaker competitors. It may consider the effect of competing means of transportation, or other relevant circumstances and conditions attending the transportation service. See *Barringer & Co.* v. *United States,* 319 U. S. 1, and authorities cited; and on the considerations upon which the Commission fixes rates, see Sharfman, The Interstate Commerce Commission, Volume III–B. These and many other controlling factors, which enter the Commission's determination of rates, may be irrelevant to decision in an ordinary Sherman Act case, but are inextricably interwoven with the present suit, in which the State must establish that injury to it is threatened by the conspiracy to fix freight rates.

The Commission's orders are enforceable by injunctions in the district courts. § 16 (12), 49 U. S. C. § 16 (12). And the administrative remedy is exclusive of any which may be afforded by courts, at least until the Commission has passed upon the validity of the rates and classifications involved. *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426; *Robinson* v. *Baltimore & Ohio R. Co.,* 222 U. S. 506; *Northern Pacific R. Co.* v. *Solum,* 247 U. S. 477; *Director General of Railroads* v. *Viscose Co.,* 254 U. S. 498; *Midland Valley R. Co.* v. *Barkley,* 276 U. S. 482. Until the Commission acts, no court can say that the rates are not lawful and reasonable or that they are not within the lowest range of the zone of reasonableness. Nor can either be assumed, the burden being upon Georgia to show that it is injured by the acts of which it complains. And if the present rates are at the lowest point of reasonableness, as they well may be, Georgia is not injured, for in that event no lower rates

could be lawfully enforced by the Commission or the courts.

It is not without pertinence to the present application that the State of Georgia and seven other southern States are parties to proceedings now pending before the Interstate Commerce Commission, Docket No. 28300, Class Rate Investigation, and Docket No. 28310, Consolidated Freight Classification, in which the Chairman of the Georgia Public Service Commission has appeared as the principal witness on behalf of the State. In these proceedings the witness urged uniformity of rates in southern and official classification territories, in conformity to the official territory system of rates. The witness relied on § 3 (1) of the Act, 49 U. S. C. § 3 (1), making it unlawful for any rail carrier to make or give undue or unreasonable preferences or advantage to any particular person, locality or particular description of traffic; on § 1 (4) (5) (6), 49 U. S. C. § 1 (4) (5) (6), requiring common carriers by rail to establish just and reasonable rates, fares, charges and classifications; and on § 5 (b) of the Transportation Act of 1940, which requires the Commission to investigate the lawfulness of rates between points in different classification territories and to enter such orders as may be appropriate for the removal "of any unlawfulness which may be found to exist."

It is plain that the Commission has jurisdiction in these proceedings to set aside such unlawful rates as may have resulted from the conspiracies alleged in the State's amended complaint. If the Commission orders them set aside, nothing further remains for any court to do, for reasons which will presently more fully appear, save only as it may be asked to review or enforce the Commission's order. Without prior resort to the Commission, Georgia does not and cannot establish in a court proceeding that it is threatened with injury by the conspiracy or that it

is necessary for it to resort to the courts to secure the relief which it seeks in the present suit.

The State seeks to avoid these plain provisions of the Clayton and Interstate Commerce Acts by its insistence that by its amended complaint it asks relief not from the unlawful rates which have been or will be established as a result of the alleged conspiracy, but from the conspiracy itself, over which the Interstate Commerce Commission is said to have no jurisdiction, and from which it can give no relief. In the State's bill of complaint, as originally presented, it sought an injunction setting aside the unlawful rates. Evidently realizing that all courts are precluded from taking such action before the Commission has determined the validity of the rates, the State sought to overcome the difficulty by an amendment to its bill of complaint, purporting to withdraw its attack on the rates and assailing the conspiracy alone. But, as the Court seems to recognize, even the amended complaint contains allegations and raises issues as to whether the rates charged by the defendants are discriminatory. The complaint therefore raises questions as to interference with the primary jurisdiction of the Interstate Commerce Commission which are essentially the same as those presented by the original bill.

This verbal maneuver, as a means of conferring jurisdiction on this Court, is futile, for the reason, as we have said, that the State cannot maintain its suit in equity either under § 16 of the Clayton Act or upon general equity principles, without establishing a threatened injury to it or those whom it represents. And this is equally true whether it sues as *parens patriae* or as owner of a railroad, and a shipper and consignee of freight. The threatened injury can ensue only from the maintenance of the unlawful rates and practices, which are specially charged to be discriminatory. But "a rate is not necessarily illegal be-

cause it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What rates are legal is determined by the Act to Regulate Commerce" and not by the antitrust laws. *Keogh* v. *Chicago & Northwestern R. Co., supra,* 162. Hence it follows in this case that the suit can be maintained only by showing that the alleged conspiracy has resulted or will result in unlawful rates, or that without the conspiracy, lawful rates, other than those now in force, would prevail, determinations which can be made only by the Interstate Commerce Commission, and which must be made by it, before this Court can take any judicial action based upon such determinations.

We assume for present purposes that a conspiracy to fix lawful rates may be a violation of the antitrust laws, as was intimated in the *Keogh* case. But as this Court there pointed out, pages 161–162, the remedy is not to be had by the suit of a private individual; "the Government may have redress by criminal proceedings under § 3, by injunction under § 4, and by forfeiture under § 6." The State cannot, more than a private individual, bring a suit under the Clayton Act to restrain the conspiracy unless it be a conspiracy to do something injurious to the plaintiff. The only such injury alleged in a great variety of ways is that caused by unlawful and discriminatory freight rates established by the conspiracy. No such injury can be presumed from a conspiracy to fix lawful rates or to fix any rate unless it can be known with what new rates those now in force will be replaced by Commission action.

For this and like reasons, this Court has uniformly refused to permit a party under guise of suing under the antitrust laws, to seek in the courts by indirection, determinations which are reserved for the Commission in the first instance. *Keogh* v. *Chicago & Northwestern R. Co., supra; Central Transfer Co.* v. *Terminal Railroad Assn.,* 288 U. S. 469, 476; *Terminal Warehouse Co.* v. *Pennsyl-*

vania R. Co., 297 U. S. 500; and compare *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474; *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195. As these cases show, the State cannot make its assault on a matter said not to be within the jurisdiction of the Commission, when adjudication must turn upon matters which are within its jurisdiction. Here the Court cannot ascertain and enjoin threatened injury resulting from a conspiracy to fix unlawful freight rates without considering their lawfulness and reasonableness, and thus encroaching upon the authority which Congress has given to the Commission alone. The case is therefore peculiarly one for the application of the rule that equity will not undertake to give relief until the plaintiff has exhausted his administrative remedies, for until that has occurred, it cannot be known that the plaintiff is without adequate relief or, in the event that it is not, what relief equity may appropriately give.

Second. Independent of, but supplementing the considerations which indicate the unmistakable intention of Congress that a suit like the present should not be made the means of breaking down the regulatory powers of the Commission, are the provisions of § 16 of the Clayton Act. As already noted, a proviso to the section withholds from "any person" other than the United States the right "to bring suit in equity for injunctive relief against any common carrier subject to the provisions of" the Interstate Commerce Act "in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

When the Clayton Act was adopted in 1914, the Commission had already been given broad powers to fix and regulate rates by the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, and the Mann-Elkins Act of June 18, 1910, c. 309, 36 Stat. 539. Congress realized the danger that indiscriminate suits for injunctions under the

antitrust laws, in many cases affecting interstate rail carriers, would substitute the many district courts for the Commission, the single rate-making authority, a retrogression from the consistent Congressional policy to avoid confusion and conflict in this field. Hence, when Congress, by § 16 of the Clayton Act, for the first time authorized private suitors to seek relief by injunction under the antitrust laws, it was at pains to bar such suits against carriers with respect to any matters within the province of the Commission. Thus it was the purpose of § 16 to preclude the breakdown of the unified rate structure established for the nation by the Commission, as would inevitably result from the maintenance under the Sherman Act of numerous individual suits, like the present one, affecting rates which Congress had left within the Commission's exclusive control in the first instance.

The statutory command can no more be evaded than may the exclusive jurisdiction of the Commission to regulate rates, by saying that the "relief" which Georgia seeks is not a matter subject to the jurisdiction of the Commission. Section 16 does not foreclose a suit merely where the "relief" is a matter subject to the jurisdiction of the Commission. Its words are much broader. They deny the remedy, except to the United States, "in respect of *any matter* subject to . . . the jurisdiction" of the Commission. As we have said, Georgia cannot show damage save by showing that the Commission would approve some rate structure other than that presently existing. That is certainly a "matter subject to the . . . jurisdiction" of the Commission, sufficient to preclude a suit under § 16.

The inseparability of equitable relief against a rate-making conspiracy from that against the unlawfulness of the rates which are or may be its fruits, has already been pointed out. Suffice it to say here that precisely the argument now made for disregarding the prohibition of § 16 was rejected by this Court in a suit brought by an injured

private party to restrain agreements or conspiracies to do acts within the jurisdiction of the Commission. *Central Transfer Co.* v. *Terminal Railroad Assn., supra.* And compare *United States Navigation Co.* v. *Cunard S. S. Co., supra,* where this Court gave the like construction to § 16 of the Clayton Act, in its comparable relation to the authority of the Shipping Board to fix rates under the Shipping Act of 1916, c. 451, 39 Stat. 728, 46 U. S. C. §§ 801–842, as amended by the Merchant Marine Act of 1920, c. 250, 41 Stat. 988.

In the *Central Transfer Co.* case it was urged that § 16 of the Clayton Act did not preclude the relief sought, since the Commission did not have jurisdiction over the agreements or contracts complained of, but only over the acts involved in their performance. This Court gave the conclusive answer which we think should be given now, that no injunction could be effectively given against the agreement or conspiracy without in some manner relating it to the lawfulness of the acts done or to be done in execution of the agreement or contract, and that the determination of the lawfulness of those acts and their regulation were within the exclusive jurisdiction of the administrative agency. In that case, as well as in the *United States Navigation Co.* case, it was pointed out that any other construction would defeat the plain purpose of § 16 to preclude, except in suits by the Government, judicial interference with or prejudgment of the lawfulness of matters which Congress has indubitably placed within the jurisdiction of the administrative agency.

Equitable relief under § 16 in the present case must be denied upon the principle identical with that upon which the Court has relied in denying the right of the State to recover damages in the suit which it proposes here. The fact that in this branch of the case, as in *Keogh* v. *Chicago & Northwestern R. Co., supra,* and *Terminal Warehouse Co.* v. *Pennsylvania R. Co., supra,* the suit is for damages

resulting from unlawful rates, instead of an injunction restraining threatened damage or injury, is without significance. For in either case, damage cannot ensue unless the agreement or conspiracy results in an unlawful rate or practice of whose lawfulness the Commission is the sole arbiter. And in both, this Court has held that the suit cannot be maintained without first resorting to the Commission.

Congress did not see fit by its extensive revision of the Interstate Commerce Act in the Transportation Act of 1940, to alter the application of the Clayton Act to the jurisdiction of the Interstate Commerce Commission. For us to alter it now to meet the exigencies of a particular case, which presents no plausible relevant differences from those which we have heretofore decided, is an assumption of power which only Congress could rightly exercise, and a power which it has plainly declined to exercise.

Third. Even assuming, as the State does, and as the Court is persuaded, that a court of equity could be called upon to enjoin a conspiracy to establish rates in anticipation of a determination of their unlawfulness, it would plainly be impossible to frame a decree for relief in advance of a determination by the Commission that the present rates are unlawful, or that those resulting from the decree would be lawful. Courts cannot enjoin, in general terms, violations of the Sherman Act, without specifying what acts are to be enjoined as violations, or as aiding or inducing violations. *Swift & Co.* v. *United States,* 196 U. S. 375, 396; *Swift & Co.* v. *United States,* 276 U. S. 311, 328; cf. *New York, N. H. & H. R. Co.* v. *Interstate Commerce Comm'n,* 200 U. S. 361, 404; *Labor Board* v. *Express Publishing Co.,* 312 U. S. 426. Nor can it determine in advance what rates may be lawfully established since the jurisdiction to make that determination is reserved exclusively to the Commission.

Hence the suggestion, which the Court has been persuaded to accept, that this Court can find a way to enjoin the alleged conspiracy to fix rates, without regard to what rates are or may be agreed upon and whether the Commission finds them to be lawful or unlawful, is an invitation to a course of the veriest futility. Any injunction which this Court could properly frame must not be an idle gesture. It must be one to prevent the threatened injury. An injunction to prevent a conspiracy without relation to its injurious consequences could not have that effect, and the injunction could be related to those consequences in this case only by defining rates and practices which the Commission has not declared, and may or may not declare, to be unlawful.

It is futile to attempt to enjoin a conspiracy to fix rates because of their injurious effect on the plaintiff, unless it is known that they are unlawful or will be and unless the Court is free to determine the point. And it is futile for this Court to attempt to prescribe what rates will be lawful since its determination will not be binding upon the Commission, and may be ignored by it. Indeed, even after the Commission has made such a determination this Court, in the first instance, is without power to set it aside, *North Dakota* v. *Chicago & Northwestern R. Co., supra; Texas* v. *Interstate Commerce Comm'n,* 258 U. S. 158, 164–165, for exclusive jurisdiction to set aside an order of the Commission is vested in a district court of three judges under the Urgent Deficiencies Act, c. 32, 38 Stat. 219, as amended, 28 U. S. C. §§ 41 (28), 43.

It is the duty of this Court to dismiss an original suit in which it cannot make an effective decree. See *Arizona* v. *California,* 298 U. S. 558, 572, and cases cited. *A fortiori,* it is its duty not to entertain such a suit.

The soundness and the compelling necessity for the construction which the Court has hitherto given to § 16 of the Clayton Act could not be better illustrated and em-

phasized than by reference to the situation exhibited by the case which is now before us. Any decree, effective to prevent the injury of which the State complains, would necessarily result in further inequalities in rates, such as are now alleged to exist. The Court cannot enjoin as unlawful the alleged conspiracy to establish rates without undertaking to say what rates and practices are to be deemed lawful and what unlawful. But by this determination the Interstate Commerce Commission would not be bound, nor would the United States or any railroad other than those which are parties defendant.

Only Georgia would secure relief approximating that sought by the bill. If relief enjoining the conspiracy complained of were effective to relieve the State of the injury from unlawful rates to which it objects, and without which it could not maintain the suit under § 16, the decree must result in a new rate structure applicable to the railroads which are parties defendant. Prejudice and discrimination would be created as to every other State in southern territory and as to shippers and consignees of freight in those States who would still be governed by the published tariff rates, against which only Georgia and its citizens would have secured some measure of relief. There would be two sets of rates between the south and the north, one, effected as a result of this Court's decree, applicable to shippers in Georgia over the railroads which are defendants here, and another governed by published tariffs approved by the Commission and applicable to all other shippers and railroads in the south. Since illegality in existing rates is averred because of disparity in the level of rates in two rate-making areas, with no allegation that southern carriers receive more than a fair charge for their transportation service, the Court would be required to determine whether the discrimination should be removed by increasing rates in official territory or establishing an intermediate level of new rates, *Interstate Commerce*

Commission v. *United States,* 289 U. S. 385, 392—a determination which could be arrived at only by the performance by this Court of the legislative function of rate making which has hitherto been reserved to the Commission.

If all this is to be avoided by the injunction against the alleged conspiracy, but without enjoining any of its asserted evil consequences in rate making, the issue originally tendered would, by the amendment to the bill of complaint, seem to amount to little if anything more than a political issue. The amended complaint alleges that "The wrong done transcends that experienced by individuals. For as men, firms, and corporations have come and gone, the conspiracy has continued over the decades." While trial upon the original complaint might have reduced this grievance to the dimensions of a cause of action to enjoin illegal freight rates injurious to the State, it now appears as the grievance of a section of the country against an existing federal system of rate making, which should be addressed to Congress rather than to this Court.

The support which the Department of Justice lends to Georgia's contentions by the brief amicus, filed in this Court in behalf of the United States, removes any evident need for entertaining this suit. The Government is charged with the enforcement of the antitrust laws, and is authorized by § 4 of the Sherman Act and § 16 of the Clayton Act to maintain suits for that purpose, which others cannot bring. If it believes that the alleged conspiracy exists and should be stopped by the remedial action of courts, without resort to the Commission, there would seem to be no reason why, avoiding the many technical obstacles to the present suit, it should not proceed to remedy in the usual manner the grievances of the citizens of the United States including citizens of Georgia.

Other objections aside, it seems obvious that this Court cannot give any effective relief removing the threat of injury to the State resulting from a railroad rate conspiracy without breaking down the system of rate regulation by the Commission—a system which Congress has painstakingly built up since the decisions, more than forty-five years ago, in *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, and *United States* v. *Joint Traffic Assn.*, 171 U. S. 505, when the Commission was without power to prescribe rates. See *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co., supra; Terminal Warehouse Co.* v. *Pennsylvania R. Co., supra,* 513.

The reasoning of the Court is not and cannot be restricted to this case. If Georgia may prosecute the present suit, every shipper or consignee of freight who asserts injury by a conspiracy respecting railroad rates in violation of the antitrust laws may maintain a like suit in a district court. The prosecution of such suits cannot fail to bring chaos into the field of interstate rate making. The entry of decrees for the plaintiffs could only mean the breakdown of the unified system of fixing rates by Commission action, which Congress has ordained by the Interstate Commerce Act. It was the purpose of § 16 of the Clayton Act to preclude such a breakdown. Its purpose can and should be effected by the refusal of this Court to entertain the proposed suit.

A. H. PHILLIPS, INC. *v.* WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR.

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

No. 608. Argued March 2, 1945.—Decided March 26, 1945.

1. Provisions of the Fair Labor Standards Act granting exemptions from the operation of the Act are to be narrowly construed. P. 493.

2. Section 13 (a) (2) of the Fair Labor Standards Act, exempting from the operation of the Act employees "engaged in any retail . . . establishment," *held* inapplicable to warehouse and central office employees of an interstate retail chain store system. P. 493.

144 F. 2d 102, affirmed.

CERTIORARI, 323 U. S. 704, to review the affirmance of a decree, 50 F. Supp. 749, enjoining the petitioner from violating the Fair Labor Standards Act.

Mr. Joseph B. Ely, with whom *Messrs. Frederick M. Kingsbury* and *Edward T. Collins* were on the brief, for petitioner.

Miss Bessie Margolin, with whom *Solicitor General Fahy, Messrs. Robert L. Stern, Douglas B. Maggs* and *Archibald Cox* were on the brief, for respondent.

Mr. Charles B. Rugg filed a brief on behalf of the American Retail Federation, as *amicus curiae,* urging reversal.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Section 13 (a) (2) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 1067, 29 U. S. C. § 213 (a) (2), states that the wage and hour provisions of the Act shall not apply with respect to "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." The issue posed by this case is whether employees working in the warehouse and central office of an interstate grocery chain store system are "engaged in any retail . . . establishment" within the meaning of § 13 (a) (2) so as to be exempt from the wage and hour provisions.

The petitioner corporation operates a chain of 49 retail grocery stores in cities and towns within a 35-mile radius from Springfield, Massachusetts. Of these stores, 40 are in Massachusetts and 9 are in Connecticut. Quite apart from

these retail stores, petitioner maintains a separate warehouse and office building in Springfield in which work the employees involved in this case.

The warehouse is the only one maintained by petitioner and it services all the 49 stores. Except for bread, pastry and milk, which are secured from local sources, all of petitioner's merchandise is delivered by rail and truck to the warehouse where it is divided and then delivered by petitioner's trucks to the individual stores according to need. About 80% of the merchandise passing through the warehouse is received from outside Massachusetts, while about 18% of the total sales by dollar volume of the merchandise shipped from this warehouse is accounted for by petitioner's Connecticut stores. Each week a regular order is delivered to each store from the warehouse and additional deliveries are made as required. Merchandise is supplied on the basis of requisitions prepared by individual store managers, subject to revision by one of the three superintendents in the central office. All of petitioner's sales are made exclusively at the retail stores and no deliveries to customers are made from the warehouse.

Employees in the central office, which is located in the same building as the warehouse, perform the usual functions of checking invoices, paying bills, making out payrolls, keeping inventory records, checking store deliveries and the like. The various employees in the warehouse and the truck drivers handle the physical work connected with the receipt, storage and shipment of merchandise. None of these employees segregates his time as between interstate and intrastate shipments; both types of shipments are handled indiscriminately to and from the warehouse.

On the basis of these facts, the Administrator of the Wage and Hour Division sought to enjoin petitioner from violating the overtime and record provisions of the Act. The District Court granted the injunction, holding (1)

that the warehouse and central office employees were engaged in interstate commerce within the meaning of the Act and (2) that they were not exempted from the wage and hour provisions by reason of § 13 (a) (2) since the warehouse and office building did not constitute a retail establishment. 50 F. Supp. 749. The First Circuit Court of Appeals affirmed as to both points. 144 F. 2d 102. Petitioner, however, has sought review here only as to the second point. And certiorari was granted because of the conflicting views expressed on this issue by lower appellate courts.[1]

The Fair Labor Standards Act was designed "to extend the frontiers of social progress" by "insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." Message of the President to Congress, May 24, 1934. Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people. We accordingly agree with the two courts below that the exemption contained in § 13 (a) (2) is inapplicable in this case and that the employees involved are entitled to the benefits of the wage and hour provisions of the Act. We hold, in other words, that the warehouse and central office of petitioner's chain store system cannot properly be considered a retail establishment within the meaning of § 13 (a) (2).

---

[1] The decision below in this case is in accord with the reasoning of *Walling* v. *American Stores Co.*, 133 F. 2d 840 (C. C. A. 3), but is in conflict with *Allesandro* v. *C. F. Smith Co.*, 136 F. 2d 75 (C. C. A. 6), *Walling* v. *L. Wiemann Co.*, 138 F. 2d 602 (C. C. A. 7), and *Walling* v. *Block*, 139 F. 2d 268 (C. C. A. 9).

It is necessary, in the first place, to understand the true nature of petitioner's warehouse and office. The prime function of petitioner's chain store system is to sell groceries at retail. Like most large chains, however, petitioner has found it economically feasible to perform and integrate both the retail and wholesale functions of the grocery business. The independent wholesaler or middleman has been eliminated from the channel of distribution of petitioner's merchandise. Petitioner not only operates the retail outlets but purchases the merchandise in quantity from producers, stores it in a warehouse and systematically allots it to the individual stores. Certain economies in operation result from the direct mass buying and centralized merchandising control which would otherwise be impossible to achieve.[2] A warehouse and a central office such as petitioner maintains are vital factors in this integration of the retail and wholesale functions. They are necessary instruments for the successful performance of the wholesale aspects of a multi-function business of this type.

There are, to be sure, certain distinctions between the wholesale activities of a chain store system and those of an independent wholesaler. Thus a chain store enterprise does not customarily sell merchandise in its warehouse to retailers or other wholesale customers as does an independent wholesaler.[3] The goods stored in a chain store warehouse are merely distributed rather than sold to the retail stores. See *Liggett Co.* v. *Lee*, 288 U. S. 517, 537, 538. But this and other differences that can be found arise from the fact that the chain organizations have completely

---

[2] See Beckman and Nolen, The Chain Store Problem (1938), pp. 48–50.

[3] Although petitioner's warehouse apparently does no wholesale business with independent retailers, many chain store warehouses sell certain quantities of merchandise to outside retailers in addition to supplying their own retail outlets. Beckman and Nolen, The Chain Store Problem (1938), p. 8.

meshed the retail and wholesale functions. Many of the costs and risks normally assumed by the wholesale merchant because of his independent and competitive nature are eliminated by the chain store organization. The resulting savings and simplifications serve only to emphasize some of the major effects of the apparent trend away from the independent middleman in our economy of distribution.[4] The disappearance of the independent middleman, together with many of his separate operations and charges, does not mean, however, that his essential intermediary or wholesale function of moving goods from producer to retailer has been abolished. In this instance it has only been taken over by the retailer, acting through its own distinct wholesale units.[5]

In a realistic sense, therefore, most chain store organizations are merchandising institutions of a hybrid retail-wholesale nature. They possess the essential characteristics of both the retailer and the wholesaler. Their wholesale functions, which are integrated with but are physically distinct from their retail functions, are performed through their warehouses and central offices. That

---

[4] Does Distribution Cost Too Much?, Twentieth Century Fund (1939), pp. 81–85, 100–110, 178–181, 345–346; Beckman and Nolen, The Chain Store Problem (1938), pp. 7–9, 42–61; 15 Encyclopaedia of the Social Sciences (1935), pp. 411–416.

[5] "While it is frequently said that the function of wholesaling is vital even though the wholesaler may not be in every line, some amplification of this remark seems advisable. *Some agency must provide the machinery to move all merchandise from the producer to the retailer. Regardless of what this function is called, it is essentially the same as wholesaling.* . . . Chain stores, once they assume enough importance to justify a warehouse, are engaged in wholesaling as well as retailing. Whatever goods are handled at retail outlets must be bought in quantity, handled in the warehouse and allotted to the individual stores in much the same way that wholesalers would serve the independent dealers." Chamber of Commerce of the United States, National Wholesale Conference, Report of Committee I, Wholesalers' Functions and Services (1929), pp. 13–14.

fact is the essential key to the problem presented by this case. It serves to make clear the inapplicability of § 13 (a) (2) to petitioner's warehouse and central office employees.

Section 13 (a) (2) by its very terms exempts only those employees engaged in a retail or service establishment operating primarily in local commerce. Petitioner claims that its retail stores, warehouse and central office together constitute a "retail establishment" within the meaning of this exemption. The lack of merit in this claim is obvious. Even if, as petitioner urges, the word "establishment" referred to an entire business or enterprise, the combined retail-wholesale nature of petitioner's interstate business would prevent it from properly being classified as a local "retail establishment." But if, as we believe, Congress used the word "establishment" as it is normally used in business and in government [6]—as meaning a distinct physical place of business—petitioner's enterprise is composed of 49 retail establishments and a single wholesale establishment. Since the employees in question work in the wholesale establishment, § 13 (a) (2) is plainly irrelevant.

Moreover, it is quite apparent from the sparse legislative history of § 13 (a) (2) that Congress did not intend to exempt as a "retail establishment" the warehouse

---

[6] Prior to the adoption of the Fair Labor Standards Act the term "establishment" was used in the sense of physical place of business by many census reports, business analyses, administrative regulations, and state taxing and regulatory statutes. As applied to chain store systems, "establishment" thus described each unit in the chain. For example, under the N. R. A. Codes of Fair Competition, prepared by committees from the industries concerned, retail stores of a grocery chain were subject to the Retail Food and Grocery Trade Code, while the chain store warehouses and central offices were treated as separate "establishments" subject to the Wholesale Food and Grocery Trade Code. See N. R. A. Codes of Fair Competition, Vol. IV, pp. 460–1, 470, and Vol. V, pp. 5–6, 13–14.

and central office of an interstate chain store system. From the standpoint of its legislative ancestry, § 13 (a) (2) is the offspring of a manifest desire to exclude from the scope of the Act "business in the several States that is of a purely local nature." Sen. Rep. 884, 75th Cong., 1st Sess., p. 5. Congress was interested in exempting those regularly engaged in local retailing activities and those employed by small local retail establishments, epitomized by the corner grocery, the drug store and the department store.[7] It felt that retail concerns of this nature do not sufficiently influence the stream of interstate commerce to warrant imposing the wage and hour requirements on them. *Ibid.* p. 5. Section 13 (a) (2) is a part of the Act only because of the fear that § 13 (a) (1), in exempting employees regularly engaged in a "local retailing capacity," did not clearly exclude those employed by local retailers who are situated near state lines and who make occasional interstate sales. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 571.

Here petitioner's warehouse and central office employees are performing wholesale duties in the very midst of the stream of interstate commerce. They constantly deal with both incoming and outgoing interstate ship-

[7] The original language of § 13 (a) (2), introduced as an amendment by Representative Celler, applied to any retail "industry." Representative Celler stated that if the amendment were accepted "retail dry goods, retail butchering, grocers, retail clothing stores, department stores will all be exempt." Several other Congressmen expressed their desire to assure the exemption of "the corner grocery store man or the filling station man" and "the local groceryman, druggist, clothing store, meat dealer—any merchant in fact." 83 Cong. Rec. 7299, 7436–7438. The exemption as it finally emerged from the joint House-Senate conference committee applied to any retail "establishment" rather than "industry." The use of the word "establishment" is more appropriate to the small local retailers which Congress had in mind and clearly indicates that Congress meant by it something less or different than "industry" or "enterprise."

ments. Such tasks are completely unlike those pursued by employees of the small local retailers, who were the sole concern of Congress in § 13 (a) (2). These duties, rather, are economically, functionally and physically like those of the independent wholesaler's employees who, when engaged in interstate commerce, are admittedly entitled to the benefits of the Act. We fail to perceive in § 13 (a) (2) or in its Congressional background any intent to discriminate against chain store employees engaged in wholesale activities or to give to chain store warehouses a competitive advantage in labor costs over independent wholesalers.

We are thus unable to say that the warehouse and central office employees of petitioner's interstate chain store system plainly and unmistakably fall within either the terms or the spirit of the exemption specified in § 13 (a) (2). Economic facts, legal principles and consistent and thorough administrative interpretation [8] of the exemption all compel the conclusion that § 13 (a) (2) is not applicable to the facts of this case. We therefore affirm the judgment of the court below.

Affirmed.

The CHIEF JUSTICE, MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON concur in the result.

MR. JUSTICE ROBERTS dissents.

---

[8] See Interpretative Bulletin No. 6, United States Department of Labor, Wage and Hour Division, originally issued in December, 1938, and revised in June, 1941. See also First Annual Report of the Administrator of the Wage and Hour Division, United States Department of Labor (1940), p. 21, informing Congress that "each physically separated store of a chain of stores will be considered a separate 'retail establishment.' The warehouses and central executive offices of the chain are not 'retail establishments.'"

UNITED STATES v. WILLOW RIVER POWER CO.

CERTIORARI TO THE COURT OF CLAIMS.

No. 312. Argued February 8, 9, 1945.—Decided March 26, 1945.

1. An owner of a dam and hydroelectric plant near the confluence of navigable and non-navigable streams, and embracing lands riparian to the navigable stream, is not entitled under the Fifth Amendment to compensation from the United States for a reduction in the generating capacity of the plant, which resulted from an authorized navigation improvement that raised the level of the water of the navigable stream above ordinary high-water mark. *United States* v. *Cress*, 243 U. S. 316, distinguished. Pp. 504, 506.
2. The resulting damage to the riparian owner in this case did not constitute such a taking of property as is required by the Fifth Amendment to be compensated. P. 510.

101 Ct. Cls. 222, reversed.

CERTIORARI, 323 U. S. 694, to review a judgment for the plaintiff in a suit against the United States to recover compensation for an alleged taking of property.

Mr. Paul A. Freund, with whom *Solicitor General Fahy*, *Assistant Attorney General Shea* and *Miss Cecelia H. Goetz* were on the brief, for the United States.

Mr. R. M. Rieser, with whom *Mr. John Wattawa* was on the brief, for respondent.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The Willow River Power Company has been awarded $25,000 by the Court of Claims as just compensation for impaired efficiency of its hydroelectric plant caused by the action of the United States in raising the water level of the St. Croix River. Reality of damage and reasonableness of the award are not in issue. Our question is

whether the damage is the result of a "taking" of private property, for which just compensation is required by the Fifth Amendment.

Willow River in its natural state was a non-navigable stream, which flowed to within a few rods of the St. Croix River, turned and roughly paralleled it for something less than a mile, and then emptied into the St. Croix. Many years ago an earth dam was thrown across the Willow about a half-mile above its natural mouth. A new mouth was cut across the narrow neck which separated the two rivers and a dam was built across the artificial channel close to or upon the banks of the St. Croix. Here also was built a mill, which operated under the head produced in the pool by the two dams, which obstructed both the natural and the artificial channel of the Willow River.

These lands and appurtenant rights were acquired by the Willow River Power Company, a public utility corporation of the State of Wisconsin, and were devoted to hydroelectric generation for supply of the neighborhood. The plant was the lowest of four on Willow River operated by the Company as an integrated system. The powerhouse was located on land owned by the Company above ordinary high water of the St. Croix. Mechanical energy for generation of electrical energy was developed by water in falling from the artificial level of non-navigable Willow River to the natural level of navigable St. Croix River. The elevation of the head water when at the crest of the gates was 689 feet above mean sea level. The operating head varied because elevation of the tail water was governed by the fluctuating level of the St. Croix. When that river was low, the maximum head was developed, and was 22.5 feet; when the river was at flood stage, the operating head diminished to as little as eight feet. The ordinary high-water mark is found to have been 672 feet, and the head available above that was seventeen feet.

The Government, in pursuance of a Congressional plan to improve navigation, in August of 1938 had completed what is known as the Red Wing Dam in the upper Mississippi, into which the St. Croix flows. This dam was some thirty miles downstream, but it created a pool which extended upstream on the St. Croix beyond respondent's plant at an ordinary elevation of 675 feet. Thus the water level maintained by the Government in the St. Croix was approximately three feet above its ordinary high-water level at claimant's property. By thus raising the level at which tail waters must flow off from claimant's plant, the Government reduced the operating head by three feet, using ordinary high water as the standard, and diminished the plant's capacity to produce electric energy. The Company was obliged to supplement its production by purchase from other sources.

Loss of power was made the only basis of the award. The Court of Claims found as a fact that "The value of the loss in power as a result of the raising of the level of the St. Croix River by three feet above ordinary high water was $25,000 at the time and place of taking," and it rendered judgment for that amount. There is no finding that any fast lands were flooded or that other injury was done to property or that claimant otherwise was deprived of any use of its property. It is true that the water level was above high-water mark on the St. Croix River banks and on claimant's structures, but damage to land as land or to structures as such is not shown to be more than nominal and accounts for no part of the award. The court held that the Government "had a right to raise the level of the river to ordinary high-water mark with impunity, but it is liable for the taking or deprivation of such property rights as may have resulted from raising the level beyond that point." Turning, then, to ascertain what property right had been "taken," the Court referred

to *United States* v. *Cress*, 243 U. S. 316, 329, 330, which it said was identical in facts, and held it had no option but to follow it and that "It results that plaintiff is entitled to recover the value of the decrease in the head of its dam." [1]

The Fifth Amendment, which requires just compensation where private property is taken for public use, undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project. It does not undertake, however, to socialize all losses, but those only which result from a taking of property. If damages from any other cause are to be absorbed by the public, they must be assumed by act of Congress and may not be awarded by the courts merely by implication from the constitutional provision. The court below thought that decrease of head under the circumstances was a "taking" of such a "property right," and that is the contention of the claimant here.

It is clear, of course, that a head of water has value and that the Company has an economic interest in keeping the St. Croix at the lower level. But not all economic interests are "property rights"; only those economic advantages are "rights" which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion. The law long has recognized that the right of ownership in land may carry with it a legal right to enjoy some benefits from adjacent waters. But that a closed catalogue of abstract and absolute "property rights" in water hovers over a given piece of shore land, good against all the world, is not in this day a permissible assumption. We cannot start the process of decision by calling such a claim as we have here a

[1] 101 Ct. Cls. 222, certiorari granted, 323 U. S. 694.

"property right"; whether it is a property right is really the question to be answered. Such economic uses are rights only when they are legally protected interests. Whether they are such interests may depend on the claimant's rights in the land to which he claims the water rights to be appurtenant or incidental; on the navigable or non-navigable nature of the waters from which he advantages; on the substance of the enjoyment thereof for which he claims legal protection; on the legal relations of the adversary claimed to be under a duty to observe or compensate his interests; and on whether the conflict is with another private riparian interest or with a public interest in navigation. The claimant's assertion that its interest in a power head amounts to a "property right" is made under circumstances not present in any case before considered by this Court.

Claimant is the owner of lands riparian to the St. Croix River, and under the law of Wisconsin, in which the lands lie, the shore owner also has title to the bed of the stream. *Kaukauna Co.* v. *Green Bay Canal Co.*, 142 U. S. 254, 271; *Jones* v. *Pettibone*, 2 Wis. 308; *Willow River Club* v. *Wade*, 100 Wis. 86, 76 N. W. 273. The case seems to have been tried on the theory that the Company may also claim because of interference with its rights as a riparian owner on the Willow. But the Government has not interfered with any natural flow of the Willow past claimant's lands. Where it was riparian owner along Willow's natural channel claimant already had created an artificial level much above the Government level. If claimant's land along the Willow was at all affected it was at the point where the land was riparian to the artificial channel, just back of the shore line of the St. Croix, where the land had been cut away to install the dam and power plant and to utilize the advantages of being riparian to the St. Croix. We think the claimant's maximum and only interest in the level of the St. Croix arises from its riparian position

thereon and is not helped by the fact that its utilization of riparian lands on the St. Croix involves conducting over them at artificial levels waters from the Willow.

The property right asserted to be appurtenant to claimant's land is that described in *United States* v. *Cress*, 243 U. S. 316, 330, as "the right to have the water flow away from the mill dam unobstructed, except as in the course of nature" and held in that case to be an "inseparable part" of the land. The argument here is put that the waters of the St. Croix were backed up into claimant's tailrace, causing damage. But if a dyke kept the waters of the St. Croix out of the tailrace entirely it would not help. The water falling from the Willow must go somewhere, and the head may be preserved only by having the St. Croix channel serve as a run-off for the tail waters. The run-off of claimant's water may be said to be obstructed by the presence of an increased level of Government-impounded water at the end of claimant's discharge pipes. The resulting damage may be passed on to the Government only if the riparian owner's interest in "having the water flow away" unobstructed above the high-water line is a legally protected one.

The basic doctrine of riparian rights in flowing streams prevails with minor variations in thirty-one states of the Union.[2] It chiefly was evolved to settle conflicts between

[2] The other 17 have some form of the appropriative system. It is based on the principle of priority or seniority, under which rights accrue to users in the order in which they first put waters to beneficial use. The principle is not equal right of use but paramount right in the earlier user. The use is not limited to riparian tracts but may be diverted to sites remote from the stream, thus spreading the benefits beyond riparian lands, a considerable advantage to some arid regions. The beneficial use is more extensive and includes use for irrigation, mining, manufacturing as well as domestic uses, and the water may be permanently diverted and the stream thereby diminished to an extent not allowable under the riparian rights theory. See Bannister, *Interstate Rights in Interstate Streams in the Arid West* (1923) 36 Harv. L. Rev. 960.

parties, both of whom were riparian owners. Equality of right between such claimants was the essence of the resulting water law. "The fundamental principle of this system is that each riparian proprietor has an equal right to make a reasonable use of the waters of the stream, subject to the equal right of the other riparian proprietors likewise to make a reasonable use." [3] With this basic principle as a bench mark, particular rights to use flowing water on riparian lands for domestic purposes and for power were defined, each right in every riparian owner subject to the same right in others above and to a corresponding duty to those below.

The doctrine of riparian rights attained its maximum authority on non-navigable streams. No overriding public interest chilled the contest between owners to get the utmost in benefits from flowing streams. Physical conditions usually favored practical utilization of theoretical rights. In general non-navigable streams were small, shifted their courses easily and were not stable enough to serve as property lines as larger streams often do. They were shallow, could be forded and were no great obstacle to tillage or pasturage on two sides of the stream as a single operation. Such streams, like the lands, were fenced in, and while the waters might show resentment by carrying away a few spans of fence in the spring, the riparian owner's rights in such streams were acknowledged by the custom of the countryside as well as recognized by the law. In such surroundings and as between such owners equality of benefits from flowing waters was sought in the rule that each was entitled to their natural flow, sub-

[3] Bannister, *supra*, at 960. Choice of the arid sections of the country of the appropriative in preference to the riparian system is cited in Cardozo, Growth of the Law, 118, 119–20, as an example of "conscious departure from a known rule, and the deliberate adoption of a new one, in obedience to the promptings of a social need so obvious and so insistent as to overrun the ancient channel and cut a new one for itself."

ject only to a reasonable riparian use which must not substantially diminish their quantity or impair their quality. It was in such a stream that this Court found Cress as a landowner under the law of Kentucky possessed "the right to have the water flow away from the mill dam unobstructed, except as in the course of nature." 243 U. S. 316, 330.

Cress owned riparian lands and the bed as well of a non-navigable creek in Kentucky. He built a dam which pooled the water and diverted it to his headrace; after it turned the wheel of his mill, it was returned to the stream by his tailrace. The Government built a dam in the navigable Kentucky River which backed up the water in this non-navigable tributary to a point one foot below the crest of the mill dam, leaving an unworkable head. The Court concluded that Cress was entitled to compensation as for a taking. It found that Cress had the right as a riparian owner to the natural flow-off of the water in this non-navigable stream. The *Cress* case is significant in that it measured the rights of a riparian owner against the Government in improving navigation by the standard which had been evolved to measure the rights of riparian owners against each other. The rights of the Government at that location were held to be no greater than those of a riparian owner, and therefore, of course, not paramount to the rights of Cress.

We are of opinion that the *Cress* case does not govern this one and that there is no warrant for applying it, as the claimant asks, or for overruling it, as the Government intimates would be desirable. The Government there was charged with the consequences of changing the level of a non-navigable stream; here it is sought to be charged with the same consequences from changing the level in a navigable one. In the former case the navigation interest was held not to be a dominant one at the property damaged; here dominance of the navigation interest at the St. Croix is clear. And the claimant in this

case cannot stand in the Cress shoes unless it can establish the same right to have the navigable St. Croix flow tail waters away at natural levels that Cress had to have the non-navigable stream run off his tail waters at natural levels. This could only be done by an extension of the doctrine of the *Cress* case. As we have already said, it "must be confined to the facts there disclosed." *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 597.

On navigable streams a different right intervenes. While riparian owners on navigable streams usually were held to have the same rights to be free from interferences of other riparian owners as on non-navigable streams, it was recognized from the beginning that all riparian interests were subject to a dominant public interest in navigation. The consequences of the latter upon the former have been the subject of frequent litigation.

Without detailing the long struggle between such conflicting interests on navigable streams, it may point out that by 1909 the lines had become sharply drawn and were then summarized by a leading author:[4] "The older authorities hold that such an owner has no private rights in the stream or body of water which are appurtenant to his land, and, in short, no rights beyond that of any other member of the public, and that the only difference is that he is more conveniently situated to enjoy the privileges which all the public have in common, and that he has access to the waters over his own land, which the public do not." "Access to and use of the stream by the riparian owner is regarded as merely permissive on the part of the public and liable to be cut off absolutely if the public sees fit to do so." And he quoted another writer of standing:[5] "The owner of the bank has no *jus privatum*, or special usufructuary interest, in the water. He does not,

[4] 1 Lewis on Eminent Domain (3d ed. 1909) 116, 119.

[5] Wood on Nuisances (1st ed.) § 592.

from the mere circumstance that he is the owner of the bank, acquire any special or particular interest in the stream, over any other member of the public, except that, by his proximity thereto, he enjoys greater conveniences than the public generally. To him, riparian ownership brings no greater rights than those incident to all the public, except that he can approach the water more readily, and over lands which the general public have no right to use for that purpose. But this is a mere convenience, arising from his ownership of the lands adjacent to the ordinary high-water mark, and does not prevent the State from depriving him entirely of this convenience, by itself making erections upon the shore, or authorizing the use of the shore by others, in such a way as to deprive him of this convenience altogether, and the injury resulting to him therefrom, although greater than that sustained by the rest of the public, is '*damnum absque injuria.*'" On the other hand, the author pointed out, there were cases holding that the riparian owners on navigable streams "have valuable rights appurtenant to their estates, of which they cannot be deprived without compensation." He considered this the better rule, and suggested that the courts indicated some tendency to adopt it.

However, in 1913 this Court decided *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53. It involved the claim that water power inherent in a navigable stream due to its fall in passing riparian lands belongs to the shore owner as an appurtenant to his lands. The Court set aside questions as to the right of riparian owners on non-navigable streams and all questions as to the rights of riparian owners on either navigable or non-navigable streams as between each other. And it laid aside as irrelevant whether the shore owner did or did not have a technical title to the bed of the river which would pass with it "as a shadow follows a substance." It declared that "In

neither event can there be said to arise any ownership of the river. Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable." 229 U. S. at 62, 69. This Court then took a view quite in line with the trend of former decisions there reviewed, that a strategic position for the development of power does not give rise to right to maintain it as against interference by the United States in aid of navigation. We have adhered to that position. *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 424. The *Chandler-Dunbar* case held that the shore owner had no appurtenant property right in two natural levels of water in front of its lands or to the use of the natural difference between as a head for power production. In this case the claimant asserts a similar right to one natural level in front of his lands and a right of ownership in the difference between that and the artificial level of the impounded water of the Willow River. It constituted a privilege or a convenience, enjoyed for many years, permissible so long as compatible with navigation interests, but it is not an interest protected by law when it becomes inconsistent with plans authorized by Congress for improvement of navigation.

It is conceded that the riparian owner has no right as against improvements of navigation to maintenance of a level below high-water mark, but it is claimed that there is a riparian right to use the stream for run-off of water at this level. High-water mark bounds the bed of the river. Lands above it are fast lands and to flood them is a taking for which compensation must be paid. But the award here does not purport to compensate a flooding of fast lands or impairment of their value. Lands below that level are subject always to a dominant servitude in the interests of navigation and its exercise calls for no compensation. *United States* v. *Chicago, M., St. P. & P. R.*

Co., 312 U. S. 592; *Willink* v. *United States*, 240 U. S. 572. The damage here is that the water claimant continues to bring onto its lands through an artificial canal from the Willow River has to leave its lands at an elevation of 675 instead of an elevation of 672 feet. No case is cited and we find none which holds a riparian owner on navigable waters to have such a legal right. The *Cress* case which the Court of Claims relied upon does not so hold and does not govern here.

Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them. Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all.

Operations of the Government in aid of navigation ofttimes inflict serious damage or inconvenience or interfere with advantages formerly enjoyed by riparian owners, but damage alone gives courts no power to require compensation where there is not an actual taking of property. Cf. *Gibson* v. *United States*, 166 U. S. 269; *Scranton* v. *Wheeler*, 179 U. S. 141; *Bedford* v. *United States*, 192 U. S. 217; *Jackson* v. *United States*, 230 U. S. 1; *Hughes* v. *United States*, 230 U. S. 24; *Cubbins* v. *Mississippi River Commission*, 241 U. S. 351. Such losses may be compensated by legislative authority, not by force of the Constitution alone.

The uncompensated damages sustained by this riparian owner on a public waterway are not different from those often suffered without indemnification by owners abutting on public highways by land. It has been held in

nearly every state in the Union that "there can be no recovery for damages to abutting property resulting from a mere change of grade in the street in front of it, there being no physical injury to the property itself, and the change being authorized by law." [6] This appears to be the law of Wisconsin. *Smith* v. *Eau Claire,* 78 Wis. 457, 47 N. W. 830; *Walish* v. *Milwaukee,* 95 Wis. 16, 69 N. W. 818; *McCullough* v. *Campbellsport,* 123 Wis. 334, 101 N. W. 709; cf. *Smith* v. *Washington,* 20 How. 135; *Transportation Co.* v. *Chicago,* 99 U. S. 635. It would be strange if the State of Wisconsin is free to raise an adjacent land highway without compensation but the United States may not exercise an analogous power to raise a highway by water without making compensation where neither takes claimant's lands, but each cuts off access to and use of a natural level.

We hold that claimant's interest or advantage in the high-water level of the St. Croix River as a run-off for tail waters to maintain its power head is not a right protected by law and that the award below based exclusively on the loss in value thereof must be reversed.

MR. JUSTICE REED concurs in the result on the ground that the United States has not taken property of the respondent.

MR. JUSTICE ROBERTS.

I think the judgment of the Court of Claims should be affirmed. The findings of fact by that court are supported by the evidence. They are to the following effect.

The St. Croix River is navigable. The Willow River is a non-navigable stream emptying into the St. Croix at Hudson, Wisconsin. The respondent has constructed several dams in the Willow River for the purpose of gen-

[6] 1 Lewis on Eminent Domain (3d ed. 1909) 210.

erating power. The one farthest down stream is "located near the confluence of the Willow River and the St. Croix River in the city of Hudson, Wisconsin, on land owned by [respondent] above ordinary high water of the St. Croix River." At the time of the erection of the respondent's dam, ordinary high water in the St. Croix at Hudson was 672 feet above sea level. The respondent's dam raised the water level in Willow River to a height of 694.5 feet above sea level, thus affording a power head of 22.5 feet.[1]

By the Government's erection of Red Wing Dam the water level in the St. Croix at Hudson was raised to 675.3 feet above mean sea level. The backing up of the water reduced the power head of respondent's dam by approximately three feet, and diminished its supply of power accordingly.

In the court below, the United States denied that the Red Wing Dam had raised the level of the St. Croix at Hudson to the extent claimed by the respondent, and contended that Willow River was a navigable stream and the respondent's dam was, therefore, an obstruction in the navigable waters of the United States for interference with or injury to which the United States was not responsible. These contentions were overruled and are now abandoned. There was no claim by the Government that any portion of the respondent's construction was below

[1] The court's opinion refers to the circumstance that the dam in question is not built across the natural channel of Willow River. Neither the court below nor the Government relies on this phase of the case, and I take it that decision does not depend upon it. The facts are that the St. Croix runs substantially from north to south. Willow River, which runs westward, formerly turned southward a short distance from the St. Croix and substantially paralleled the latter before emptying into it. The respondent dammed the natural channel to form a pool just east of the St. Croix, and then built its powerhouse, dam and spillway at a point at the edge of the pool nearest the St. Croix.

ordinary high-water mark in the St. Croix. In fact the Government's answer admitted averments of the petition that the dam and power plant were located *near* a point where the Willow River discharges into the St. Croix River, and upon the respondent's property described in the petition. The answer further alleged that the "dam so constructed by the plaintiff *near* the point where the Willow River discharges into the St. Croix River . . . was constructed upon a concrete foundation extending across or occupying the full width of the mouth of a navigable stream" (meaning the Willow River, which the Government then claimed was navigable). The opinion of the court below states that respondent's tailrace emptied into the St. Croix River below ordinary high-water level, and this seems to be true. But the fact is irrelevant.

The respondent owned the land on either side of the Willow River at and above the point where its dam was constructed. Under the law of Wisconsin the respondent owned the bed of Willow River, and both by common and statute law of Wisconsin it had the right to erect and use the dam.[2] That right was property; and such a right recognized as private property by the law of a state is one which under the Constitution the federal government is bound to recognize. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312; *Fox River Paper Co.* v. *Railroad Commission,* 274 U. S. 651, 654, 655. Compare *Ford & Son* v. *Little Falls Fibre Co.,* 280 U. S. 369, 375, 377.

---

[2] Revised Statutes Wisconsin 1858, Chap. XLI, §§ 2, 3; Chap. LVI, § 1; Wisconsin Stats. 1943, §§ 30.01 (2)(3)c, 31.07; Wisconsin Laws, Private & Local, 1866, Ch. 122; 1872, Ch. 115; *Mabie* v. *Matteson,* 17 Wis. 1; *A. C. Conn Co.* v. *Little Suamico Lumber Mfg. Co.,* 74 Wis. 652, 43 N. W. 660; *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.,* 75 Wis. 385, 390–391, 44 N. W. 638; *Water Power Cases,* 148 Wis. 124, 134 N. W. 330; *McDonald* v. *Apple River Power Co.,* 164 Wis. 450, 160 N. W. 156; *Apfelbacher* v. *State,* 167 Wis. 233, 167 N. W. 244.

Unless *United States* v. *Cress*, 243 U. S. 316, is to be disregarded or overruled, the respondent is entitled to recover for the property taken by the reduction of the efficiency of its dam due to the raising of the high-water mark. If the respondent's power dam had been in Willow River at a distance of one hundred yards or more above the confluence of the two streams, there can be no question that the decision in the *Cress* case would require payment for the injury done to its water power. Since under local law the owner of the land and the dam was entitled to have the water of the non-navigable stream flow below his dam at the natural level of the Willow River, which is affected by the natural level of the St. Croix, the raising of that level by navigation works in the St. Croix invaded the respondent's rights. This is the basis of decision in the *Cress* case. The fact that the respondent's dam is close to the high-water mark of the St. Croix River can not call for a different result.

The court concludes that the *Cress* case is inapplicable by ignoring the finding of the trial court that the increase in level of the St. Croix above high-water mark has diminished the head of respondent's dam by three feet. But to reach its conclusion the court must also disregard the natural law of hydraulics that water seeks its own level. At the confluence of the two rivers at normal high water of the St. Croix, both the St. Croix and the Willow are at the same level. Any increase in the level of the St. Croix above high-water mark must result in raising the natural level of the Willow to some extent. The court below has found that the increase in the level of the St. Croix operates to diminish the head at respondent's dam by the specified amount. The facts thus established are in all relevant respects precisely those on the basis of which this court sustained the recovery of damages in the *Cress* case.

If the fact is that respondent discharges the water from its power plant through a tailrace extending below high-

water mark of the St. Croix, that fact is irrelevant to the problem presented. Respondent claims, and the court below has sustained, only the right to have the flow of the Willow maintained at its natural level. That level has been increased by raising the level of the St. Croix above its high-water mark. The increase in the level of the St. Croix above high-water mark has operated to raise the level below the respondent's dam to an extent which has damaged respondent by diminishing the power head. To that extent respondent has suffered damage and is entitled to recover on principles announced in the *Cress* case.

United States v. *Cress* has stood for twenty-eight years as a declaration of the law applicable in circumstances precisely similar to those here disclosed. I think it is a right decision if the United States, under the Constitution, must pay for the destruction of a property right arising out of the lawful use of waters not regulable by the federal government because they are not navigable.

The CHIEF JUSTICE concurs in this opinion.

CONNECTICUT LIGHT & POWER CO. *v.* FEDERAL POWER COMMISSION.

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

No. 189. Argued January 3, 1945.—Decided March 26, 1945.

1. The declaration of policy in § 201 (a) of the Federal Power Act, that federal regulation is "to extend only to those matters which are not subject to regulation by the States," is relevant in resolving ambiguity in specific provisions of the Act which purport to effectuate that policy. P. 527.
2. In the provision of § 201 (b) of the Federal Power Act, that the Commission shall have jurisdiction over all facilities for the transmission or wholesale of electric energy in interstate commerce, "but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used . . . in local

distribution," the phrase "facilities used in local distribution" delimits the jurisdiction of the Commission and establishes a legal standard which must be observed in determining whether a company is a "public utility" under the Act. P. 530.

3. The exemption from the Commission's jurisdiction of "facilities used in local distribution" is not limited to facilities which distribute no out-of-state energy. Facilities may carry out-of-state energy exclusively and still be exempt under the Act. The test is whether they are local distribution facilities. P. 531.
4. The jurisdiction of the Commission under the Federal Power Act to regulate accounting practices extends only to companies which are "public utilities" under the Act, i. e., companies which own or operate facilities that are subject to the jurisdiction of the Commission. P. 531.
5. The court below having considered irrelevant the appropriate test of the Commission's jurisdiction under the Act, its inquiry on review did not proceed under a correct rule of law and its judgment must be reversed. P. 532.
6. Where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of federal authority to act should appear affirmatively and not rest on inference alone. P. 532.
7. The business of local distribution of electric energy does not as a matter of law exclude the process of reducing out-of-state electric energy from high to low voltage in subdividing it to serve ultimate consumers. P. 534.
8. Upon the record in this case, it is doubtful whether the Commission applied the correct law, and the case should be remanded to the Commission for appropriate jurisdictional findings. This Court does not undertake to decide as an original matter whether the facilities in question are facilities which subject the company to the Act, nor whether there was basis for jurisdiction of the Commission during some past period by reason of the company's operation of facilities since abandoned. P. 534.
9. The jurisdiction of the Commission under the Federal Power Act, over facilities for the transmission of electric energy in interstate commerce which are not used in local distribution, does not depend upon whether any particular volume or proportion of interstate energy is involved; and such a jurisdictional limitation is not to be supplied by construction. P. 536.

141 F. 2d 14, reversed.

CERTIORARI, 323 U. S. 687, to review a judgment sustaining an order of the Federal Power Commission requiring the petitioner to comply with the uniform system of accounts prescribed by the Commission under the Federal Power Act.

Messrs. Claude R. Branch and *Gay H. Brown,* with whom *Messrs. Edward M. Day* and *Lawrence A. Howard* were on the brief, for petitioner.

Assistant Attorney General Shea, with whom *Solicitor General Fahy, Messrs. Joseph B. Goldman, Charles V. Shannon, Howard E. Wahrenbrock* and *Howell Purdue* were on the brief, for respondent.

Mr. John E. Benton, with whom *Mr. Frederick G. Hamley* was on the brief, for the Connecticut Public Utilities Commission et al., as *amici curiae,* urging reversal.

Mr. Francis A. Pallotti, Attorney General, filed a brief on behalf of the State of Connecticut, as *amicus curiae,* urging reversal.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The Federal Power Commission has asserted jurisdiction to regulate the accounting practices of the Connecticut Light and Power Company. The Federal Power Act as amended in 1935, 49 Stat. 838, 16 U. S. C. § 792 *et seq.,* declares a congressional policy concerning the business of transmitting and selling electric energy for ultimate distribution to the public, and states that regulation of "that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are

637582°—46——37

not subject to regulation by the States." § 201 (a), 49 Stat. 847, 16 U. S. C. § 824 (a).

The Company, incorporated by Connecticut, serving customers only in Connecticut and owning no utilities property outside of that state, is comprehensively regulated by the Connecticut Public Utilities Commission in accounting practices as in many other matters, and it challenges the jurisdiction of the Federal Power Commission.

The State of Connecticut, appearing *amicus curiae,* through its Attorney General avers that this assumption of jurisdiction by the Federal Commission "represents an unwarranted and illegal invasion of the powers of the State to regulate its local distributing company, which powers were clearly to be preserved to the State under the provisions of the Federal Power Act." The Connecticut Public Utilities Commission joins with the National Association of Railroad and Utilities Commissioners, also appearing as *amici curiae,* and they contend that the Federal Power Commission's order regulating accounting practices exceeds any authority given by the Federal Power Act and intrudes upon the field which that Act expressly reserved to local regulation.

The basic facts are not seriously in dispute. The Company for some time prior to August 26, 1935, the effective date of the Federal Power Act, operated as a member of the Connecticut Valley Power Exchange, an interstate power pool which interchanged energy among certain systems in New York, Massachusetts, and Connecticut. Had such operation continued, the Company would be subject to the Act and to the Commission's order. Two days before its effective date and frankly for the purpose of avoiding federal regulation the Company rearranged its operations with intent to cut every connection and discontinue every facility whose continued operation would render it subject to the Federal Power Commission's

control. The Commission conceded in its opinion and the Government admits here the Company's right to do so.[1] But the Commission said petitioner's effort was "only a gesture," for while it cut certain connections "it did not cut other interconnections over which interstate energy flowed." Of those facilities which the Commission held subjected the Company to the Power Act at the time it became effective, the Company has since divested itself of all but one, and on that one the Commission rests its present jurisdiction to control petitioner's accounting. But it also claims that its accounting orders were entitled to obedience up to the time of the abandonment of the other facilities and because of them.

The facilities on which jurisdiction is predicated are for two general types of operation, one being used in receipt of interstate power, the other for transmission of energy sold to a municipality which in turn sold some part of it for export from the state.

The only presently existing facilities said to confer jurisdiction are at Bristol. Here the petitioning company purchases energy from the Connecticut Power Company, which despite a confusing similarity of name is an entirely separate and unaffiliated concern. The petitioning company receives power at 66,000 volts from the lines of the Connecticut Power Company over a short tap line, owned by the Connecticut Power Company, which leads to petitioner's substation. There the energy is stepped down to 4,600 and 13,800 volts and transmitted thence over many circuits to consumers in and around Bristol. The substation includes all of the usual equipment, lightning arresters, disconnects, oil circuit breakers, busses, step-down

[1] Cf. *Re Twin State Gas & Electric Co.*, 33 P. U. R. (NS) 39, where the Commission approved a public utility's sale of certain facilities even though the sale might have been "a step in the direction that eventually results in the vendor company obtaining a status other than that of a public utility within the jurisdiction of this Commission."

transformers, and appurtenant structures of an outdoor substation; and in the substation building a synchronous condenser is owned and operated, as required by the supply contract, to maintain the power factor.

What is called the East Hampton connection, severed July 1, 1939, consisted of facilities by which the petitioner received energy from the Connecticut Power Company at 13,800 volts and transmitted it several miles to its Leesville substation where it was reduced to 4,600 volts and to other substations where it was reduced to 2,300 volts and supplied to customers. What is referred to as the Torrington-Winsted District connection, discontinued in June of 1941, was differently operated. Energy was purchased from the Torrington Electric Light Company, which in turn had purchased it from the Connecticut Power Company. Delivery was accepted by petitioner at the bus bar of the Torrington Company at low voltage, 2,300 volts, petitioner maintained a substation which stepped this voltage up to 27,600, at which it was transmitted about ten miles over its lines to a substation at Winsted where facilities were operated to lower the voltage to 4,600, whence it was put on distribution lines.

The Commission held in all three instances that such facilities of petitioner were "for the transmission of electric energy . . . as distinguished from local distribution thereof." It found that the energy received from the Connecticut Power Company and Torrington Company "regularly, frequently and for substantial periods of time included electric energy in substantial amounts transmitted from Massachusetts." Hence it concluded petitioner owned facilities for transmission of energy in interstate commerce and was a "public utility" under its jurisdiction by virtue of the Act.

The other type of operation on which it predicated jurisdiction was terminated in February 1941. It consisted of sale of energy at wholesale to the Borough of

Groton, which operated a municipal distribution plant. The Borough, with knowledge of the Company, resold a portion of this energy to a corporation which transmitted it to Fishers Island, a small island off Connecticut shore but territory of New York. There it was distributed to that small community at retail. When the Groton contract expired in 1940 petitioner refused to renew it unless the Borough discontinued sales of energy destined for Fishers Island. This change was required by the Company avowedly to eliminate flow of its energy to New York and thus to remove one of the grounds on which the Commission has asserted jurisdiction.

The Commission held that from the effective date of the Act to February 28, 1941, facilities owned by the Company were used to convey electric energy to the Borough of Groton "for the transmission and sale at wholesale of electric energy in interstate commerce" and that such facilities were for transmission of such energy "as distinguished from local distribution thereof." Hence the Company was held to have been a public utility during the period of such operation and subject for that period to the jurisdiction of the Commission.

It is not denied, although the Commission's findings and opinion make no mention of the fact and appear to have given it no weight, that the predominant characteristic of the company's over-all operation is that of a local and intrastate service. It serves one hundred seven towns, cities, and boroughs of Connecticut with a total population of about 660,000 and in addition supplies substantially all the power used by local companies which serve communities of Connecticut having a population of 130,000. It owns no lines crossing the Connecticut boundary and does not connect with any other company at the boundary. It has no business other than Connecticut service for which it needs any facilities whatever, and if local distribution service were terminated, no remaining pur-

pose or use of any kind is suggested for the facilities in question. Its purchases and sales, its receipts and deliveries of power, are all within the state. Its rates and its fiscal and accounting affairs are fully and so far as appears effectively regulated by the State of Connecticut.

The Federal Power Commission on January 7, 1941 issued its order requiring petitioner to show cause why it should not be held to be a "public utility" subject to the Act and why it should not reclassify and keep its accounts according to the Federal Commission's uniform system. On May 15, 1942 it issued findings and decision. Rehearing was denied. The Company then applied for the review by the Court of Appeals of the District of Columbia to which the statute entitles it. § 313 (b) of the Act, 49 Stat. 860.

The Court of Appeals sustained the orders. 141 F. 2d 14. It held that "The Federal Power Act obviously intends to confer Federal jurisdiction upon electric distribution systems which normally would operate as interstate businesses." It construed the "but" clause of the Act, which we shall later consider, as "intended to make it clear that this [the Commission's] jurisdiction extends even to local facilities where the Act provides for their regulation, as it does in the case of accounting practices." The Court concluded that "Therefore, whether or not the facilities by which petitioner distributes energy from Massachusetts should be classified as 'local' is not relevant to this case. The sole test of jurisdiction of the Commission over accounts is whether these facilities, 'local' or otherwise, are used for the transmission of electric energy from a point in one state to a point in another." We granted certiorari. 323 U. S. 687.

The first question is whether the reviewing court acted under a misapprehension as to the meaning of the statute.

The jurisdictional and regulatory provisions of the Federal Power Act apply only to "public utilities," and the

Act provides that by "public utilities" it "means any person who owns or operates facilities subject to the jurisdiction of the Commission." § 201 (e), 49 Stat. 848. These facilities are carefully defined. "The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." § 201 (b). Transmission and sale as used in this provision are further defined to mean respectively "transmission of electric energy in interstate commerce" and "sale of electric energy at wholesale in interstate commerce." And the Act goes on to say: "electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof" and that sale of electric energy at wholesale means "a sale of electric energy to any person for resale." §§ 201 (c), (d). Of course as preamble to all of these provisions stands the policy declaration that Federal regulation "of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." § 201 (a).

Can it be said in that state of the statute that whether facilities are local is not relevant to this case? The Court of Appeals in returning an affirmative answer to this question noted that "There is a superficial inconsistency" between its position and the last quoted provision of the Act. But it said that we, in *Jersey Central Power & Light Co.* v. *Federal Power Commission,* 319 U. S. 61, held this "lim-

itation" "not to apply to the sections of the Act which specifically give the Federal Power Commission jurisdiction over matters of financial arrangement, such as the accounting section which we are discussing here." This misapprehends our holding in the *Jersey Central* case. The line did not cross state borders and since it was wholly within one state, it was contended that the line was used for intrastate transmission and that the Act did not apply although the line was used to transmit power in its course of exportation from the State. We denied this contention and said, "It is impossible for us to conclude that this definition means less than it says and applies only to the energy at the instant it crosses the state line and so only to the facilities which cross the line and only to the company which owns the facilities which cross the line. The purpose of this act was primarily to regulate the rates and charges of the interstate energy. If intervening companies might purchase from producers in the state of production, free of federal control, cost would be fixed prior to the incidence of federal regulation and federal rate control would be substantially impaired, if not rendered futile." 319 U. S. at 71–72. We held that the "primary purpose" of the 1935 amendments to the Power Act was to give the Power Commission control of sales of energy across state lines which had been held to be beyond the control of the state of export in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83. Here, however, the federal authority to fix the sale price of the energy coming from Massachusetts in interstate commerce attaches and presumably has been or at least may be exercised pursuant to the *Jersey Central* holding before the energy reaches this company. What petitioner does or fails to do is only after the incidence of federal regulation and can in no way frustrate it.

In the *Jersey Central* case on consideration of its facts we said, "We conclude, therefore, that Jersey Central is

a public utility under this act." 319 U. S. at 73. Such a finding made the provisions of the Act apply to it. But the Company contended, notwithstanding its status as a public utility, that it was carried out of that particular federal regulation by the fact that the state regulated its security issues. We held that state regulation does not operate to exempt from the security provisions a company otherwise subject to the Commission's jurisdiction but that "The sounder conclusion, it seems to us, is that the limitation is directed at generation, transmission and sale rather than the corporate financial arrangements of the utilities engaged in such production and distribution." *Id.* at 74–75. In other words, the policy admonition is to be heeded in determining whether particular facilities make their owner a "public utility" rather than in exempting from specific regulatory provisions a company found to be a public utility. The *Jersey Central* case does not read the policy declaration out of the Act as the court below assumed it to do.

Legislative history is illuminating as to the congressional purpose in putting these provisions into the Act. As frequently is the case, this original bill was drafted by the counsel and aides of the agency concerned.[2] In its support Commissioner Seavey of the Federal Power Commission said to the House Committee, "The new title II of the act is designed to secure coordination on a regional scale of the Nation's power resources and to fill the gap in the present State regulation of electric utilities. It is conceived entirely as a supplement to, and not a substitute for, State regulation." [3] Progress of the bill through various stages shows constant purpose to protect rather than to supervise authority of the states. In reporting a

[2] Hearings, Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess., 223.

[3] Hearings on H. R. 5423, House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., 384.

revised bill to the Senate the Committee on Interstate Commerce said, "Subsection (a) . . . declares the policy of Congress to extend that regulation to those matters which cannot be regulated by the States and to assist the States in the exercise of their regulatory powers, but not to impair or diminish the powers of any State commission."[4] The Report of the House Committee on Interstate and Foreign Commerce in presenting the amended bill called attention to *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, holding that rates charged in interstate wholesale transactions may not be regulated constitutionally by the states, and expressed the purpose to give federal jurisdiction to regulate rates of wholesale transactions, but not to give jurisdiction over local rates. It said:

"The bill takes no authority from State commissions and contains provisions authorizing the Federal Commission to aid the State commissions in their efforts to ascertain and fix reasonable charges. . . . The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority and contain throughout directions to the Federal Power Commission to receive and consider the views of State commissions. Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill."

. . . . .

"Subsection (b) confers jurisdiction upon the Commission over the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce, but does not apply to any other sale of electric energy or deprive a State of any lawful authority now exercised over the exportation of hydroelectric energy transmitted out of the State. As

[4] Sen. Rep. No. 621, 74th Cong., 1st Sess.

in the Senate bill no jurisdiction is given over local distribution of electric energy, and the authority of States to fix local rates is not disturbed even in those cases where the energy is brought in from another State." [5]

If we consider the professions of the sponsors of this bill to have been in good faith, where are we to find them written into the Act?

The policy declaration that federal regulation is "to extend only to those matters which are not subject to regulation by the States" is one of great generality. It cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose. But such a declaration is relevant and entitled to respect as a guide in resolving any ambiguity or indefiniteness in the specific provisions which purport to carry out its intent. It cannot be wholly ignored.

The declared purpose might also be looked for in specific denials of power to the Commission, such as that found in § 204 (f), which provides that its controls, relating to issuance of securities, shall not extend to a public utility operating in a state under the laws of which its securities are regulated by a state commission. But such exemptions from particular regulations apply only to companies found in general to be subject to federal regulation and do not protect the state's general control over its local utilities.

The assurance which the sponsors of this legislation expressed as to protection of the general jurisdiction of a state over electric utilities of this character either is not given effect by this Act at all, or it is to be found in the words of § 201 (b), "but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, . . . over facilities used in local distribution . . ." The court below, following a statement in

[5] H. R. Rep. No. 1318, 74th Cong., 1st Sess., 7, 8, 27.

Hartford Electric Light Co. v. *Federal Power Commission*, 131 F. 2d 953 (C. C. A. 2d, 1942), held that this "but" clause "is intended to make it clear that this jurisdiction extends even to local facilities where the Act provides for their regulation, as it does in the case of accounting practices." This seems to get the cart before the horse, for whether the Act provides for such regulation depends on whether the facilities are under the jurisdiction of the Commission; the Commission's jurisdiction does not depend on some independent application of the regulatory provisions. But the cited decision, pointing out that one of the several types of facilities mentioned as exempt in the "but" clause, i. e., those "used *only* for transmission in intrastate commerce," could not possibly be used for interstate transmission, rejected the whole provision to avoid a "foolish interpretation." It concluded, "The 'but' clause then shows up not as one reducing jurisdiction but as a negatively worded confirmation of the Commission's jurisdiction, in certain circumstances, over the facilities mentioned in the 'but' clause." [6] The Commission takes much the same position here.

It is hard for us to believe that Congress meant us to read "shall have jurisdiction" where it had carefully writ-

---

[6] The statement was not decisive of the result, which rested on an alternative ground; and the court did recognize need for the further step of finding that the generating facilities were used as facilities for interstate wholesale sales, and therefore were within § 201 (b). The court below failed expressly to find existence of jurisdictional facilities under § 201 (b). The quoted statement reads in full:

"Moreover, among the facilities described in the 'but' clause of § 201 (b), are those used 'only for the transmission . . . in intrastate commerce'; as such facilities could not possibly be among those used for interstate transmission or interstate wholesale sales, the 'but' clause becomes foolish if interpreted as carving out of the authority granted in the earlier part of the same sentence the facilities described in the 'but' clause. Such a foolish interpretation is avoided by giving effect to a phrase in the 'but' clause, i. e., 'except as specifically provided

ten "but shall not have jurisdiction." The command "thou shalt not" is usually rendered as to forbid and we think here it was employed without subtlety or contortion and in its usual sense. If otherwise in doubt this provision should be read in harmony with the policy provision. So read, its terms seem plainly to state circumstances under which the Commission shall not have jurisdiction. As such it is the provision which loomed importantly in the minds and speech of its sponsors, perhaps was necessary to get the bill passed, and is one which the Commission must observe and the courts must enforce.

This bill came before Congress as prepared by the staff of the Commission, couched largely in the technical language of the electric art. Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test. Technology of the business is such that if any part of a supply of electric energy comes from outside of a state it is, or may be, present in every connected distribution facility. Every facility from generator to the appliance for consumption may thus be called one for transmitting such interstate power. By this test the cord from a light plug to a toaster on the breakfast table is a facility for transmission of interstate energy if any part of the load is generated without the state. It has never been questioned that technologically generation, transmission, distribution and consumption are so fused and interdependent that the

---

in this Part or the Part next following [sections 824–825r of this title].' The 'but' clause then shows up not as one reducing jurisdiction but as a negatively worded confirmation of the Commission's jurisdiction, in certain circumstances, over the facilities mentioned in the 'but' clause. In other words, the 'but' clause is to be construed as if it read: 'Wherever it is so specifically provided in Parts II and III, the Commission shall have jurisdiction over the facilities used for generation, for local distribution, for intrastate transmission, etc.'" *Hartford Electric Light Co.* v. *Federal Power Commission,* 131 F. 2d 953, 962.

whole enterprise is within the reach of the commerce power of Congress, either on the basis that it is, or that it affects, interstate commerce, if at any point it crosses a state line. Such a broad and undivided base for jurisdiction of the Power Commission would be quite unobjectionable and perhaps highly salutary if the United States were a unitary government and the only conflicting interests to be considered were those of the regulated company.

But state lines and boundaries cut across and subdivide what scientifically or economically viewed may be a single enterprise. Congress is acutely aware of the existence and vitality of these state governments. It sometimes is moved to respect state rights and local institutions even when some degree of efficiency of a federal plan is thereby sacrificed. Congress may think it expedient to avoid clashes between state and federal officials in administering an act such as we have here. Conflicts which lead state officials to stand shoulder to shoulder with private corporations making common cause of resistance to federal authority may be thought to be prejudicial to the ends sought by an act and regulation more likely to be successful, even though more limited, if it has local support. Congress may think complete centralization of control of the electric industry likely to overtax administrative capacity of a federal commission. It may, too, think it wise to keep the hand of state regulatory bodies in this business, for the "insulated chambers of the states" are still laboratories where many lessons in regulation may be learned by trial and error on a small scale without involving a whole national industry in every experiment.

But whatever reason or combination of reasons led Congress to put the provision in the Act, we think it meant what it said by the words "but shall not have jurisdiction, except as specifically provided in this Part or the Part next following . . . over facilities used in local distribu-

tion." Congress by these terms plainly was trying to reconcile the claims of federal and of local authorities and to apportion federal and state jurisdiction over the industry. To define the scope of state controls, Congress employed terms of limitation perhaps less scientific, less precise, less definite than the terms of the grant of federal power. The expression "facilities used in local distribution" is one of relative generality. But as used in this Act it is not a meaningless generality in the light of our history and the structure of our government. We hold the phrase to be a limitation on jurisdiction and a legal standard that must be given effect in this case in addition to the technological transmission test.

Nor do we think the exemption of "facilities used in local distribution" exempts only those which do not carry any trace of out-of-state energy. Congress has said without qualification that the Commission shall not, unless specifically authorized elsewhere in the Act, have jurisdiction "over facilities used in local distribution." To construe this as meaning that, even if local, facilities come under jurisdiction of the Federal Commission because power from out of state, however trifling, comes into the system, would nullify the exemption and as a practical matter would transfer to federal jurisdiction the regulation of many local companies that we think Congress intended to leave in state control. It does not seem important whether out-of-state energy gets into local distribution facilities. They may carry no energy except extra-state energy and still be exempt under the Act. The test is whether they are local distribution facilities. There is no specific provision for federal jurisdiction over accounting except as to "public utilities." The order must stand or fall on whether this company owned facilities that were used in transmission of interstate power and which were not facilities used in local distribution.

Since the Court of Appeals considered irrelevant the jurisdictional test which we find to be imposed by Congress, the inquiry on review has not proceeded under a correct rule of law and it follows that the judgment of the Court of Appeals must be reversed.

Whether the Commission's decision was reached under the same misapprehension of the law of its jurisdiction is not made so clear from its findings or opinion. Of course under the Act "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." § 313 (b). The Commission has found that each of the facilities in question is "used for the transmission of electric energy purchased as aforesaid from the Connecticut Power Company, as distinguished from local distribution thereof." It has not, however, made an explicit finding that these facilities are not used in local distribution; and we are in doubt whether by application of the statute as herein construed it could have done so. We have said, and it is applicable to this case, that "Where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of federal authority to act should appear affirmatively and not rest on inference alone." *Yonkers* v. *United States,* 320 U. S. 685, 692; *Florida* v. *United States,* 282 U. S. 194, 211–12; cf. *Palmer* v. *Massachusetts,* 308 U. S. 79, 84; *Federal Trade Commission* v. *Bunte Bros.,* 312 U. S. 349, 351. Nothing except explicit findings excluding the grounds of state control gives assurance that the bounds of federal jurisdiction have been accurately understood and fully respected, and that state power has been considerately and deliberately overlapped.

The findings and opinion of the Commission leave us in doubt, to say the least, as to whether what we consider limitations on the jurisdiction of the Commission were so considered by it. The only specific reference to the sub-

ject is the statement that "Respondent's contentions that it is subject to regulation by the Public Utilities Commission of the State of Connecticut and therefore not subject to the regulation provided by the Federal Power Act must be rejected," citing *Northwestern Electric Co.* v. *Federal Power Commission,* 125 F. 2d 882, and *In the Matter of Hartford Electric Light Co.,* 2 F. P. C. 502, aff'd, 131 F. 2d 953. In both of those cases factual differences in reference to the status of the company as a public utility were involved, and we agree with the Commission that once a company is properly found to be a "public utility" under the Act the fact that a local commission may also have regulatory power does not preclude exercise of the Commission's functions. Cf. *Northwestern Electric Co.* v. *Federal Power Commission,* 321 U. S. 119. But such a rejection of state control as grounds of exemption must be preceded by the finding, giving due weight to the policy declaration in doubtful cases, that the company in question is a "public utility" by reason of ownership of facilities not used in local distribution.

In determining this the Commission announced and applied a rule which appears to be one of law as to interstate transmission: "Such transmission, in our opinion, extends from the generator, where generation is complete [citing *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 181] to the point where the function of conveyance in bulk over a distance, which is the essential characteristic of 'transmission,' is completed and the process of subdividing the energy to serve ultimate consumers, which is the characteristic of 'local distribution,' is begun [citing *Southern Gas Corp.* v. *Alabama,* 301 U. S. 148, 155; and *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465, 471]."

The *Southern* and *East Ohio* cases both involved natural gas transportation into a state and sales of gas at retail therein. Each was a tax case in which the state

asserted that the sales within the state constituted an intrastate business which in one case would support a state levy of an annual franchise tax based on the actual amount of capital employed in the state; and in the other, an excise tax based on gross receipts from the business within the state. The companies each contended that sales made to consumers within the state were still within interstate commerce and hence there was no state jurisdiction to tax. In neither case was this Court required to determine the exact point at which interstate commerce ceased and intrastate commenced. It was required to find only some "doing of business" within the state in order to sustain the constitutionality of the statutes involved. In both cases it upheld the power of the state to tax and in both held that the distribution at low pressure was a local business for taxation purposes as distinguished from transmission in interstate commerce. But a holding that distributing gas at low pressure to consumers is a local business is not a holding that the process of reducing it from high to low pressure is not also part of such local business. In so far as the Commission found in these cases a rule of law which excluded from the business of local distribution the process of reducing energy from high to low voltage in subdividing it to serve ultimate consumers, the Commission has misread the decisions of this Court. No such rule of law has been laid down.

But for such an erroneous view of the law established by our decisions it seems doubtful if the Commission would have reached the conclusion that it did upon this record. Nor is it clear that if it were reached it would be supported by substantial evidence. Expert testimony received by the Commission on the subject from the Commission's own experts seems to have been predicated upon the Commission's understanding of the law. It is not for us to make an original appraisal of the facts. We do not therefore undertake to decide as an original matter

whether the facilities in question are or are not facilities which can subject the Company to the Act.

Nor do we undertake to pass upon the contention of the Government that even if the present facilities do not constitute a sufficient basis for federal jurisdiction the operation of other facilities since abandoned subjects the Company to the accounting order of the Commission for the period of January 1, 1937, when it became effective, until June 1, 1941 or some other date, depending on the facility found to be the basis of jurisdiction. The Company contends that to make it install an expensive system of accounting for a period that was short and has already expired would be a mere waste of time and money and would be of no practical benefit. The Commission contends that the accounting requirements and information would tend to discourage further write-ups and inflation of accounts and would amount to "regulation by the informatory process." It contends that this company has been guilty of accounting abuses in the nature of write-ups and the creation of fictitious surpluses which would be eliminated or at least discouraged by an application of its uniform system of accounts. The Company denies that such abuses exist. It is not, however, contended that Congress has conferred any jurisdiction upon the Commission to reach accounting abuses when and if they exist except as to companies which own facilities subject to the jurisdiction of the Commission. In other companies the correction of these abuses, if they exist, is left to the state government, which has this company completely within its power and whose constituents are the sufferers by any abuses that may exist. We will not undertake to make an original finding as to jurisdiction for a period, any more than as to jurisdiction at the present time.

Another contention made by the Company may be shortly disposed of. It is contended that the volume of energy passing over certain of these facilities is insignifi-

cant in proportion to the total. Only about one-fifth of one per cent of all the energy received and generated by the Company throughout the State of Connecticut was transmitted out of the state during the time of the connection of Fishers Island with the Borough of Groton. Congress appears to have left to the Commission's sound administrative discretion to determine whether or not to assert its authority in such situations. Congress annually receives a report of the Commission's work and appropriates the funds for its continuance. If it thinks the Commission is over-extending its attention to trivial situations it has ready means of control in its hands. The wisdom of its work is not our concern, but only its legal justification. We do not find that Congress has conditioned the jurisdiction of the Commission upon any particular volume or proportion of interstate energy involved, and we do not think it would be appropriate to supply such a jurisdictional limitation by construction.

For the reasons stated, the judgment of the Court of Appeals is reversed with instructions to remand the cause to the Federal Power Commission for further proceedings consistent with this opinion.

Reversed.

MR. JUSTICE RUTLEDGE concurs in the result.

MR. JUSTICE MURPHY, dissenting.

The findings and opinion of the Federal Power Commission in this case make clear that they are substantially and reasonably rooted in fact and law and that proper respect has been shown for jurisdictional limitations. Remand of the case to the Commission for further consideration thus can only serve to produce needless delay and to force the Commission to make certain minor and unnecessary changes in its written opinion. Cf. dissenting opinion in *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 95.

The basic jurisdictional fact necessary to sustain the imposition on petitioner of the Commission's accounting standards is that petitioner be a public utility within the meaning of the Federal Power Act. In the setting of this case petitioner must thus be found to own or operate facilities for the "transmission of electric energy in interstate commerce." § 201 (b). Nowhere in the Act has Congress defined "transmission" or "facilities" other than to say in § 201 (c) that "electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof." The Commission therefore has the duty in the first instance of interpreting and applying these terms to the factual situation confronting it. A court's function in reviewing this jurisdictional determination is necessarily limited to ascertaining whether that determination has warrant in the record and a reasonable basis in law, giving due weight to the fact that the Commission is an expert body designated by Congress and specially equipped to grapple with the highly technical problems arising in this field. *Labor Board* v. *Hearst Publications,* 322 U. S. 111, 130, 131.

The Commission here has found that petitioner owns and operates an electric utility system in the State of Connecticut. It is undisputed that electric energy generated in Massachusetts is transmitted over the wires of other companies to petitioner's facilities at Bristol, Connecticut. In order to transmit power economically for such a long distance, it is necessary to raise the voltage and reduce the current in Massachusetts as the energy starts its interstate journey. But the high voltage needed for transit purposes cannot be utilized by consumers. It therefore is necessary to employ apparatus at the receiving end of the interstate transmission to lower the voltage. Petitioner accordingly maintains step-down transformers and substation facilities at Bristol for that purpose. After the voltage is lowered, the energy is subdivided and dis-

tributed over petitioner's wires to consumers in and around Bristol.

The Commission concluded that the functions of the Bristol step-down transformers and substation facilities constitute transmission of energy in interstate commerce since it felt that, in its opinion, such transmission "extends from the generator, where generation is complete, to the point where the function of conveyance in bulk over a distance, which is the essential characteristic of 'transmission,' is completed and the process of subdividing the energy to serve ultimate consumers, which is the characteristic of 'local distribution,' is begun." In other words, the Commission viewed the interstate transmission as complete only after the energy is converted back into a form suitable for local distribution and use and the facilities used for such conversion purposes are necessarily facilities for interstate transmission.

The jurisdictional determination of the Commission must therefore stand or fall upon the validity of its analysis of when long-distance transmission of electrical energy across state lines is at an end. Only if we can point to an absence of any substantial evidence to support the Commission's view or if we can find legal or statutory principles compelling the opposite view can we justifiably say that the Commission had no jurisdiction in this case or that remand should be made to the Commission for further proceedings. But the Commission's view cannot be undermined on either basis and it should therefore be affirmed.

Certainly there is ample testimony in this case by engineers to the effect that the Bristol substation equipment constitutes "facilities for transmission of electric energy in interstate commerce," as distinguished from "facilities used in local distribution." And the very fact that the Commission, with all its accumulated wisdom and experience, is of the opinion that interstate transmission ceases

only after the transmitted energy has been converted into a form suitable for local distribution and use is not without weight and significance.

From a legal standpoint, the Commission made no plain error. Clearly no opinion in this Court has purported to decide at what precise point interstate transmission of electrical energy ends and local distribution commences. This seems to be a novel point insofar as legal precedent is concerned. The Commission's conclusion in this respect hardly seems so unreasonable and unsound as to require us to hold, as a matter of law, that interstate transmission ends just before the voltage is decreased. And this Court does not pretend so to hold in this case.

The Court criticizes the Commission and remands the case to it, however, mainly because it cited *Southern Gas Corp.* v. *Alabama,* 301 U. S. 148, 155, and *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465, 471, in a footnote in support of its proposition that interstate transmission ends only after the energy is converted back into a form suitable for local distribution. It is said that the Commission erroneously assumed that those cases set forth a rule of law which excluded the process of reducing energy from high to low voltage in subdividing it to serve ultimate consumers from the business of local distribution. But even assuming that these two cases do not enunciate such a rule and do not directly support the Commission's proposition, it does not follow that the Commission committed reversible error by citing them in a footnote. The Commission's proposition was grounded not on these two cases but upon the testimony in the record and its own knowledge and experience pertaining to electrical transmission. This is plainly revealed by the use of the phrase "in our opinion" in the sentence setting forth the Commission's distinction between interstate transmission and local distribution. The slight reference to the *Southern Gas* and *East Ohio* cases was at most for purposes of

analogy and cannot serve to impair the true underlying basis of the Commission's proposition. Presumably all the Commission need do on remand in this respect is to remove the footnote reference to these cases—a fact that makes obvious the proposition that more than an irrelevant or even erroneous citation of a case should be required before we are justified in reversing an administrative determination and sending it back for further consideration.

The Court also deals at great length with the policy declaration in § 201 (a) of the Act that federal regulation is "to extend only to those matters which are not subject to regulation by the States" and with the "but" clause in § 201 (b), which states that the Commission shall not have jurisdiction, except as specially provided, over certain facilities, including those used in local distribution. But neither of these provisions is controlling in this case where the Commission has made a clear and supportable finding that petitioner is a public utility within the meaning of the Act and where the only federal regulation sought to be imposed is the accounting requirements of § 301 (a).

It may be conceded that this Court in *Jersey Central Co.* v. *Federal Power Commission,* 319 U. S. 61, did not read out of the Act the policy declaration in § 201 (a). But it did make clear that the declaration, which speaks solely in terms of "regulation," was directed solely at proposed federal regulation of the generation, transmission and sale of electric energy rather than at proposed federal regulation of the corporate financial arrangements of utilities, such as their accounting methods. 319 U. S. at 74, 75. Congress did not intend, in other words, to intrude upon state regulation of generation, transmission and sale of energy but it did intend to impose financial regulations on public utilities engaged in interstate transmission of energy even though states might also impose financial

regulations. This means, under the facts of this case, that interstate transmission of energy is a proper test of whether federal accounting standards may be imposed. What sort of transmission may be a proper subject of federal regulation in and of itself if the State of Connecticut already regulates the transmission facilities is not in issue. The Commission clearly did not misconceive the meaning of this policy declaration and, in light of this Court's opinion, it apparently need do no more than spell out its recognition of the scope and present inapplicability of the declaration.

Nor did the Commission do violence to the "but" clause of § 201 (b). Here the Commission, following the rule stated in the *Jersey Central* case, 319 U. S. at 73, that "the determinative fact is the ownership of facilities used in transmission," has found that petitioner is a public utility since it owns and operates facilities used in interstate transmission of energy. The Commission thus has jurisdiction over petitioner for accounting purposes. The denial of jurisdiction in the "but" clause where facilities are used for transmission of energy in local commerce has no relevance in this case, an obvious fact which the Commission apparently now must make explicit on remand.

The Commission is dealing here with a difficult marginal case. The precise dividing line between interstate transmission and local distribution can only be drawn by those familiar with the engineering and electrical problems involved. The problem in this case, moreover, is a relatively unique one. An informal survey by the Commission has shown that out of a total of about 1,000 privately owned electric utilities there are only 12 which own or operate step-down substation facilities for taking out-of-state energy and which would not otherwise be public utilities under the Act. The problem is thus one peculiarly within the competence of the Commission, which has shown no desire to use the principle it has enunciated in

this case and could not use it as a vehicle for assuming unjustified jurisdiction over the facilities of all the local distributing companies in the nation. It has given proper respect to the dictates of Congress relative to state regulation. We should therefore affirm its action in this case without burdening it with requirements of artistic refinement and of negations of the applicability of irrelevant statutory provisions.

MR. JUSTICE BLACK and MR. JUSTICE REED join in this dissent.

COMMISSIONER OF INTERNAL REVENUE *v.* WHEELER ET AL., EXECUTORS, ET AL.

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

No. 354. Argued February 2, 1945.—Decided March 26, 1945.

Article 115–3 of Treasury Regulations 101, promulgated under the Revenue Act of 1938, requires that, for computing under § 112 (b) (7) (E) the amount of "earnings and profits" distributed by a corporation as liquidating dividends, with respect to securities which the corporation had acquired by tax-free exchanges for its own stock and had later sold, the basis be the transferor's cost rather than the value of the securities at the time of their acquisition by the corporation. *Held:*

1. The regulation was reasonable and a valid exercise of the rule-making power. P. 546.

2. Though the Tax Court relied on § 501 of the Second Revenue Act of 1940, it is unnecessary here to determine the constitutionality of applying that section retroactively. P. 547.

143 F. 2d 162, reversed.

CERTIORARI, 323 U. S. 694, to review the reversal of a decision of the Tax Court, 1 T. C. 640, which sustained the Commissioner's determination of deficiencies in income tax.

Mr. Bernard Chertcoff, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch* and *Walter J. Cummings, Jr.* were on the brief, for petitioner.

Mr. Wm. Dwight Whitney, with whom *Messrs. Roswell Magill* and *George G. Tyler* were on the brief, for the respondents.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The Circuit Court of Appeals for the Ninth Circuit has held Section 501 (a) of the Second Revenue Act of 1940 to be unconstitutional.[1] This of course called for grant of certiorari.[2]

Since our problem is not computation of a tax, the facts relevant to the issues in the five cases, consolidated on appeal, may be shortly stated. In 1925, John H. Wheeler and his wife, Frances, organized under the laws of California the John H. Wheeler Company. Then and thereafter they transferred an assortment of securities to it in exchange for shares of its common stock. The securities had cost them $304,684.49 and at transfer had a fair market value of $491,800. In exchange the Wheelers received 4,918 shares with a par value of $100 each. No gain by them was recognized for income-tax purposes by reason of the exchange. Cf. Int. Rev. Code § 112 (b) (5).

For purposes of determining its income-tax liability on subsequent disposition of the securities, the corporation was obliged to and did use as a cost base the cost of the securities to the transferors, $304,684.49. Cf. Int. Rev. Code § 113 (a) (8). But for its corporate accounting the corporation set up a cost of $491,800, market value at the

[1] 143 F. 2d 162.

[2] 323 U. S. 694.

time of acquisition in exchange for common stock of equal par value. The whole question in this case is which of these bases is to be used to compute, pursuant to § 112 (b) (7) (E) of the Revenue Act of 1938, 52 Stat. 447, 488, the amount of "earnings and profits" distributed as liquidating dividends. The Act of 1938, to induce corporate liquidations, permitted a qualified stockholder to elect postponement of a portion of the gain realized on a December 1938 liquidation and to be taxed, as for a dividend, on "so much of the gain as is not in excess of his ratable share of the earnings and profits of the corporation . . ." If the market-value basis is used for the securities acquired from the Wheelers and later sold, the operations of the Company showed a deficit on November 30, 1938, when the books were closed. If the cost-to-transferors basis is used, "earnings and profits" were distributed to respondents, the stockholders, in the amount of $132,813.48, as computed by the Commissioner.[3]

After considering the applicability of § 112 (b) (7), the stockholders duly dissolved the corporation and distributed its assets during December 1938. They elected to be taxed on the gains on their shares pursuant to § 112 (b) (7), and they reported, of course, according to the higher or market-value basis for the securities acquired and disposed of by the Company. The Commissioner asserted a deficiency based on the lower cost to the transferors. In explaining his determination he relied on § 501 (a) of the Second Revenue Act of 1940, 54 Stat. 974, 1004, which provides that earnings and profits on the sale or other disposition of property shall be determined by using the adjusted basis for determining gains and by recognizing such gains to the extent that they are recognized for computing net income, and on § 501 (c), which makes the provisions of § 501 (a) applicable to prior years.

[3] This was slightly modified by the Tax Court in an aspect not material here.

The Tax Court sustained the Commissioner.[4] It held § 501 (a) of the Act of 1940 a "complete answer" to taxpayers' contention, and it overruled their claim that if the section was applicable to increase their 1938 liability it was retroactive in contravention of the Fifth Amendment to the Constitution. The Circuit Court of Appeals agreed that the section was applicable, but held that such retroactivity rendered it unconstitutional.

Although the term "earnings and profits" has long been in the revenue acts, in connection with the definition of dividends, it has never been defined by the statutes[5] (except in so far as § 501 (a) of the Second Act of 1940 has now done so). But under the Revenue Act of 1934 and succeeding acts, the Commissioner dealt by regulation with that portion of the problem of definition relevant here. Article 115–3 of Treasury Regulations 101, promulgated under the 1938 Act, provided in part as follows: "Gains and losses within the purview of section 112 or corresponding provisions of prior Acts are brought into the earnings and profits at the time and to the extent such gains and losses are recognized under that section."[6] This regulation, if valid, disposes of the controversy, for when the corporation sold its securities acquired from the Wheelers it realized gain, based on transferor's cost, which was fully recognized under § 112.

The only reason to doubt the validity of the regulation is found in certain decisions of the Board of Tax Appeals and lower courts, mentioned in the Tax Court's opinion. Despite these adverse decisions, however, the Commis-

---

[4] 1 T. C. 640.

[5] See Paul, Selected Studies in Federal Taxation (Second Series, 1938) 149, 155 *et seq.*

[6] The provision appears in Reg. 94, Art. 115–3, under the Act of 1936; Reg. 86, Art. 115–1, under the Act of 1934; and in Reg. 103, § 19.115–3 and Reg. 111, § 29.115–3 under the Internal Revenue Code.

sioner persisted in applying the regulation. The question was never reviewed here. Before it was finally judicially considered, Congress enacted § 501 of the Second Revenue Act of 1940, as the committee reports show,[7] to "clarify the law" by enacting the substance of the regulation. But if the regulation itself was valid and effective, the clarifying amendment of 1940 added nothing to the liability of these taxpayers, and even though the Tax Court relied on it rather than on the regulation, no question of retroactivity is presented.

We think the regulation is reasonable and a valid exercise of the rule-making power. The taxpayers are insisting on using as a base for tax purposes a figure that in itself had no relation to taxation. It was no doubt permissible and perhaps the correct accounting, for determining earned surplus for dividends and such corporate purposes, for the corporation to set up its books on the market value of its property at the time of acquisition, which determined the value of the stock it issued. But "earnings and profits" in the tax sense, although it does not correspond exactly to taxable income, does not necessarily follow corporate accounting concepts either.[8] Congress has determined that in certain types of transaction the economic changes are not definitive enough to be given tax consequences, and has clearly provided that gains and losses on such transactions shall not be recognized for income-tax liability but shall be taken account of later. §§ 112, 113. It is sensible to carry through the theory in determining the tax effect of such transactions on earnings and profits. Compare *Commissioner* v. *Sansome,* 60 F. 2d 931, and see Sen. Rep. No. 2156, 74th Cong., 2d Sess., p. 19; H. R. Rep. No. 2894, 76th Cong., 3d Sess., p. 41. Indeed, Congress appears to have provided for this result in the statute

---

[7] See H. R. Rep. No. 2894, 76th Cong., 3d Sess., p. 41; Sen. Rep. No. 2114, 76th Cong., 3d Sess., p. 22.

[8] See 1 Mertens, Law of Federal Income Taxation (1942) § 9.33.

itself (§ 111 (c) of the 1938 Act), which declares: "In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized *for the purposes of this title,* shall be determined under the provisions of section 112." [9] In this case, to be sure, there was no question of recognition of gain or loss to the corporation at the time of the exchange with the Wheelers, because it was issuing its own stock and so realized no gain or loss. But to recognize the increment in value as affecting earnings and profits would no more harmonize with the taxless character of the transaction than to treat a realized gain as doing so. The same policy which carries over the transferor's basis for purposes of the corporation's income tax (§ 113 (a) (8)) requires carrying it over for determining the taxability of its distributions, as the Commissioner's regulation directs: gains and losses are to be brought into earnings and profits at the time and "to the extent" that they are recognized under § 112. Finally, no doubt of the reasonableness of the rule can linger in the presence of § 501 (a), by which Congress has indicated its express approval of the principle that the basis for determining earnings and profits shall be the basis for determining gain.

We therefore think that on principles often reiterated [10] the regulation is valid and decisive of this issue. There is no necessity to predicate the determination of deficiency on the 1940 amendment. The 1940 amendment conse-

---

[9] (Italics supplied.) See Paul, Selected Studies in Federal Taxation (Second Series, 1938) 193–95.

[10] *Boske* v. *Comingore,* 177 U. S. 459, 470; *Brewster* v. *Gage,* 280 U. S. 327, 336; *United States* v. *Kirby Lumber Co.,* 284 U. S. 1, 3; *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378. It may also be noted that the regulation has the support of the doctrine that reenactment of the statute without disapproval of regulations thereunder gives them added sanction. *United States* v. *Dakota-Montana Oil Co.,* 288 U. S. 459, 466; *Helvering* v. *Winmill,* 305 U. S. 79, 83; *Helvering* v. *Griffiths,* 318 U. S. 371, 395, 397.

quently has no retroactive effect on the liability of these taxpayers and the conclusion of the Court of Appeals that it is unconstitutional is not warranted. The judgment of the Court of Appeals is reversed and that of the Tax Court is affirmed.

Reversed.

MR. JUSTICE ROBERTS is of opinion the judgment should be affirmed for the reasons stated by the Circuit Court of Appeals, 143 F. 2d 162.

MARKET STREET RAILWAY CO. *v.* RAILROAD COMMISSION OF CALIFORNIA ET AL.

APPEALS FROM THE SUPREME COURT OF CALIFORNIA.

Nos. 510 and 511. Argued February 26, 1945.—Decided March 26, 1945.

1. For the purpose of appeal to this Court, the judgment of the Supreme Court of California here involved became final upon that court's denial of a petition for rehearing; and an appeal was not premature though taken before expiration of the 30-day period in which, under the state law and practice, the state court could have modified the judgment. P. 551.
2. An order of the state commission requiring the appellant street railway company to reduce its base cash fare from seven to six cents, *held*, under the Fourteenth Amendment of the Federal Constitution, not a deprivation of property without due process of law. Pp. 553, 569.

   (a) There is no foundation in the record for the company's contention that in the proceedings before the Commission it was given no adequate notice that its rates were under attack and therefore no opportunity for a hearing on the reasonableness of its rates. P. 558.

   (b) The order was not unsupported by evidence and was not rendered invalid by the fact that the Commission evaluated the company's experience for itself without the aid of expert testimony. P. 559.

   (c) The order was not invalid as based on matters outside the record. The Commission's incidental reference to the company's

own reports, although they were not formally in evidence in the proceeding, did not deny due process, in the absence of any showing of error or prejudice. P. 561.

(d) As the rate prescribed by the Commission is not here found to be confiscatory, it is unnecessary to determine whether "value of service" would justify a rate which does not yield a fair return. To the extent that the Commission was influenced by considerations of the value of the service in this case, there was no denial to the company of any constitutional right. P. 562.

(e) In view of the company's economic plight, the order was not invalid even though under the prescribed rate the company would operate at a loss. That the Commission used as a rate base the price at which the company had offered to sell its properties to the municipality, and disregarded theoretical reproduction costs, did not vitiate the order. P. 564.

The due process clause does not insure values nor require restoration of values that have been lost by the operation of economic forces.

(f) That the test of experience which the order contemplated was unavailable can not affect its constitutional validity, where the company itself, by litigation and subsequent sale of the property, had frustrated such test. P. 568.

24 Cal. 2d 378, 150 P. 2d 196, affirmed.

APPEALS from a judgment affirming an order of the state commission which directed the railway to reduce its fares from seven to six cents. Because of uncertainty as to whether the first appeal was premature, a second appeal was taken; the second appeal is here dismissed and the first heard on the merits.

Mr. Francis R. Kirkham, with whom *Messrs. Cyril Appel* and *Felix T. Smith* were on the brief, for appellant.

Mr. Everett C. McKeage, with whom *Mr. Wyman C. Knapp* was on the brief, for appellees.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Two appeals have been taken from a single judgment of the Supreme Court of California because counsel was

uncertain when the judgment became final for our jurisdictional purposes. The decision was rendered July 1, 1944; it concluded, "The order is affirmed"; a petition for rehearing was denied July 27, 1944. The first appeal was applied for and allowed on July 31, 1944. If the judgment became final on denial of rehearing, this appeal was timely. However, the California Rules on Appeal expressly provide that a decision of the Supreme Court "becomes final thirty days after filing unless otherwise ordered prior to the expiration of said 30-day period." [1] Remittitur does not issue until the end of the 30-day period.[2] It issued on August 1 and certified, according to practice, that "the foregoing is a true copy of an original judgment entered in the above entitled cause on the 1st day of July, 1944; and now remaining of record in my

---

[1] Rule 24 (a) provides: "[When decisions become final] All decisions of the reviewing courts shall be filed with the clerk. A decision of the Supreme Court becomes final 30 days after filing unless otherwise ordered prior to the expiration of said 30-day period. Pursuant to article VI, section 4c, of the Constitution, a decision of a District Court of Appeal becomes final as to that court, 30 days in civil cases and 15 days in criminal cases after filing, and thereafter is not subject to modification or rehearing by said court. Where an opinion is modified without change in the judgment, during the time allowed for rehearing, such modification shall not postpone the time that the decision becomes final as above provided; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the date of modification." Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California, effective July 1, 1943. See 22 Cal. 2d 1.

[2] Rule 25 so provides. "A remittitur shall issue after the final determination of any appeal, or of any original proceeding in review in which an alternative writ or order to show cause has been issued. Unless otherwise ordered, the clerk of the Supreme Court shall issue the remittitur when a judgment of that court becomes final . . ." Rule 25 (a). "For good cause shown, or on stipulation of the parties, the Supreme Court may direct the immediate issuance of a remittitur." Rule 25 (b). For discussion of this rule see Witkin, *New California Rules on Appeal* (1944) 17 So. Calif. L. Rev. 248 *et seq.*

office." If the date of its issue, being also the date of finality fixed by the rule, governs finality for purposes of our jurisdiction, the judgment was not a final one at the time the first appeal was granted. On the chance that it might be dismissed as premature, a second appeal was presented and allowed on September 21.

Our jurisdiction to review a state court judgment is confined by long-standing statute to one which is final. Judicial Code, § 237, 28 U. S. C. § 344. Final it must be in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.

We have held that finality of a judgment of a state court for determining the time within which our jurisdiction to review may be invoked is not controlled by the designation applied in state practice. *Department of Banking* v. *Pink,* 317 U. S. 264; *Cole* v. *Violette,* 319 U. S. 581. The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment. The waiting period prescribed by the statute here seems to reserve a power of that character. The decision during this period does not lack the attributes of an adjudication, it is not awaiting lapse of time to become a judgment, it merely is subject to modification. When this period runs, unless the court has moved meanwhile, it becomes powerless to change or modify the judgment. *Oakland* v. *Pacific Coast Lumber Co.,* 172 Cal. 332, 337, 156 P. 468; *Estate of Ross,* 189 Cal. 317, 318, 207 P. 1014. The rule is thus a limitation on the time during which the court may reconsider, which in absence of such rule might expire only with the end of the term or some other event determinative under local law. Such latent powers of state courts over their judgments

are too variable and indeterminate to serve as tests of our jurisdiction. Our test is a practical one. When the case is decided, the time to seek our review begins to run. A timely petition for rehearing defers finality for our purposes until it is acted upon or until power to act upon it has expired as here it would appear to do at the end of the 30-day period.[3] If rehearing is granted, the judgment is opened, and does not become final as a prerequisite to application for review by us until decision is rendered upon rehearing.

We postponed consideration of jurisdiction until hearing on the merits.[4] We hold that this judgment became final on denial of rehearing, that the first appeal was timely and that the precautionary second appeal is duplication. Accordingly the appeal in No. 511 is dismissed and that in No. 510 is entertained upon its merits.

The Market Street Railway Company at the commencement of these proceedings operated a system of passenger transportation by street car and by bus in San Francisco and its environs. The Railroad Commission of California instituted on its own motion an inquiry into the Company's rates and service. After hearings, an order

---

[3] "The Supreme Court or a District Court of Appeal may grant a rehearing in any cause after its own decision; and any cause pending in a department of the Supreme Court may be ordered heard by the Supreme Court in bank. A rehearing or hearing in bank may be granted on petition, as provided in subdivision (b) of this rule, or on the court's own motion, prior to the time the decision becomes final therein." Rule 27 (a).

"An order of the Supreme Court granting a rehearing shall be signed by at least 4 justices assenting thereto, and filed with the clerk; and a hearing in bank after decision in department may be ordered as provided in article VI, section 2, of the Constitution. If no order is made before the decision becomes final, the petition shall be deemed denied, and the clerk shall enter a notation in the register to that effect." Rule 27 (e).

[4] November 13, 1944.

was promulgated reducing the fare from seven to six cents.[5] The Company, after rehearing was denied,[6] obtained review by the Supreme Court of California. It also obtained a stay of the Commission's order, conditioned upon impounding the disputed one cent per passenger to abide settlement of the issues upon which its ownership would depend. The Supreme Court of California affirmed the order [7] and appeal is taken to this Court. Meanwhile the Company sold its operative properties to the City of San Francisco. The case is saved from being moot only because its decision is necessary to determine whether the Company is entitled to the impounded portion of the fares or whether the money shall be refunded to passengers making claims and unclaimed amounts thereof be paid over to the state, as required by conditions of the stay order.

The appeal raises constitutional issues only. The contention is that the order deprives the appellant of its property without due process of law, contrary to the Fourteenth Amendment. Appellant claims denials of due process in matters of procedure in that it had no adequate notice that its rates were under attack or adequate opportunity for a hearing thereon, that the order in several vital particulars is not supported by substantial evidence or by any evidence, and that it was improperly based on matters outside of the record on which there was no opportunity to cross-examine or to be heard. It claims a taking of its property as a result of the order on the ground that it would force the Company to operate at a loss because the Commission used a rate base of $7,950,000, the price at which appellant had offered to sell its operative properties to the City, and did not consider reproduction cost,

[5] The opinions are reported in 45 Cal. R. C. Dec. 53.

[6] The opinion on rehearing is reported in 45 Cal. R. C. Dec. 162.

[7] The Court's opinion is reported in 24 Cal. 2d 378, 150 P. 2d 196.

historical cost, prudent investment, or capitalization bases, on any of which under conventional accounting the six-cent fare would produce no return on its property and would force a substantial operating deficit upon the Company.

The appellant in support of its contentions that it has been denied due process in procedure and has been subjected to an unconstitutional taking of its property invokes many decisions of this Court in which statements have been made that seem to support its contentions. But it should be noted at the outset that most of our cases deal with utilities which had earning opportunities, and public regulation curtailed earnings otherwise possible. But if there were no public regulation at all, this appellant would be a particularly ailing unit of a generally sick industry. The problem of reconciling the patrons' needs and the investors' rights in an enterprise that has passed its zenith of opportunity and usefulness, whose investment already is impaired by economic forces, and whose earning possibilities are already invaded by competition from other forms of transportation, is quite a different problem. The Company's practical situation throws important light both on the question whether the rate reduction has taken its property and also upon the criticisms it makes of the conduct of the hearings.

Transportation history of San Francisco follows a pattern not unfamiliar. This property has passed through cycles of competition, consolidation and monopoly, and new forms of competition; it has seen days of prosperity, decline, and salvage. In the 1850's an omnibus service began to operate in San Francisco. In the 1860's came the horse car. The 1870's saw the beginning of the cable car, for which the contour of the city was peculiarly adapted. The Market Street Railway Company was incorporated in 1893 and took over 11 of the 17 street car lines then independently operated in the city. In 1902, United

Railroads of San Francisco was organized. This consolidated under one operating control properties of the Market Street Company and five other lines, comprising 229 miles of track, much of which was cable-operated. It suffered greatly from the earthquake and fire of 1906, but carried out a considerable program of reconstruction between 1906 and 1910. In 1921 it failed to pay interest on outstanding bonds. Bondholders acquired the properties and revived the Market Street Railway Company, which had been a dormant subsidiary of United, to operate them.

In 1912 the City and County of San Francisco began operation of a municipal street railway line. This line is not and never has been under the Railroad Commission's jurisdiction. It expanded rapidly, its routes in some instances parallel those of appellant, and its competition has been serious. Throughout the period of competition the municipal lines have operated on a five-cent fare. The Market Street Line also operated on a five-cent fare until July 6, 1937. In that year it applied to the Commission for an increase to a seven-cent fare. This was denied, but a two-cent transfer charge and other adjustments were authorized. In March 1938 the Company again petitioned for a seven-cent fare, with reduction for school children. The Commission authorized a seven-cent fare, but required some concession to token buyers. A few months later the Company again asked a straight seven-cent fare and relief from the token rate. The Commission directed the Company to apply to the City for permission to abandon certain lines and to protect it against "jitney competition," stipulating that the seven-cent fare could be made effective if the City failed to respond. The City did not act, and the seven-cent fare became effective January 1, 1939.

But the increase of fare brought no increase of revenue. Both traffic and revenue continued to decline, and in 1941 reached the lowest point in twenty years. Then came

war, bringing accelerated activity, increase of population of the city, rubber and gas shortage, restrictions on purchase of new and retirement of many old automobiles. Traffic and revenues showed a sudden increase. The Commission found, however, that the service had constantly deteriorated and was worse under the seven-cent fare than under the former five-cent rate. It recognized that some of the causes were beyond the Company's control. But after allowance for those causes, it also found evidence of long-time neglect, mismanagement, and indifference to urgent public need. It found the Company's service inferior to the service of the municipal lines, although appellant charged a 40 per cent higher fare. Defects in service consisted of failure to operate on schedule, long intervals between cars, followed by several cars operating with little headway, overloading, inadequate inspection, and inadequately maintained rolling stock. The Company had some 70 cars out of operation and in storage because of shortage of manpower. Its street car rolling stock was obsolete, 73 electric cars and 12 cable cars being out of service. None of the cars was modern. The municipal lines had tried to lease the unused cars for operation on its lines, but the Company refused. The City was denied priorities for purchase of new busses by federal authorities because of idle rolling stock in the city. The Commission concluded that the reason for the Company's declining to lease for a fair rental rolling stock it could not use was fear of competition. The Company was handicapped in manpower, the municipal lines offering somewhat better wages and working conditions that seemed more attractive. The entire system was suffering from deferred maintenance, the amount expended for way and structures maintenance having been steadily reduced, both in dollars and in proportion of total operating costs.

The Commission disagreed with the Company as to the use to be made of war-time increase in revenues. The

Company said it had no definite plan for setting aside anything for maintenance. The management thought its first obligation was to discharge its debts. The Commission took the view that allowances for depreciation as part of the costs of operation should be spent in replacement of depreciated property, and not for payment of debts.

Reviewing the financial results of fare increases, the Commission concluded that the Company would reap no lasting benefit from rates in excess of five cents, due to the tendency of a higher rate to discourage patronage. The war traffic the Commission thought temporary. But it concluded that a six-cent fare would sufficiently stimulate traffic to leave after operating expenses approximately a six per cent return on a rate base of $7,950,000. This was the figure at which the Company had offered to sell its operative properties to the City. Accordingly the Commission found the six cents to be a reasonable rate to the Company and to be all or more than the reasonable value of the services being rendered to patrons. It considered this rate to be experimental and kept the proceeding open for such further orders as might be just and reasonable. The Company applied for rehearing on substantially the grounds it urges here. Its arguments were considered at length in an opinion which denied rehearing. The Supreme Court of California overruled all of the Company's objections and affirmed the Commission's order.

The reduced rate never took effect. The Company obtained delay from the Commission and a stay order from the Court. It then sold its properties to the City, which took over and continued the seven-cent fare. So the anticipations of the Commission as to increased patronage from the rate reduction never have been put to the test of experience. Our review considers only whether the order was valid when and as made.

1. Appellant says that the order is invalid because it was denied a fair hearing, given no adequate notice that its rates were under attack, and hence was afforded no opportunity for a hearing on the reasonableness of its rates. We find this contention to have no foundation in the record. The order of the Commission instituting the proceeding recited its belief "that public interest demands an inquiry into the reasonableness of the rates, as well as the sufficiency and adequacy of the service rendered" by appellant, and investigation was ordered of both. Due notice of the proceeding was given and it was entitled an investigation "into the reasonableness of the rates and charges, and into the sufficiency and adequacy of the" service. The hearing was opened with a similar statement by the Commission. The record is replete with evidence that would have no bearing on the questions of service except as fares were involved. Experts of the Commission testified at length as to financial history and rate experience of the Company. The Company's president testified concerning the rate situation and the Company's experience with the seven-cent fare. Its counsel put in evidence the Commission's former decisions authorizing increases in fares.

The Company particularly complains that it had no notice that the Commission was receiving evidence of its offer to sell its properties for $7,950,000 for use as a rate base. The offer was received in evidence without limitation or statement of its purpose. Nothing appears to mislead or entrap the Company or to lull it into a sense of security. It seems simply to have assumed that no explanation of the offer was necessary. Doubtless the decision and the grounds of decision were unexpected. But surprise is not necessarily want of due process.

We find that the Company had reasonable notice that its rates were under attack and was not denied opportunity to be heard thereon. We can well understand how

counsel's attention became diverted to more sharply contested aspects of the case. But even if a more convincing showing were made that the Company had relevant evidence to be heard, we find no adequate excuse for the failure to offer it in the proceeding. No offer was rejected, no request for time to obtain such evidence was denied. A misapprehension by a litigant of the steps which its best interests require during a trial may be appealing grounds for a plea to the discretion of the hearing tribunal for another chance, but it is not grounds for our interference as a denial of constitutional rights.

2. It is next contended that the order is invalid under the due process clause because it is unsupported by evidence and is based on the Commission's speculation and conjecture. This charge relates particularly to those findings which predict the effect of a rate reduction in stimulating traffic. The Commission's estimates and predictions do not follow any particular testimony. Appellant urges that such predictive findings may be made only on expert testimony, subject to cross-examination, explanation, and rebuttal, and may not be based on the Commission's own expert knowledge. Various considerations are advanced to show that the Commission's predictions were based on innocent analysis and were improbable.

Appellant relies upon our holding in *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292. In that case the Commission ordered refunds "upon the strength of evidential facts not spread upon the record." This consisted "of information secretly collected and never yet disclosed. The company protested. It asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain and to rebut them. The response was a curt refusal. Upon the strength of these unknown documents refunds have been ordered for sums mounting into millions, the Commission reporting its conclusion, but not the under-

lying proofs. The putative debtor does not know the proofs today. This is not the fair hearing essential to due process. It is condemnation without trial." *Id.* at 300. Nothing of that kind occurred in this case. The basis for a judgment is here in the record. The Company itself put in evidence decisions by the Commission in which by cautious steps it permitted advance of the rates from five to seven cents. Traffic records before and after each advance are in evidence. Also in the record is the traffic experience of the competing municipal line, which did not increase its fares and which did not suffer declines in traffic and revenues comparable to those which followed this Company's increase of fares. This is not a case where the data basic to a judgment have been withheld from the record. The complaint is that the Commission formed its own conclusions without the aid of expert opinions. It is contended that the Commission should draw conclusions from these facts only upon hearing testimony of experts as to the conclusions they would draw from the facts of record. Experts' judgments, however, would not bind the Commission. Their testimony would be in the nature of argument or opinion, and the weight to be given it would depend upon the Commission's estimate of the reasonableness of their conclusions and the force of their reasoning. There is nothing to indicate that any consideration which could be advanced by an expert has not been advanced by the Company in argument and fully weighed.

We cannot say that it is a denial of due process for a commission so experienced as the record shows this Commission to have been with the affairs of this particular appellant to draw inferences as to the probable effect on traffic of a given rate decrease on such a record as we have here. Particularly would a conclusion of denial of due process be unwarranted where, as here, the Commission

recognized the infirmity of any predictions, regarded its rate order as a temporary experiment for which no fixed period was set, and held open the proceeding to receive whatever lessons experience might teach. Its step here is after all only receding, on experience, from steps it earlier had taken to advance the rate, which also had been regarded as experimental and as to which experience had disappointed expectations. We find no denial of due process in these circumstances from the fact that the Commission evaluated the Company's experience for itself without the aid of expert testimony.

3. It also is urged that the order is invalid under the due process clause because it is based on matters outside the record. The decision of the Commission stated that "In the eight months' period, January to August, inclusive, of 1943 the operating revenues of the company amounted to $5,689,775," and compared this with the operating revenues for the same period of 1942 and found an increase of 20 per cent. On this basis it estimated the total for the full year of 1943 under the prevailing seven-cent fare. Challenged upon the ground that the operating revenues from January to August of 1943 were not in the record, the Commission admitted that these figures were taken from the appellant's monthly reports filed with the Commission. It contended that even if it was in error to refer to such reports, the error was harmless, since the record without the figures supported the reasonableness of the six-cent fare and it was therefore immaterial that the Commission used some additional figures. No contention is made here that the information was erroneous or was misunderstood by the Commission, and no contention is made that the Company could have disproved it or explained away its effect for the purpose for which the Commission used it. The most that can be said is that the Commission in making its predictive findings went out-

side of the record to verify its judgment by reference to actual traffic figures that became available only after the hearings closed. It does not appear that the Company was in any way prejudiced thereby, and it makes no showing that, if a rehearing were held to introduce its own reports, it would gain much by cross-examination, rebuttal, or impeachment of its own auditors or the reports they had filed. Due process, of course, requires that commissions proceed upon matters in evidence and that parties have opportunity to subject evidence to the test of cross-examination and rebuttal. But due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties. The process of keeping informed as to regulated utilities is a continuous matter with commissions. We are unwilling to say that such an incidental reference as we have here to a party's own reports, although not formally marked in evidence in the proceeding, in the absence of any showing of error or prejudice constitutes a want of due process.

4. The order is said to be invalid under the due process clause because it is based in part on the so-called "value of service" theory. It is urged that "a confiscatory rate cannot be sustained on the theory that it is an adequate price for the service independently valued" and there is no evidence justifying a rate reduction on the theory of the value of the service.

The question whether a confiscatory rate can be justified because service is bad can only be reached when we find a prescribed rate to be confiscatory. As we do not find this rate to be such, we do not need to pronounce upon the abstract doctrine as to the validity of the "value of service" theory as justifying rates that do not yield a fair return. The Commission in this case did not make an independent valuation of the service to patrons and fix rates accordingly.

The consideration of service as a justification for rates arises in this case upon a comparison of the service of the Company under the five-cent rate and under the seven-cent rate. The Commission found that the 40 per cent increase of rate had been accompanied by a deterioration of service. Some factors in the bad service were beyond the Company's control; others were found not to be without remedy by good management. Certainly if the increased fare had been accompanied by an improved service, it would be used as an argument by the Company, and a powerful one it would be, for the continuance of the higher rate. That higher rates failed to improve, failed even to maintain, service certainly removed one of the justifications for the increase which the Company was enjoying. It must not be forgotten that the increases that the Commission had allowed were also experimental. So far as the public was concerned the experiment with the seven-cent rate yielded them no better immediate service and, because of the Company's policies, gave them no prospect of more permanent service. In fact, by discouragement of patronage it threatened the continuance of the service.

Under these circumstances the Commission did not put a monetary value on a street car ride as the basis of the fare. Using the Company's service under the five-cent fare as a standard, it found that the public—aside from the service to war plants, which was admittedly good—was receiving no more transportation service for seven cents than it had received at five, and at the same time the Company was not receiving increased revenues because the price of the service had exceeded the value that the public put upon it and it had thereby withdrawn its patronage.

Certainly the due process clause of the Constitution is not violated when a commission takes into consideration practical results to the public of advances which it has allowed in rates. To the extent that the Commission was

influenced by considerations of the value of the service in this case, we find nothing that denies the Company any rights possessed under the Federal Constitution.

5. The order is asserted to be invalid because it is said to be confiscatory and to compel appellant to operate at a loss. The Commission used a rate base of $7,950,000, the price at which the property had been offered to the City, and the six-cent rate is not calculated to permit any return on a greater valuation. Before we consider the validity of this rate base, we may well consider what alternatives the case presents. No study of the present cost of reproduction is shown, no present fair value is suggested. Nor do we think it important. Apart from familiar objections to the reproduction-cost method, no responsible person would think of reproducing the present plant, consisting in substantial part of cable cars and obsolete equipment. There is no basis for assuming that anyone, in the light of conditions which prevail in the street-surface railroad industry generally, would consider reproducing any street railway system. It was no constitutional error to proceed to fix a rate in disregard of theoretical reproduction costs.

The Commission in 1920 made a valuation study of appellant's properties and found an historical reproduction cost of road and equipment to be $29,715,147. This valuation, brought forward by adding additions and betterments and deducting retirements, shows a total amount for road and equipment as of December 31, 1942 of $25,343,543.

Actual investment is not disclosed by the record. It does disclose that the book value of appellant's properties as of December 31, 1942 was $41,768,505.20.

The Company's outstanding securities at the end of 1942, issued with the approval of the Commission, totaled $37,921,323.96 at face value. They consisted of common stock of over $10,000,000; 3 different classes of preferred

stock of $21,000,000; first mortgage bonds of $4,217,500; equipment notes of $735,748.28; and additional long-term debt of $1,041,625.68.

Not one of these nor any combination of them affords a practical or possible rate base, nor does the Company suggest that allowance of any rate will earn it a return upon any of these. It has not itself ventured to ask a rate higher than seven cents, although the inadequacy of its yield to take care of the financial requirements of the Company has for some time been apparent. This company obviously is up against a sort of law of diminishing returns; the greater amount it collects per ride, the less amount it collects per car mile. It has long been recognized that this form of transportation could be preserved only by the most complete cooperation between management and public and the most enlightened efforts to make the service attractive to patrons.[8] It is obvious that, for whatever

[8] In May of 1919 the Secretary of Commerce and the Secretary of Labor joined in a letter to President Wilson, advising him that 50 or more urban street railway systems representing a considerable percentage of the electric railway mileage was in the hands of receivers, affecting some of the largest cities of the country, and that other systems were on the verge of insolvency and the industry as a whole was virtually bankrupt. They urged the appointment of a commission to study and report upon the problem. President Wilson on June 1, 1919 named a commission which held extensive public hearings. The first witness was ex-President William Howard Taft, speaking for the National War Labor Board, and others, including leading municipal and railway officials and such experienced persons in the problem of regulation as Newton D. Baker, Milo R. Maltbie, Morris L. Cook, Joseph B. Eastman, and many others. Proceedings of the Federal Electric Railways Commission, v. 1. An exhaustive report with many recommendations was made. See Analysis of the Electric Railway Problem prepared for the Federal Electric Railways Commission by De Los F. Wilcox, New York City, 1921. Its recommendations were extensive, including certain changes both by the municipalities and by the companies affected. The recommendations were not generally heeded by either.

637582°—46——40

cause, the appellant has not succeeded in maintaining its service on a paying basis.

It is idle to discuss holdings of cases or to distinguish quotations in decisions of this or other courts which have dealt with utilities whose economic situation would yield a permanent profit, denied or limited only by public regulation. While the Company does not assert that it would be economically practicable to obtain a return on its investment, it strongly contends that the order is confiscatory by the tests of *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 603, 605, from which it claims to be entitled to a return "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital" and to "enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed." Those considerations, advanced in that case (which was reviewed pursuant to statute rather than under the Fourteenth Amendment), concerned a company which had advantage of an economic position which promised to yield what was held to be an excessive return on its investment and on its securities. They obviously are inapplicable to a company whose financial integrity already is hopelessly undermined, which could not attract capital on any possible rate, and where investors recognize as lost a part of what they have put in. It was noted in the *Hope Natural Gas* case that regulation does not assure that the regulated business make a profit. 320 U. S. at 603; see *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 590. All that was held was that a company could not complain if the return which was allowed made it possible for the company to operate successfully. There was no suggestion that less might not be allowed when the amount allowed was all that the company could earn.

Without analyzing rate cases in detail, it may be safely generalized that the due process clause never has been held by this Court to require a commission to fix rates on the present reproduction value of something no one would presently want to reproduce, or on the historical valuation of a property whose history and current financial statements showed the value no longer to exist, or on an investment after it has vanished, even if once prudently made, or to maintain the credit of a concern whose securities already are impaired. The due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces.

The owners of a property dedicated to the public service cannot be said to suffer injury if a rate is fixed for an experimental period, which probably will produce a fair return on the present fair value of their property. If it has lost all value except salvage, they suffer no loss if they earn a return on salvage value. If the property has no prospect of salvage except through dismantling and sale for scrap, the scrap value for such of it as is to be scrapped may represent its present worth. In this case the owners were fortunate in having a potential buyer. Negotiations had long been under way. The operative properties were twice offered to the City of San Francisco for $7,950,000 and twice the voters rejected the proposition. Ultimately the properties were sold for $7,500,000. The evidence shows that the president of the Company reported to the directors "that the price mentioned is the amount that has been agreed upon for the purchase by the City and County of San Francisco of the operative properties of the Company after negotiations in respect thereto which covered a considerable period of time and, as previously mentioned, is the best price obtainable therefor."

Upon this understanding the Board of Directors ratified the offer and directed the officers to consummate it.

It is now contended that this offer was calculated by a capitalization of earning power and that this Court condemned such a basis of valuation in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 601, when it said, "The heart of the matter is that rates cannot be made to depend upon 'fair value' when the value of the going enterprise depends on earnings under whatever rates may be anticipated." The pronouncement in the *Hope* case was directed to a situation where the demand for the service permitted such a range of choice in rates as would greatly affect the value of the property. No such choice appears open to the appellant. Apart from a little brief war-time prosperity, it seems doubtful whether any rate would yield appellant's operating expenses.

Under these circumstances we do not find that anything has been taken from the appellant by the impact of public regulation. If the expectations of the Commission as to traffic increase were well founded, it would earn under this rate on the salvage value of its property, which is the only value it is shown to have. If expectations of increased traffic were unfounded, it could probably not earn a return from any rate that could be devised. We are unable to find that the order in this case is in violation of constitutional prohibitions, however unfortunate the plight of the appellant.

6. The Company also contends that it is entitled to reversal because the order contemplated a test of experience, and the experiment has not taken place, and the Commission's predictions cannot be verified. However, it was the Company which defeated the experiment. A very short trial—a period much shorter than is required to conduct a litigation—would have indicated the effect

of the rate reduction in stimulating traffic. But at the Company's request the experiment was stayed and then totally frustrated by the sale of the property. Under these circumstances the unavailability of experience to test the order cannot affect its validity. It might be grounds for an appeal to the discretion of the tribunal which rendered the order. It certainly is not a constitutional objection to be enforced by us.

The fixing of future rates always involves an element of prediction. Even monopolies must sell their services in a market where there is competition for the consumer's dollar and the price of a commodity affects its demand and use. This effect may be predicted or projected, but it can be known only from experience. The many detailed objections which the Company makes to the Commission's computations of probable yield would be answered by experience. There is nothing in the order which requires that the test period should be a year or any definite time, and there is no ground for assuming that the Commission would have rejected an application to make such changes in the schedule as experience might show to be necessary, in order to produce, if possible, the revenue which it found to be needed. The Commission had not in the past been indifferent to appellant's fiscal problems. Under such circumstances we think it is not forbidden by the Constitution that there be a pragmatic test of matters which even the most expert could not know in advance. Cf. *Clark's Ferry Bridge Co.* v. *Public Service Commission,* 291 U. S. 227.

We have considered appellant's complaints in considerable detail because the case in so many ways departs from the usual rate case. We find no constitutional infirmity in the result or in the procedure by which it is reached. The judgment of the Supreme Court of California is therefore

Affirmed.

HARTFORD-EMPIRE CO. ET AL. *v.* UNITED STATES.

NO. 2. APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.*

Decided April 2, 1945.

1. Upon review of a decree of the district court in a suit brought by the United States for violation of the Sherman Act, this Court, though it affirms the district court's findings as to violation of the Act, may modify provisions of the decree. P. 571.
2. The opinion heretofore rendered by this Court in these cases (*Hartford-Empire Co.* v. *United States*, 323 U. S. 386) is here added to and clarified in several particulars. P. 571.

UPON PETITION by the United States for clarification or reconsideration of *Hartford-Empire Co.* v. *United States*, 323 U. S. 386.

Solicitor General Fahy for the United States.

Messrs. John T. Cahill, Thurlow M. Gordon, Stuart S. Wall and *Jerrold G. Van Cise* for the Hartford-Empire Co. et al.; *Mr. Boykin C. Wright* for the Corning Glass Works; *Messrs. Robert T. Swaine, Lloyd T. Williams, Henry A. Middleton* and *George B. Turner* for the Owens-Illinois Glass Co. et al.; *Messrs. Stephen H. Philbin* and *Joseph D. Stecher* for the Hazel-Atlas Glass Co. et al.; and *Messrs. Arnold Boyd* and *Hamilton Vreeland, Jr.* for the Knox Companies.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Subsequent to the announcement of the decision of the court in the above cases, the United States filed a petition for clarification or reconsideration.

*Together with No. 3, *Corning Glass Works et al.* v. *United States;* No. 4, *Owens-Illinois Glass Co. et al.* v. *United States;* No. 5, *Hazel-Atlas Glass Co. et al.* v. *United States;* No. 6, *Thatcher Manufacturing Co. et al.* v. *United States;* and No. 7, *Lynch Corporation et al.* v. *United States,* also on appeals from the District Court of the United States for the Northern District of Ohio.

We have no occasion to reconsider the opinion as respects the necessity for modification of the decree entered by the District Court. In the many cases which have come here for review of decrees in suits brought by the Government for violation of the Sherman Law, it has never been suggested that this court must accept the decree fashioned by the trial court, if we affirm that court's findings as to violation of the statute, and cannot modify the terms of relief as drafted by the court below. The practice has been the contrary.[1] This is not only in conformity to the unquestioned power of an appellate court in an equity cause, but because in suits under the Sherman Act, it is unthinkable that Congress has entrusted the enforcement of a statute of such far-reaching importance to the judgment of a single judge, without review of the relief granted or denied by him.

In order that there may be no misunderstanding we think it well to add to the opinion in the following particulars.

1. The opinion states (p. 411):

"The royalties paid to the receiver by Hartford's lessees may, unless the District Court finds that Hartford has, since the entry of the receivership decree, violated the anti-trust laws, or acted contrary to the terms of the final decree as modified by this opinion, be paid over to Hartford. In any event Hartford should receive out of these royalties compensation on a *quantum meruit* basis, for services rendered to lessees."

---

[1] *Swift & Co.* v. *United States,* 196 U. S. 375, 396; *Harriman* v. *Northern Securities Co.,* 197 U. S. 244; *Standard Oil Co.* v. *United States,* 221 U. S. 1, 81; *United States* v. *American Tobacco Co.,* 221 U. S. 106, 184; *United States* v. *Terminal Railroad Assn.,* 224 U. S. 383, 409; *United States* v. *Union Pacific R. Co.,* 226 U. S. 470; *United States* v. *Swift & Co.,* 286 U. S. 106; *Local 167* v. *United States,* 291 U. S. 293, 299; *Sugar Institute* v. *United States,* 297 U. S. 553, 602; *United States* v. *Univis Lens Co.,* 316 U. S. 241, 254; *United States* v. *Bausch & Lomb Optical Co.,* 321 U. S. 707, 723–728.

The Government points out that had it not been for the receivership, many of the licensees (most of whom were not parties to the proceeding) would have paid no further royalties to Hartford, and that they may be able to justify refusal of payment of any royalties from the date of the receivership, and ought not to be put into the position of recovering royalties paid to the receiver, from Hartford.

It has been open to each of these licensees at any time to repudiate its lease and license, to return the leased machinery, to refuse to pay further rentals or royalties, and to defend any suit arising out of such refusal to pay, either for infringement or otherwise. It may be that licensees have not taken this course because they relied on the decree as entered by the District Court. In such reliance they may have expected that the moneys paid the receiver would be repaid to them.

In view of the modifications required by the opinion of this court, such licensees must pay reasonable rental and service charges on a *quantum meruit* basis (leaving out of consideration any amount otherwise payable for the privilege of practicing the patented inventions involved) in respect of the machines used in the interim. Unless Hartford, since the entry of the decree by the District Court, has been guilty of some added violation of the anti-trust laws, licensees must elect (a) to remain licensees on such reasonable rental and royalty basis for the future as the District Court may fix, or (b) repudiate the leases and litigate their rights as against Hartford to retain any portion of the rents and royalties paid. Depending upon such election of each of the lessees, the District Court may, on the application of each, make an appropriate order for the disposition of the fund in the light of the licensees' election and the principles stated in the opinion of this Court.

2. The Government expresses apprehension lest the statement in the opinion that the decree of the District

Court is vacated and the cause remanded for further proceedings would result in the existence of no judgment in effect in the interval between the issue of this court's mandate and the formulation of a new decree by the District Court. We need only say that the decree from which the appeal was taken stands until further order or orders are entered by the District Court pursuant to mandate.

3. In various portions of the opinion direction is given for provisions in the decree relating to "feeders, formers, stackers and lehrs, and patents covering these or improvements of them, or methods or processes used in connection with them . . ." It is said that this phraseology may omit the Owens and Hartford suction machine patents, including O'Neill suction patents acquired by Owens. The language used was intended to cover such suction machines.

4. The opinion states (p. 419):

"Hartford and the other corporate defendants mentioned in paragraph 24 should be required to lease or license glass making machinery of the classes each now manufactures to any who may desire to take licenses . . ."

It is suggested that this language might permit Hartford to cancel all its leases and retake the leased machinery.

That was not intended by the language used. It was intended that if persons desired to take a license instead of taking a lease, and Hartford were willing to license without leasing machinery, this might be done on reasonable terms. Hartford should of course be compelled to lease machinery covered by its patents according to its past practice, on reasonable terms, and should be required to license the patents involved for manufacture and use or sale, also on reasonable terms.

5. The Government finds some dubiety in the phrase, relating to revision of paragraph 24 (a) of the District

Court's decree, viz., "should be required to lease or license glass making machinery of the classes each now manufactures to any who may desire to take licenses." The language is amended to add after the word "manufactures" the words "or leases."

6. The Government suggests that the opinion should be clarified to permit independent machinery manufacturers to obtain licenses. The opinion is so modified, and the corporate defendants are required to license all applicants to make, use, or sell the patented machines at reasonable royalties.

7. The Government apprehends that the use of the word "standard" with respect to the royalties to be charged by Hartford may be taken as a determination that present royalties are reasonable. To avoid any misunderstanding we substitute for the phrase "standard royalties" the phrase "uniform reasonable royalties." Such uniform reasonable royalties may include rental of the machines, the servicing of the machines, or the use of the patents for the production of glassware on the leased machines, the licensee to have the option at his election to take and pay for any or all of these privileges. Hartford should also be required to license the patents for manufacture for use or sale, but with the limitation that similar licenses at uniform reasonable royalties must be available to all who desire them.

8. The Government desires that power be reserved to the District Court to dissolve Hartford.

The District Court, in its opinion, concluded, and we think properly, that in the situation presented a dissolution of Hartford and a distribution of its patents into various hands would create a worse situation than that envisaged by the District Court's decree. We think this is equally true of the status to be established by the modification of the decree required by our opinion. The opinion did not disturb paragraph 57 (A) of the decree entered

below. If it be found that a decree entered in accordance with this court's opinion has failed to bring about a correction of the violations of the anti-trust law which are the basis of the relief granted, it will of course be open to the Government, on a proper showing, to apply for further or other relief.

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

MR. JUSTICE RUTLEDGE, dissenting.

The necessity for a second opinion, in effect a further detailed writing of the decree in this case, gives added point to the view expressed in an earlier dissent, 323 U. S. 438, that this Court should not undertake the long distance writing of the detailed provisions for relief, amounting to a framing of the decree, in Sherman Act proceedings. I do not say that Congress has entrusted enforcement of the Sherman Act "to the judgment of a single judge."[1] I do say that his judgment upon the facts of this case is necessarily better informed than that of appellate judges, however conscientious or industrious; and accordingly his findings, when they are sustained without

[1] There can be no question of this Court's power to review and modify terms of relief in Sherman Act suits, when they exceed the limits imposed by law or amount to an abuse of discretion. As the Court's opinion indicates, this power has been frequently exercised, most often in the cases cited to strengthen rather than to weaken the remedy where violation has been found, *United States* v. *American Tobacco Co.*, 221 U. S. 106, 184; *United States* v. *Union Pacific R. Co.*, 226 U. S. 470; *United States* v. *Swift & Co.*, 286 U. S. 106; *United States* v. *Univis Lens Co.*, 316 U. S. 241; and in no instance substantially to the extent of rewriting the detailed provisions of the decree in extenso, as is done in this case; cf. *Swift & Co.* v. *United States*, 196 U. S. 375, 396; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *Sugar Institute* v. *United States*, 297 U. S. 553; *United States* v.

qualification upon the character and extent of the violation, are entitled to similar weight upon the character of the relief required, unless they exceed the limits imposed by law or amount to a clear abuse of discretion. Many of the detailed revisions made here in the decree cannot qualify in either category. A court which so accurately found the facts and made conclusions concerning the violation hardly can have erred so consistently or so grossly as this Court's action necessarily implies was the case.

Further elaboration of this view is not now required, except to say that if the Court is thus to take over the business of the trial courts, actually if not in form commingling its appellate with original jurisdiction, of course it should spare no pains to make its mandate clear or to correct minute errors inevitable in performing the task without having heard the evidence, however great the care given to it.

This reminder alone perhaps would not justify further objection by dissenting justices. It cannot be captious, however, if they find themselves unable to accept, through acquiescence by silence, stated views of the record at variance with their own. It is stated in the revised opinion that "the District Court, in its opinion, concluded, and we think properly, that in the situation presented *a dissolution* of Hartford and a distribution of its patents into various hands *would create a worse situation than that envisaged by the District Court's decree.*" (Emphasis added.) I am unable to locate such a finding or conclusion in the record.

A former dissenting opinion pointed out (323 U. S. 445) that the District Court did not deny the Govern-

---

Bausch & Lomb Optical Co., 321 U. S. 707. In *Local 167* v. *United States*, 291 U. S. 293, the judgment and decree were affirmed without change, the Court observing, at 299: "The United States is entitled to effective relief. . . . In framing its [the decree's] provisions doubts should be resolved in favor of the Government and against the conspirators."

ment's prayer for dissolution. It only deferred action on that request and this was expressly upon the condition that Hartford meet the conditions of its decree, including compulsory licensing, royalty free, and transfer of its management to court officers, not only pending appeal but until the court should find, after a reasonable time, that competition had been restored to the industry. The court expressly stated: "If after the expiration of a reasonable time, it appears to the court that the steps he is now taking are insufficient *to restore a free and competitive status to the industry,* the receivers shall be ordered to submit a plan or plans for the dissolution of Hartford." The court further said, "Dissolution is not resorted to by the court unless Hartford wills it so. The measures herein adopted by the court *are deemed necessary to install competition to the industry* . . ." It previously had stated that "no half-way measures will suffice," that the Government had requested dissolution, but that "the court, however, is first going to *make an attempt to avoid that, if it is possible to do so and at the same time restore competition* to the industry. If this cannot be worked out to the satisfaction of the court, dissolution will be ordered." (Emphasis added.) 46 F. Supp. 621, 622, 620.[2]

The District Court has made no finding that competition has been restored to the industry. This Court does not purport to make one, and has no power to make one, in the absence of evidence to show that competition has been restored. No such evidence has been taken. Yet, as I read its terms, this Court's decree, including the present revisions, forbids the District Court to make one upon remand of this cause.

[2] It is hardly necessary to point out specifically the large difference between a finding that competition has been restored to the industry and one that "a dissolution of Hartford and a distribution of its patents into various hands would create a worse situation than that envisaged by the District Court's decree."

Clearly competition had not been restored to the industry when the District Court's decree was entered in August, 1942. The only occasion for its decree then, or for continuance now of the relief as modified, was and is to bring about such a restoration. This Court's original decree declared, "The receivership should be wound up and the business returned to Hartford." 323 U. S. 411. That direction was made upon the assumption that the District Court had concluded "that a continuance of certain of Hartford's activities would be of advantage to the glass industry and denied, *for the time being,* that form of relief," i. e., dissolution. 323 U. S. 408. That assumption has now been stated in the present opinion as one that the District Court "concluded, *and we think properly,* that in the situation presented *a dissolution* of Hartford and a distribution of its patents into various hands *would create a worse situation* than that envisaged by the District Court's decree." The further conclusion is expressed that "this is equally true of the status *to be established by the modification* of the decree required *by our opinion.*" Unless this language is at once a ruling that dissolution was not justified and would not have been sustained, if ordered in 1942, and that it should not now be decreed, I am unable to understand its meaning. That it is so effective appears from the further direction, *"If it be found* that a decree entered *in accordance with this court's opinion* has failed to bring about a *correction of the violations* of the anti-trust law which are the basis of the relief granted, it will of course be open to the Government, on a proper showing, to apply for further or other relief." (Emphasis added.)

In my judgment this effectively modifies, if it does not nullify, paragraph 57A of the District Court's decree in so far as it reserved the power to order dissolution of Hartford, if after a reasonable time competition should not be restored, notwithstanding the apparent disclaimer of

this effect. No finding can now be made, nor can one be made for some time in the future, that "a decree entered *in accordance with this court's opinion* has failed to bring about a correction of the violations," much less that competition has been restored in the industry, for the simple reason that no such decree has been entered. If only such a finding can sustain an order for dissolution, obviously no such order can be made upon the remand of this case, whether or not the District Court then might find, upon conclusive evidence, that competition had not been restored, even under the more stringent terms of its decree. Only at some indefinite future time could such an order be entered, based upon evidence that the milder terms of this Court's decree had failed to restore competition.

In my opinion, therefore, the District Court is foreclosed from finding that competition has not been restored, even under the more stringent provisions of its decree, during the nearly three years it has been in force. If in that time those measures have not been effective to restore competition, as the court clearly thought might prove to be true, the greatly softened measures of this Court's decree hardly can be expected to accomplish that object. Yet it effectually forbids the District Court to examine the effects of its decree upon the restoration of competition, to make a present finding, if the evidence should justify it, that competition has not been, or cannot be, restored, and to decree dissolution accordingly.

In effect this Court finds the fact for itself, without evidence and, in my opinion, without right. That is true unless the purpose is to rule, as a matter of law, that Hartford cannot now be dissolved and is entitled to continue in business, thus dominating the industry, even though competition has not been restored. This comes near, if not entirely, to destroying the long-established power to order dissolution.

I think also that the royalties collected and impounded by the court for Hartford's protection in the event of reversal of its judgment should be returned to those from whom they were collected. Apart from the view, previously expressed, that the District Court's finding should not be disturbed to the effect that free licensing was required to restore competition if Hartford were to continue in business and in control of its more than 600 patents, these funds were collected only by reason of the District Court's order requiring this in order to preserve the status quo pending appeal. No one can tell now whether or not the licensees, but for this order, would have elected to refuse to pay the royalties and litigate their right to do so. Those funds should not be returned to Hartford, to be retained by it as the product or consequence not only of its violation but also of the court's order.

Moreover, under the terms of this Court's revised decree, if the licensees who have paid in the royalties elect to remain licensees, and pay the reasonable royalties required "for the future," it is not clear that provision is made for repayment to them of any portion of the royalties collected which may be in excess of the reasonable royalties this Court's decree requires be paid for the future. The opposite appears to be the course directed. The revised opinion requires the licensees to elect "to *remain* licensees on such reasonable rental and royalty basis *for the future* as the District Court may fix" or to repudiate the leases and litigate with Hartford their rights "to retain *any portion* of the rents and *royalties paid.*" (Emphasis added.) Under the terms of the District Court's decree, the receivers have collected rents and royalties "under the present contracts and agreements of Hartford in its licensing and lease system." Hartford has no more right to retain unreasonable royalties collected while the District Court's decree has remained or continues to be in effect than it has to collect such royalties for the future.

MR. JUSTICE BLACK joins in this opinion.

Syllabus.

COLORADO INTERSTATE GAS CO. *v.* FEDERAL POWER COMMISSION ET AL.

NO. 379. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.*

Argued January 29, 30, 1945.—Decided April 2, 1945.

The Federal Power Commission under the Natural Gas Act ordered reductions in petitioners' interstate wholesale rates. Though separate companies, petitioners operated their properties as an integrated system. Their business consisted of intrastate sales, direct industrial sales, and interstate wholesales, of which only interstate wholesales are subject to regulation by the Commission. *Held:*

1. In determining the amount of the reductions in the interstate wholesale rates, the Commission was not bound to make a separation of the properties used in the regulated business from those in the unregulated, and its formula for allocation of costs between regulable and non-regulable sales did not contravene the Act. P. 586.

(a) *Minnesota Rate Cases*, 230 U. S. 352, and *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, distinguished. P. 589.

(b) Under the Act the appropriateness of the allocation formula used by the Commission is a question of fact, not of law. P. 590.

(c) The Commission's formula did not ignore or fail to give full effect to the priority—recognized in the contracts with industrial users and in municipal franchises—which the wholesale gas had over direct industrial sales. P. 590.

(d) The Commission's treatment of the transmission line as a unit—though some laterals and equipment were used exclusively for interstate wholesales, some exclusively for intrastate or direct industrial sales, and some in common in varying degrees by the several classes of business—was not unfair. P. 590.

(e) The Commission having found that but for the direct industrial market at Pueblo and the wholesale market at Denver the pipeline would not have been built, it was fair to determine

*Together with No. 380, *Canadian River Gas Co.* v. *Federal Power Commission et al.*, also on certiorari to the Circuit Court of Appeals for the Tenth Circuit. Argued January 30, 1945.

637582°—46——41

transmission costs for the pipeline as a whole and not to compute them on a mileage demand basis. P. 591.

(f) Considerations of fairness, not mere mathematics, govern allocation of costs. P. 591.

(g) The contention that certain intrastate wholesales are burdened with too large a share of transmission costs is rejected. P. 591.

(h) The Commission's inclusion in the total cost of petitioners' service of a 6½% return on the rate base was not inappropriate, inasmuch as the rate reduction ordered was based solely on the excess of revenues over costs (including return) derived from the regulated business. P. 593.

(i) The 6½% return allowed by the Commission on the rate base does not limit the earnings of the whole enterprise to 6½%, but merely measures the earnings allowed from the regulated business. P. 594.

(j) The findings of the Commission on the allocation of costs, though they leave much to be desired, are not so vague as to make the judicial review contemplated by the Act a perfunctory process, and the case need not be remanded for further findings. P. 595.

2. Interstate sales of gas for resale, including that sold for resale for industrial use, are subject to rate regulation under the Act. P. 595.

(a) In § 1 (a) of the Act the words "ultimate distribution to the public" do not imply distribution to domestic users alone. P. 596.

(b) The declaration of policy in § 1 (a) of the Act may not be construed as taking out of § 1 (b) the express provision subjecting to regulation gas sold for resale for "industrial use." P. 596.

(c) From the proviso of § 4 (e) of the Act that the Commission shall not have authority to suspend the rate "for the sale of natural gas for resale for industrial use only," it may not be inferred that such rates are not subject to regulation by the Commission. P. 596.

(d) That the petitioners are treated as an integrated system for the purpose of allocation of costs does not require that interstate sales by one to the other for resale for industrial use be regarded as non-regulable direct industrial sales. P. 596.

3. The provision of § 1 (b) that the Act shall not apply "to the production or gathering of natural gas" does not preclude the

Commission from taking into account the production properties and gathering facilities of natural gas companies in determining the reasonableness of rates subject to its jurisdiction. Pp. 597, 604.

(a) The Commission is not precluded under the Act from including production and gathering facilities in the rate base, and is not required instead to make an allowance in operating expenses for the fair field price of the gas as a commodity. P. 600.

4. The Commission's inclusion of production properties in the rate base at actual legitimate cost was not erroneous as matter of law. Error in this respect could be determined only on consideration of the end result of the rate order, a question not presented on the limited review granted in this case. P. 604.

5. Gas leases and producing properties which were transferred at a write-up from one wholly owned subsidiary to another were properly included in the rate base at the original cost to the transferor, where no additional investment was shown to exist. *A. T. & T. Co.* v. *United States,* 299 U. S. 232, distinguished. P. 607.

142 F. 2d 943, affirmed.

CERTIORARI, 323 U. S. 807, to review the affirmance of rate orders of the Federal Power Commission under the Natural Gas Act.

Mr. Wm. A. Dougherty, with whom *Messrs. Elmer L. Brock* and *E. R. Campbell* were on the brief, for petitioner in No. 379. *Messrs. John P. Akolt* and *Charles H. Keffer* for petitioner in No. 380.

Mr. Charles V. Shannon (in Nos. 379 and 380) and *Mr. Chester T. Lane* (in No. 380), with whom *Solicitor General Fahy, Assistant Attorney General Shea, Messrs. Paul A. Sweeney, Harry S. Littman, Stanley M. Morley, Malcolm Lindsey, Thomas H. Gibson* and *Louis J. O'Marr,* Attorney General of Wyoming, were on the brief, for the Federal Power Commission et al., respondents.

Mr. Carl I. Wheat, with whom *Mr. Robert E. May* was on the brief, for the Independent Natural Gas Association of America, as *amicus curiae* in No. 380, urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Federal Power Commission after an investigation and hearing entered orders under § 5 of the Natural Gas Act of 1938 (52 Stat. 823, 15 U. S. C. § 717d) finding the interstate wholesale rates of petitioners to be excessive by specified amounts per year and requiring petitioners to reduce the rates accordingly. 43 P. U. R. (N. S.) 205. The Circuit Court of Appeals for the Tenth Circuit affirmed the Commission's orders. 142 F. 2d 943. The cases are here on petitions for certiorari which we granted, limited to the few questions to which we will presently advert.

Petitioners (to whom we will refer as Canadian and as Colorado Interstate) had their origin in an agreement made in 1927 between Southwestern Development Co. (Southwestern), Standard Oil Co. (N. J.) (Standard) and Cities Service Co. (Cities Service). It was the purpose of the agreement to bring natural gas from the Panhandle field in Texas to the Colorado markets, including Denver and Pueblo. Southwestern agreed to transfer through a wholly owned subsidiary, Amarillo Oil Co. (Amarillo), certain gas leaseholds and producing properties to a new subsidiary (Canadian) which it would organize for that purpose. Standard agreed to form a new corporation (Colorado Interstate) and to finance its construction of pipeline facilities which would connect with Canadian's facilities and transport gas from those points in the Panhandle field to the Colorado markets. Cities Service agreed to use its best efforts to obtain franchises through its subsidiaries under which the natural gas could be distributed in certain cities in Colorado including Denver and Pueblo. The gas was to be sold to Colorado Interstate by Canadian at cost (as defined in the contract) for at least 20 years from 1928. We will return

to other details of this tripartite agreement and of the organization and financing of Canadian and Colorado Interstate. It is sufficient here to say that the companies were incorporated, the pipeline was built, and the business put into operation. Although Canadian and Colorado Interstate are separate companies, the Commission found that their properties have been operated as a single enterprise.

Canadian produces from its own properties all the gas which it sells. It has about 300,000 acres of natural gas leaseholds and on December 31, 1939, was operating 94 wells. Its gathering system consists of approximately 144 miles of pipe. It owns and operates a transmission line which connects with its gathering system in the Panhandle field and ends about 85 miles distant at a point near Clayton, New Mexico. Canadian sells some of its gas at the wellhead and along the Texas portion of its transmission line for consumption in Texas. It also sells gas for resale in Clayton, New Mexico. But the chief portion of the gas in its transmission line is sold at that point to Colorado Interstate. The pipeline of Colorado Interstate extends to Denver. It sells the gas to various distributing companies for resale by them in Colorado and in a few points in Wyoming.[1] Colorado Interstate also sells gas from this pipeline direct to industrial customers in Colorado for their own use.

It is thus apparent that the pipeline from Texas to Colorado serves three different uses: (a) intrastate transportation and sale in Texas; (b) interstate transportation

[1] The latter resales are made by Colorado-Wyoming Gas Co. which transports the gas from a point near Littleton, Colorado to Cheyenne, Wyoming. The proceedings against this company were consolidated with those against Canadian and Colorado Interstate. The Commission also ordered a reduction in the rates charged by Colorado-Wyoming Gas Co. That order is here for review on certain points in No. 575, *post*, p. 626.

and sale to industrial customers; and (c) interstate transportation to distributing companies for resale. Only some of those activities are subject to the jurisdiction of the Commission. For § 1 (b) of the Act provides:

"The provisions of this chapter shall apply 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, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

It is around the meaning and implications of that provision that most of the present controversy turns.

Allocation of Cost of Service. The questions raised by Colorado Interstate and some of those raised by Canadian relate to the failure of the Commission (1) to separate the physical property used in common in the intrastate and interstate business; (2) to separate that used in common in the sales of gas to industrial consumers and the sales of gas for resale; and (3) to separate the property used exclusively in intrastate business or exclusively for industrial sales. The Commission thought it unnecessary to make such a separation of the properties. It noted that nowhere in the evidence presented by petitioners was there "a complete presentation of the entire operations of the company broken down between jurisdictional and nonjurisdictional operations." 43 P. U. R. (N. S.), p. 232. And it concluded, "All that can be accomplished by an allocation of physical properties can be attained by allocating costs including the return. The latter method is by far the most practical and businesslike." *Id.*, p. 232. The Commission adopted the so-called "demand and

commodity" method for allocating costs. Cf. *Arkansas Louisiana Gas Co.* v. *Texarkana,* 96 F. 2d 179, 185. It took the costs and divided them into three classes—volumetric, capacity, distribution.[2] Costs relating to the production system were treated as volumetric.[3] These included rate of return and depreciation and depletion on leases and wells. These volumetric costs were allocated to the customers in proportion to the number of Mcf's delivered to each customer in 1939. The larger share of the transmission costs of the Denver pipeline were classified as capacity costs. Supplies and expenses of compressing systems, maintenance of compressing system equipment and accruals for its depreciation were classed as volumetric. And one-half of the return and income taxes on the Denver pipeline and one-half of operating labor on the compressing system were classed as volumetric, the other half being classed as capacity. Capacity costs were allocated to the customers in the ratio that the Mcf sales to each customer on the system peak day of February 9, 1939, bore to the total sales to all customers on that day. Distribution costs were composed in part of depreciation, taxes, and return on investment in metering and regulating equipment through which gas is delivered at individual stations to each customer. These were allocated to each customer in the ratio which the investment for each customer bore to the total investment in such facilities which were available to serve all customers. Distribution costs also included operating and maintenance expenses incurred in operating the metering and regulating stations. These were allocated on the basis of the number of stations.

---

[2] The Commission in its report characterized volumetric costs as variable costs and capacity costs as fixed costs. 43 P. U. R. (N. S.) p. 232.

[3] A residual refining credit was determined and deducted from production costs.

The function which an allocation of costs (including return) is designed to perform in a rate case of this character is clear. The amount of gross revenue from each class of business is known. Some of those revenues are derived from sales at rates which the Commission has no power to fix. The other part of the gross revenues comes from the interstate wholesale rates which are under the Commission's jurisdiction. The problem is to allocate to each class of the business its fair share of the costs. It is of course immaterial that the revenues from the intrastate sales or the direct industrial sales may exceed their costs, since the authority to regulate those phases of the business is lacking. To the extent, however, that the revenues from the interstate wholesale business exceed the costs allocable to that phase of the business, the interstate wholesale rates are excessive. The use of that method in these cases produced the following results:

Canadian

	Revenues	*Costs*	*Excess Revenue Over Costs*
Regulated.....	$2,151,000	$1,590,000	$561,000
Unregulated.....	242,000	188,000	54,000

Colorado Interstate

	Revenues	*Costs*	*Excess Revenue Over Costs*
Regulated.....	$4,438,000	$2,373,000	$2,065,000
Unregulated.....	1,335,000	1,204,000	131,000

The Commission did not include in the rate reductions which it ordered any of the excess revenues over costs from the unregulated business. The reductions ordered were measured solely by the excess revenues over costs in the regulated business, viz., $2,065,000 in case of Colorado Interstate and $561,000 in case of Canadian.

Colorado Interstate and Canadian make several objections to that method. They maintain in the first place that a segregation of the physical property based upon use is necessary so that the payment due for the use of that

property which is in the public service may be determined. Reliance for that position is rested on the *Minnesota Rate Cases,* 230 U. S. 352, 435, and *Smith* v. *Illinois Bell Telephone Co.,* 282 U. S. 133, 146. Those were cases which involved state regulation of intrastate rates of companies doing both an intrastate and interstate business. But the rule fashioned by this Court for use in those situations was not written into the Natural Gas Act. Congress indeed prescribed no formula for determining how the interstate wholesale business, whose rates are regulated, should be segregated from the other phases of the business whose rates are not regulated. Rate-making is essentially a legislative function. *Munn* v. *Illinois,* 94 U. S. 113. Congress, to be sure, has provided for judicial review of the Commission's orders. § 19. But that review is limited to keeping the Commission within the bounds which Congress has created. When Congress, as here, fails to provide a formula for the Commission to follow, courts are not warranted in rejecting the one which the Commission employs unless it plainly contravenes the statutory scheme of regulation. If Congress had prescribed a formula it would be the duty of the Commission to follow it. But we cannot say that under the Natural Gas Act the Commission can employ only one allocation formula and that that formula must entail a segregation of property. A separation of properties is merely a step in the determination of costs properly allocable to the various classes of services rendered by a utility. But where, as here, several classes of services have a common use of the same property, difficulties of separation are obvious. Allocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science. Hamilton, Cost as a Standard for Price, 4 Law & Cont. Prob. 321. But neither does the separation of properties which are not in fact separable because they function as an integrated whole. Mr. Justice Brandeis,

speaking for the Court in *Groesbeck* v. *Duluth, S. S. & A. R. Co.*, 250 U. S. 607, 614–615, noted that "it is much easier to reject formulas presented as being misleading than to find one apparently adequate." Under this Act the appropriateness of the formula employed by the Commission in a given case raises questions of fact, not of law.

Colorado Interstate claims that the Commission's formula ignored or at least failed to give full effect to the priority which the wholesale gas has over direct industrial sales—a priority recognized in the contracts with industrial users and in the municipal franchises. But over the years the interruptions or curtailments in service to direct industrial customers appear to have been slight.[4] Moreover, to the extent that the priority accorded wholesale gas was actually exercised during the test year (1939) the allocation of costs made by the Commission gave full effect to it. As we have seen, volumetric costs were allocated to the customers in proportion to the number of Mcf's delivered to each customer during the year; capacity costs were allocated in the ratio that the Mcf sales to each customer on the system peak day bore to the total sales on that day. The formula used reflected all actual curtailments of load to each customer during the year and on the system peak day.

Colorado Interstate objects because the Commission treated the transmission line as a unit. It points out that some laterals and equipment (such as metering stations) are used exclusively for making wholesale sales, some are used exclusively for making intrastate sales or direct industrial sales, and some are used in common in varying degrees by the several classes of business. It is pointed out, for example, that the line north of Pueblo is used almost exclusively by the regulated business but that under the Commission's formula the pipeline was treated as

[4] Fifteen times in some 12 years.

if all the gas went into the pipe in Texas and came out at the Denver city gate. These objections are partially met by the manner in which distribution costs, to which we have referred, were allocated. But that is no more than a partial answer since they pertained only to metering and regulating equipment. The laterals were not segregated. They, however, appear to be used more commonly for direct industrial rather than for wholesale sales; and we are not convinced that the direct industrial sales were saddled with greater costs than they would have been had the laterals been segregated. The gravamen of this complaint is that the industrial sales are being burdened with costs of a part of the system which the direct industrial gas never uses. That contention points up our earlier observation that judgment and discretion control both the separation of property and the allocation of costs when it is sought to reduce to its component parts a business which functions as an integrated whole. The Commission found that but for the direct industrial market at Pueblo, Colorado and the wholesale market at Denver, the pipeline would not have been constructed. 43 P. U. R. (N. S.) p. 210. It is therefore obviously fair to determine transmission costs for the pipeline as a whole and not to compute them on a mileage demand basis. In that way the beneficiaries of the entire project share equitably in the cost. To allow the costs to accumulate the closer the gas gets to Denver would be to assume that the extension to Denver was a separate project on which the earlier customers were in no way dependent. These circumstances illustrate that considerations of fairness, not mere mathematics, govern the allocation of costs. Cf. *Wabash Valley Electric Co.* v. *Young,* 287 U. S. 488, 499. What we have said also answers Canadian's complaint that the wholesale sales in Texas for consumption in the towns of Dalhart, Hartley, and Texline, Texas, are burdened with too large a share of transmission costs. We can see in

this situation no difference between those customers and the ones located at more distant points on the pipeline.[5]

Colorado Interstate objects to that part of the Commission's treatment of transmission costs whereby it assigned 50% of the return to capacity costs and 50% to volumetric costs. The contention is that the entire return on the transmission facilities should be apportioned to capacity costs on the theory that the volumetric costs have no relation to the property required for meeting the maximum demands of the wholesale business and that the method employed departs from the requirements of a fair return on the property devoted to the public service. But, as we have seen, capacity costs were allocated to customers in the ratio that the Mcf sales to each customer on the system peak day bore to the total sales to all customers on that day. It is not apparent why direct industrial sales should carry a lighter share of the costs merely because their use of the pipeline may be less on the system peak day. As the Commission points out, if the method advanced by Colorado Interstate were used, the amount paid by the industrial customer for transportation of the gas through the pipeline would be measured not by the customer's use throughout the year, which might be substantial, but by its use on the system peak day which might be slight. In that event the industrial customer would obtain to an extent free transportation of gas.

Colorado Interstate also makes objection to the selection and use of February 9, 1939, as the system peak day and the allocation of the capacity cost component of the transmission costs on the basis of use on that day. It is argued that the mean temperature for that day was 8° Fahrenheit above zero, that much lower mean tempera-

[5] So far as appears Canadian presented no evidence showing the cost of these intrastate sales.

tures are experienced in the Colorado area, that as the temperature drops the load of resale gas rapidly increases, and that if these capacity costs were allocated on the basis of use during the coldest day the resale gas would carry a greater portion of them. We do not stop to develop the point. We have carefully considered Colorado Interstate's contention. As we read the record, if either of the days selected by Colorado Interstate were taken as the system peak days, there would be allocated to the industrial gas a larger portion of these capacity costs than the Commission allocated. On that showing we cannot say that the choice of February 9, 1939, was unfair.

Colorado Interstate and Canadian object to the Commission's use of the return. The Commission included in the total cost of service for these companies a 6½ per cent return on the rate base.[6] In other words, the 6½ per cent return was computed on the basis of all the property used by petitioners in their various classes of business—intrastate sales, direct industrial sales, and interstate wholesale sales.[7] Now it is apparent that if the reduction ordered was based on the excess of revenues from all classes of business over the aggregate costs, the result would be to reduce to a common level the profits from each class. In that case, whenever a company was making a higher return on its unregulated business than the rate of return allowed for the regulated business, the excess earnings from the unregulated part would be appropriated to the

[6] As we have said, the return on leases and wells was treated as volumetric costs; 50 per cent of the return on the Denver pipeline was treated as volumetric and 50 per cent as capacity costs; and return on investment in metering and regulating equipment was treated as distribution costs.

[7] As respects the accounting for the cost of money invested in the enterprise see Schlatter, Advanced Cost Accounting (1939), ch. XII; Neuner, Cost Accounting (1942), p. 277; Lawrence, Cost Accounting (1930), ch. 22.

entire business. When the unregulated business was being operated at a loss or at less than the return which was allowed, excess earnings from the regulated business would be appropriated to the unregulated business. A low rate might therefore be concealed by siphoning earnings from the unregulated business; a high rate might be built up by making the regulated business share the losses of the unregulated one.

It is said that that is what happened here. But that is not true. As we have seen, the Commission ordered a rate reduction based solely on the excess of revenues over costs (including return) derived from the regulated business. None of the excess revenues over costs (including return) from the unregulated business was included in that reduction. If the Commission in determining costs of the unregulated business had used a higher rate of return, it would have increased the costs of that business and reduced the excess revenues allocable to it. But since under the Commission's method of allocation the amount of that excess would not be reflected in the reduction ordered, there would be no difference in result.

The cases are presented as if the 6½ per cent allowed by the Commission on the rate base limits the earnings from the whole enterprise to 6½ per cent. That also is not true. The return merely measures the earnings allowed from the regulated business. As we have noted, the excess of earnings which Colorado Interstate makes from direct industrial sales (on the basis of 6½ per cent return) is $131,000 annually. The Commission pointed out (43 P. U. R. (N. S.) p. 230) that if Colorado Interstate "retains these earnings in excess of a 6½ per cent rate of return on its sales to these customers, its rate of return on its entire business is increased to approximately 8 per cent *after placing into effect the reductions in rates ordered herein.*"

Of the other objections made by Canadian and Colorado Interstate on this phase of the case, we need mention only

one.[8] It is contended that the findings of the Commission on the allocation of costs are inadequate and that the cases should be remanded to the Commission so that appropriate findings may be made. The findings of the Commission in this regard leave much to be desired since they are quite summary and incorporate by reference the Commission's staff's exhibits on allocation of cost. But the path which it followed can be discerned. And we do not believe its findings are so vague and obscure as to make the judicial review contemplated by the Act a perfunctory process. Cf. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475.

Canadian's Sales to Colorado Interstate. The Commission ordered a blanket reduction of $561,000 in the sales price of all types of gas sold by Canadian to Colorado Interstate. A substantial part of that gas is sold to Colorado Interstate for resale to direct industrial customers. Canadian maintains that the Commission has no authority to fix the rate on the sale of that portion or class of gas to Colorado Interstate. Sec. 1 (b) of the Act, however, provides, as we have noted, that the provisions of the Act apply "to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use." Canadian, however, seeks support for its position in the declaration in § 1 (a) of the Act that "the business of transporting and selling natural gas for ultimate distribution to the public is

[8] It is objected that the allocation made by the Commission results in discrimination between purchasers of gas from Colorado Interstate as indicated by the fact that costs allocated to one customer who is distant from Denver are greater than costs allocated to another customer at Denver. But all the Commission did was to order an aggregate reduction in the wholesale rates of $2,065,000 so as to produce a fair return. The adjustment of the rate schedules for various delivery points has not yet been made. See *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 584.

affected with a public interest." But we find no warrant for saying that the words "ultimate distribution to the public" imply distribution to domestic users alone. Industrial users are as much a part of the "public" as domestic users and other commercial users. And the distribution to one is as "ultimate" as the distribution to the other. Moreover, that declaration of policy may not be used to take out of § 1 (b) of the Act the express provision subjecting to regulation gas sold for resale for "industrial use." Furthermore, the declaration of policy contained in § 1 (a) is not as narrow as Canadian suggests. For § 1 (a) goes on to say 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." Sales for resale to industrial users is embraced in the broad sweep of that language. Canadian also seeks support for its position from the proviso in § 4 (e) of the Act that the Commission shall not have authority to suspend the rate "for the sale of natural gas for resale for industrial use only." Canadian infers from that provision that such rates are not subject to regulation by the Commission. The short answer, however, is that the authority of the Commission to suspend rates is restricted to rates over which it has jurisdiction. If the Commission had no authority over the rates in question, the proviso in § 4 (e) would be unnecessary. Accordingly, it seems clear that all of the gas sold by Canadian to Colorado Interstate for resale, including that sold for resale for industrial use, is subject to rate regulation by the Commission.

There is the further suggestion in Canadian's argument that since the Commission treated Canadian and Colorado Interstate as an integrated system for purposes of allocation of costs, it should have limited its rate reduction to those rates over which it would have jurisdiction if the two companies were in fact one. It is argued that in such event there would be no sales between Canadian and

Colorado Interstate and the latter's direct sales to industrial users would not be subject to the jurisdiction of the Commission. The difficulty is that Colorado Interstate purchases its gas from Canadian and the purchase price is the interstate wholesale rate which is an operating expense on which Colorado Interstate's resale rates are computed. Moreover, Canadian as required by § 4 (c) of the Act has its rate to Colorado Interstate in a rate schedule on file with the Commission. Unless and until a new rate schedule was filed or the old schedule changed by the Commission, that rate would have to be exacted by Canadian and paid by Colorado Interstate. § 4 (d). That rate therefore could hardly be maintained if Colorado Interstate were allowed as an operating expense a lesser amount for the gas it purchases from Canadian.

Producing and Gathering Facilities. Sec. 1 (b) which we have already quoted states that the provisions of the Act "shall not apply . . . to the production or gathering of natural gas." The Commission determined a rate base which includes Canadian's production and gathering properties as well as its interstate transmission system. The return allowed by the Commission was limited to 6½ per cent of the rate base so computed. The Commission made an allowance for working capital to enable Canadian to carry on its production and gathering operations. The Commission made an allowance for Canadian's operating expenses which included the cost of producing and gathering natural gas. The Commission applied its formula for allocation of costs to Canadian's production and gathering properties as well as to its other facilities. Thus Canadian contends that contrary to the mandate of § 1 (b) the Commission has undertaken to regulate the production and gathering of natural gas. Reliance for that position is sought from other provisions of the Act. It is pointed out that § 1 (a) declares that "the business of transporting and selling natural gas" for ultimate dis-

tribution to the public is affected with a public interest and that federal regulation "in matters relating to the transportation of natural gas and the sale thereof" in interstate commerce is necessary in the public interest. Transportation and sale do not include production or gathering. Other sections emphasize that distinction. Thus § 4 and § 5, the rate regulating provisions of the Act, refer to charges for the "transportation or sale of natural gas, subject to the jurisdiction of the Commission." Sec. 7 (a) relates to the extension or improvement of "transportation facilities"; § 7 (b) to the abandonment of "facilities subject to the jurisdiction of the Commission"; § 7 (c) to the construction or extension of facilities for the "transportation or sale of natural gas, subject to the jurisdiction of the Commission." It is pointed out that apart from § 1 (b) only a few sections of the Act refer to "production." Sec. 5 (b) gives the Commission power to investigate "the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas." This goes no further, it is said, than to aid state regulation. Sec. 9 (a) authorizes the Commission to ascertain and determine and by order fix "the proper and adequate rates of depreciation and amortization of the several classes of property of each natural-gas company used or useful in the production, transportation, or sale of natural gas." Sec. 9 (a) further provides that no natural-gas company subject to the jurisdiction of the Commission shall charge to operating expenses "any depreciation or amortization charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation or amortization other than that prescribed therefor by the Commission." These are said, however, to be no more than accounting requirements and distinct from the

fixing of rates to be charged for public utility or transportation services. That distinction is emphasized, it is said, by the proviso in § 9 (a) that "Nothing in this section shall limit the power of a State commission to determine in the exercise of its jurisdiction, with respect to any natural-gas company, the percentage rates of depreciation or amortization to be allowed, as to any class of property of such natural-gas company, or the composite depreciation or amortization rate, for the purpose of determining rates or charges." The provisions of § 10 (a) which give the Commission authority to require reports from natural-gas companies as to their assets and liabilities, the "cost of maintenance and operation of facilities for the production" of natural gas and the like are said to be mere information requirements quite consistent with the absence of power to regulate the production and gathering of natural gas.[9] See *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194. And the authority given the Commission by § 14 (b) is said merely to supplement the Commission's powers under sections of the Act. Sec. 14 (b) grants the Commission power to determine "the adequacy or inadequacy of the gas reserves held or controlled by any natural-gas company" and "the propriety and reasonableness of the inclusion in operating expenses, capital, or surplus of all delay rentals or other forms of rental or compensation for unoperated lands and leases." This is said to supplement the Commission's authority over the construction, extension, or abandonment of facilities or service under § 7, the determination of amortization rates under § 9 (a), and the accounting requirements of § 8.

Support for Canadian's position is also sought in the legislative history of the Act. It is pointed out that the

[9] Another section of the Act which refers to "production" is § 11 (a). It gives the Commission certain functions to perform where two or more States propose compacts dealing with the conservation, production, transportation, or distribution of natural gas.

declared purpose of the legislation was to occupy the field in which this Court had held the States might not act. See *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 609–610. And it is noted that Senator Wheeler, who sponsored the legislation in the Senate, said during the debate in answer to an inquiry whether the bill undertook to regulate the production of natural gas or the producers of natural gas: "It does not attempt to regulate the producers of natural gas or the distributors of natural gas; only those who sell it wholesale in interstate commerce." 81 Cong. Rec. p. 9312.

From these various materials it is argued that the Commission has no authority to include producing or gathering facilities in a rate base or to include production or gathering expenses in operating expenses. It is said that when the Commission follows that course, it regulates the production and gathering of natural gas contrary to the provisions of § 1 (b) of the Act. It is argued that the correct procedure is for the Commission to allow in the operating expenses of a natural-gas company, whose rates it is empowered to fix, the "fair field price" or "fair market value, as a commodity, of the gas" which finds its way into the transmission lines for interstate transportation and sale.

This is precisely the argument which West Virginia, appearing as *amicus curiae,* advanced in the *Hope Natural Gas Co.* case. We rejected the argument in that case. 320 U. S. pp. 607–615, particularly p. 614, n. 25. We have reviewed it here at this length in view of the seriousness with which it has been urged not only by Canadian but also by the Independent Natural Gas Association of America which appeared *amicus curiae.* But we adhere to our decision in the *Hope Natural Gas Co.* case and will briefly state our reasons.

A natural-gas company as defined in § 2 (6) of the Act is "a person engaged in the transportation of natural

gas in interstate commerce, or the sale in interstate commerce of such gas for resale." Canadian is such a company. It is plain therefore that the Commission has authority to fix its interstate wholesale rates. § 5. It is obvious that when rates of a utility are fixed the value of its property is affected. For as we stated in the *Hope Natural Gas Co.* case, value is "the end product of the process of rate-making not the starting point." 320 U. S. p. 601. When a natural-gas company which owns producing properties or a gathering system is restricted in its earnings by a rate order, the value of all of its property is affected. Congress of course might have provided that producing or gathering facilities be excluded from the rate base and that an allowance be made in operating expenses for the fair field price of the gas as a commodity. Some have thought that to be the wiser course. But we search the Act in vain for any such mandate. The Committee Report stated that the Act provided "for regulation along recognized and more or less standardized lines" and that there was "nothing novel in its provisions." H. Rep. No. 709, 75th Cong., 1st Sess., p. 3. Certainly the use of a rate base which reflects the property of the utility whose rates are being fixed has been customary. 2 Bonbright, Valuation of Property (1937) ch. XXX; Smith, The Control of Power Rates in the United States and England (1932), 159 Annals 101. Prior to the Act that method was employed in the fixing of the rates of gas, as well as electric, utilities. See *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S. 655; *Newark Natural Gas & Fuel Co.* v. *Newark*, 242 U. S. 405; *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U. S. 388; *Lone Star Gas Co.* v. *Texas*, 304 U. S. 224. We do not say that the Commission lacks the authority to depart from the rate-base method. We only hold that the Commission is not precluded from using it. There are ample indications throughout the Act to sup-

port that view. Sec. 6 (a) empowers the Commission to investigate and ascertain the "actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property." As we have noted, § 9 (a) gives the Commission authority not only to require natural gas companies to carry proper and adequate depreciation and amortization accounts but also to fix such rates for "the several classes of property of each natural-gas company used or useful in the production, transportation, or sale of natural gas." And § 14 (b), as already stated, not only gives the Commission authority to determine the adequacy or inadequacy of gas reserves of a natural-gas company but also empowers it to determine the "propriety and reasonableness of the inclusion in operating expenses, capital, or surplus of all delay rentals or other forms of rental or compensation for unoperated lands and leases." Sec. 9 (a) and § 14 (b), though designed not to limit the power of state regulatory agencies, plainly were designed to aid the Commission in its rate-making functions. These provisions [10] all suggest that when Congress designed this Act it was thinking in terms of the ingredients of a rate base, the deductions which might be made, and the additions which were contemplated. No exclusion of property used or useful in *production* of natural gas was made. That type of property was not singled out for special treatment; it was treated the same as all other property. We must read § 1 (b) in the context of the whole Act. It must be reconciled with the explicit provisions which describe the normal conventions of rate-making.

That does not mean that the part of § 1 (b) which provides that the Act shall not apply "to the production or gathering of natural gas" is given no meaning. Certainly

[10] §§ 5 (b), 6 (a), 9 (a), 10 (a), and 14 (b).

that provision precludes the Commission from any control over the activity of producing or gathering natural gas. For example, it makes plain that the Commission has no control over the drilling and spacing of wells and the like. It may put other limitations on the Commission. We only decide that it does not preclude the Commission from reflecting the production and gathering facilities of a natural gas company in the rate base and determining the expenses incident thereto for the purposes of determining the reasonableness of rates subject to its jurisdiction.

That treatment of producing properties and gathering facilities has of course an indirect effect on them. As we have said, rate-making like other forms of price fixing may reduce the value of the property which is being regulated. *Federal Power Commission* v. *Hope Natural Gas Co., supra,* p. 601. But that would be true whether or not a rate base was used. Canadian would be the first to object if the gas which it owns was given no valuation in these proceedings. Obviously it has value. The Act does not say that the Commission would have to value it at the fair field price if the Commission abandoned the rate-base method of regulation. We held in the *Hope Natural Gas Co.* case that under the Act it is "the result reached not the method employed which is controlling. . . . It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end." 320 U. S. p. 602. If the Commission followed Canadian's method, excluded the producing properties and gathering facilities from the rate base, valued the gas at a price which would reduce the earnings to the level of the present order, the effect on the producing properties and gathering facilities would be precisely the same as in the present case. Since there is no provision in the Act which would require the Commission to value the gas

at the price urged by Canadian, the problem on review would be whether the end result was unjust and unreasonable. The point is that whatever method for rate-making is taken the fixing of rates affects the value of the underlying property. Hence § 1 (b) could be read as petitioners read it only if Congress had put a floor under producing properties and gathering facilities and fixed a minimum return on them.

These considerations lead us to conclude that § 1 (b) does not prevent the Commission from taking into account the production properties and gathering facilities of natural gas companies when it fixes their rates.

Original Cost of Production and Gathering Facilities. The Commission found the actual legitimate cost of Canadian's property, including its producing properties and gathering facilities, to be $10,784,464 as of December 31, 1939. It deducted $2,134,629 for accrued depreciation and depletion. It added $150,738 for working capital and $571,923 for gross plant additions to December 31, 1941. The result was a rate base of $9,372,496 which the Commission rounded to $9,375,000. The Commission rejected estimates of reproduction cost new less observed depreciation because they were "too conjectural to have probative value" and adopted original cost as "the best and only reliable evidence as to property values." 43 P. U. R. (N. S.) pp. 213, 214. Canadian maintains that if its leaseholds are to be included in the rate base, it was improper to value them as the Commission did. Canadian offered evidence that their present market value was much higher. It also offered evidence of a commodity market value of natural gas per Mcf which would give a much higher value to the production phase of Canadian's business. We do not stop to develop the details of these lines of evidence. We cannot say that the Commission was under a duty to put the leaseholds into the rate base at the valuation urged by Canadian unless we revise what we said in

Federal Power Commission v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 586, and overrule *Federal Power Commission* v. *Hope Natural Gas Co., supra.* We held in those cases that the Commission was not bound to the use of any single formula in determining rates. And in the *Hope Natural Gas Co.* case we sustained a rate order based on actual legitimate cost against an insistent claim that the producing properties should be given a valuation which reflected the market price of the gas. In those cases we held that the question for the courts when a rate order is challenged is whether the order viewed in its entirety and measured by its end results meets the requirements of the Act. That is not a standard so vague and devoid of meaning as to render judicial review a perfunctory process. It is a standard of finance resting on stubborn facts.[11] "From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. Cf. *Chicago & Grand Trunk R. Co.* v. *Wellman,* 143 U. S. 339, 345–346. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. See *Missouri ex rel. Southwestern Bell Tel. Co.* v. *Public Service Commission,* 262 U. S. 276, 291 (Mr. Justice Brandeis concurring)." *Federal Power Commission* v. *Hope Natural Gas Co., supra,* p. 603.

Hence, we cannot say as a matter of law that the Commission erred in including the production properties in the rate base at actual legitimate cost. That could be de-

[11] Cf. the British standards described in Smith, The Control of Power Rates in the United States and England, 159 Annals 101, 103, 104.

termined only on consideration of the end result of the rate order, a question not here under the limited review granted the case.

Cost to Canadian's Affiliate. As we have seen, Canadian and Colorado Interstate had their origin in an agreement made in 1927 between Southwestern, Standard, and Cities Service. Pursuant to that agreement Southwestern organized Canadian, a wholly owned subsidiary, to which were transferred the gas leaseholds and producing property owned by Amarillo, a wholly owned subsidiary of Southwestern. The cash consideration for this transfer was $5,000,000, which was advanced by Standard at 6 per cent interest. Colorado Interstate was organized by Standard to construct and operate the pipeline to connect with Canadian's facilities and to transport the gas to the Denver market and intermediate points.

Canadian issued $11,000,000 of 6% twenty-year bonds to finance its portion of the total project. Colorado Interstate purchased those bonds with part of the proceeds of $19,200,000 of its own 6% twenty-year sinking fund bonds which Standard had purchased at par. Canadian repaid the $5,000,000 advance made by Standard out of the proceeds of the sale of its bonds to Colorado Interstate. Canadian's stock was issued to Southwestern and is carried on Canadian's books at $1.00. Canadian entered into a "cost" contract with Colorado Interstate whereby Canadian agreed to produce and sell gas to Colorado Interstate at "cost" for twenty years which might be extended by Colorado Interstate. Under the contract, "cost" included Canadian's operating expenses, interest at 6%, and amortization (in lieu of depreciation, depletion and retirements) of all of Canadian's indebtedness over the twenty-year period. It was also provided that Canadian's "cost" under the contract should be decreased by any profits which it might obtain from other sources including any local sales. Thus it was obvious that Canadian under

this "cost" contract would have no profits available for dividends on its stock.

But in accordance with the agreement Colorado Interstate issued $2,000,000 par value 6% preferred stock and 1,250,000 shares of no par common. Cities Service received 15% of the common stock. The rest of the common stock and all of the preferred was divided equally between Southwestern and Standard. The latter paid $2,000,000 in cash for its share of preferred and common. Southwestern received not only preferred and common stock, but also $5,000,000 in cash from the proceeds of the $11,000,000 of bonds which Canadian issued and which were to be amortized over twenty years as part of the "cost" of gas sold to Colorado Interstate by Canadian.

Canadian contends that the Commission should have included $5,000,000 in the rate base for the gas leases and producing properties acquired from Amarillo. The original cost of the properties to Amarillo was $1,879,504. That is all the Commission allowed. It said, "Any treatment which would permit the capitalization of such amounts would open the door to the renewal of past practices of the utility industry when properties were traded between affiliated interests at inflated prices with the expectation that the public would foot the bill." 43 P. U. R. (N. S.) p. 215. We agree. Southwestern owned the producing properties at the beginning of the transaction through one subsidiary; it owned them at the end of the transaction through another subsidiary. As between Southwestern and its subsidiaries there was no more than an intercompany profit. If Amarillo rather than Canadian had entered the project, had sold a bond issue to Southwestern and with part of the proceeds paid off a $5,000,000 loan to Standard, certainly the amount of that payment would not be properly included in its rate base. We fail to see a difference in substance when another wholly owned subsidiary is utilized by Southwestern.

The fact that the negotiations between Southwestern and Standard were at arm's length has no bearing on the present problem. The end result is that property has been transferred at a write-up from one of Southwestern's pockets to another. The impact on consumers of utility service of write-ups and inflation of capital assets through intercompany transactions or otherwise is obvious. The prevalence of the practice in the holding company field gave rise to an insistent demand for federal regulation. See S. Doc. No. 92, Pt. 84–A, 70th Cong., 1st Sess., Utility Corporations, Final Report of the Federal Trade Commission (1936); Bonbright & Means, The Holding Company (1932), ch. VI; Barnes, The Economics of Public Utility Regulation (1942) pp. 95 *et seq.*

American T. & T. Co. v. *United States,* 299 U. S. 232, is not opposed to our position. It merely indicates a proper treatment for an intercompany transaction where in fact an additional investment is shown to exist.

Affirmed.

MR. JUSTICE ROBERTS and MR. JUSTICE REED dissent from so much of the opinion as approves the allocation by the Commission of investments and expenses to the non-regulable transmission properties. They concur in the dissent of the CHIEF JUSTICE in *Canadian River Gas Co.* v. *Federal Power Commission, post,* p. 615.

MR. JUSTICE JACKSON, concurring.

I concur in upholding orders of the Federal Power Commission in this and companion cases. The Court cannot, consistently with *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, do otherwise.

The opinion in the *Hope* case laid down fundamental principles of decision in this language: "Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is con-

trolling. . . . It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important." *Federal Power Commission* v. *Hope Natural Gas Co., supra,* 602. This case introduced into judicial review of administrative action the philosophy that the end justifies the means. I had been taught to regard that as a questionable philosophy, so I dissented and still adhere to the dissent. But it is the law of this Court, and I do not understand that any majority is ready to reconsider it.

It is true that the Act excludes "production or gathering of natural gas" from jurisdiction of the Commission. If the Commission had imposed any direct regulation upon that activity, I would join in holding it to have exceeded its jurisdiction. But the orders in question have no immediate "impact" upon production or gathering of gas.

The statute commands the Commission to regulate the price of natural gas transported and sold at wholesale in interstate commerce for resale. The Commission has investigated the fiscal aspects of production and gathering because of their bearing on the reasonableness of interstate rates. I suppose a commission is free to take evidence as to conditions and events quite beyond its regulatory jurisdiction where they are thought to affect the cost of that whose price it is directed to determine. This, as I see it, is all that has been done here.

Of course the Commission's order, whose primary impact is on rates in the interstate markets, has a very important secondary effect on production and on producers of gas. As the industry is organized the Commission could not fix an interstate price that would not have some such reaction. Indeed, I think the Commission cannot wisely

fix a reasonable price without considering its incidental effect on production.

To let rate-base figures, compiled on any of the conventional theories of rate-making, govern a rate for natural gas seems to me little better than to draw figures out of a hat. These cases confirm and strengthen me in the view I stated in the *Hope* case that the entire rate-base method should be rejected in pricing natural gas, though it might be used to determine transportation costs. These cases vividly demonstrate the delirious results produced by the rate-base method. These orders in some instances result in three different prices for gas from the same well. The regulated company is a part owner, an unregulated company is a part owner, and the land owner has a royalty share of the production from certain wells. The regulated company buys all of the gas for its interstate business. It is allowed to pay as operating expenses an unregulated contract price for its co-owner's share and a different unregulated contract price for the royalty owner's share, but for its own share it is allowed substantially less than either. Any method of rate-making by which an identical product from a single well, going to the same consumers, has three prices depending on who owns it does not make sense to me.

These cases furnish another example of the capricious results of the rate-base method in this kind of case. The Commission has put five of the most important leaseholds, containing approximately 47,000 acres, in the rate base at $4,244.24, something under 10 cents per acre. Three such leases are put in the rate base at zero. This is because original cost was used, and these were bought before discovery of gas thereon. The Company which took the high risk of wildcat exploration is thus allowed a return of 6½ per cent on nothing for the three leases and a return of less than $300 a year on the others. Their present

market value is shown by testimony to be over 3 million dollars.

I cannot fairly say that the Commission exceeded its jurisdiction in obtaining this evidence and making these calculations, even though the evidence related to production and gathering of gas. But I do think it is a fantastic method of fixing a "just and reasonable" price for gas.[1] All of that, however, was thrashed out in the *Hope* case.

I do not recede from the views therein stated that *Hope* provides no workable basis of judicial review, no key by which commissions can anticipate what rule, if any, will control our review, and no guidance to counsel as to what issues they should try or how they should try them. I think, however, that the majority which promulgated that decision, or a majority of that majority, should be permitted to continue to spell out its application to specific problems until we see where it leads.

It is difficult for me in these cases, and in some it might be impossible, to follow the rule of *Hope* in reaching a decision. I have no intuitive knowledge as to whether a given price is reasonable, and my fundamental concept of reasonable price in this industry and how to find it has been rejected by the Court. But it happens that this case illustrates some aspects of the problem of pricing gas, as will appear from the reasons I shall state for the failure of the Company in this case to convince me that it is wronged by the reduction of prices ordered by the Commission.

[1] It does not help me to know what is a reasonable price for gas to learn what it does to outstanding securities. Many gas companies were organized and operated in care-free days when they issued stocks and bonds without supervision. It does not prove that a gas rate is too low to show that it does not pay dividends on inflated values. Nor is a rate proved excessive by the fact that it pays a large dividend upon an exceedingly conservative capitalization. I think *Hope's* use of return on stock or bond issues, repeated in these cases, is one of the least reliable of possible tests of rates.

Far-sighted gas-rate regulation will concern itself with the present and future, rather than with the past, as the rate-base formula does. It will take account of conditions and trends at the source of the supply being regulated. It will use price as a tool to bring goods to market—to obtain for the public service the needed amount of gas. Once a price is reached that will do that, there is no legal or economic reason to go higher; and any rate above one that will perform this function is unwarranted. If the supply comes from a region where there is such overproduction that owners are ready to sell for less than a fair return on their investment, there is no reason why the public should pay more. On the other hand, if the supply is not too plentiful and the price is not a sufficient incentive to exploit it and fails to bring forth the quantity needed, the price is unwisely low, even if it does square perfectly with somebody's idea of return on a "rate base." The problem, of course, is to know what price level will be adequate to perform this economic function.

This case throws light on a subject which in *Hope* I was trying to discuss more abstractly. The evidence here shows facts from which we can learn, in the way any practical buyer would seek to learn, at which price this company is able, willing, and ready to bring gas into the interstate wholesale market. It is what might be called the most-favored-customer test, a test of course not available in a fully regulated industry but peculiarly adapted to the conditions of the natural gas industry as it has developed. This petitioner, Colorado Interstate Gas Company, sells to Colorado Fuel and Iron Company a large quantity of gas for industrial use. Its consumption approximates that of all the inhabitants of Denver. Colorado Fuel and Iron used in plants 7,257,379 m. c. f.'s, while Denver was supplied for public service 6,196,882 m. c. f.'s. The rates to the Fuel and Iron Company are not and never have been regulated by public authority. In May 1938,

the Gas Company contracted to extend the Fuel and Iron supply contract for five years at 9½ cents per m. c. f. for boiler fuel and 16 cents per m. c. f. for other purposes. The same gas is sold wholesale by the same company at the Denver city gate to the local distributing company at 40 cents per m. c. f.

Of course differences in conditions of delivery must be allowed for. Gas from the field is transmitted roughly 200 miles from the field to Colorado Fuel and Iron and about another 100 miles to Denver. If 50 per cent more transportation added 50 per cent to the entire price of the Fuel and Iron Company gas, which would mean attributing a zero value to it in the field and its entire selling price to transportation, it would bring gas to the city gate of Denver at about 14 cents based on boiler gas and 24 cents based on other gas, instead of the 40 cents being charged.

Another difference must be allowed for. The Denver public service has priority over the industrial gas in time of shortage. This is an impressive legal advantage, but one whose real worth depends on the number and duration of interruptions it causes in actual practice. From the tabulation of reductions and suspensions of service the Fuel and Iron Company appears to have suffered 5 interruptions from 1932 to December 31, 1940—the shortest for fifteen hours, the longest for fifty hours. I do not belittle these interruptions—they may be very costly to an industrial customer—but nothing indicates that they account for any such difference in price as we have here.

There is every indication that the Colorado Fuel and Iron price was really a bargained one. The Gas Company's position seems to have been the same as that stated by one of the witnesses in the Panhandle case, "It may be heresy to say so but we try to charge our nonregulated customers all the traffic will bear." This may have been candor; it is not heresy. Such is the normal spirit of the market place. But the record shows that Colorado Fuel

and Iron was not at the mercy of the Gas Company, was bargaining at arm's length, had a good bargaining position. It had been using other fuels and the Gas Company had to bid for its business as against fuel competition. Under this pressure the Gas Company was able, ready, and willing to part with its gas, delivered 200 miles from the field, at 9½ to 16 cents per m. c. f.

What about the Denver rate? There the local distributing company, which was the purchaser, was a subsidiary of Cities Service, one of the three companies that owned the pipe line and gas supply and were the sellers of the gas. That local company had been distributing manufactured gas, by comparison with which 40-cent natural gas would look cheap, and is cheap. It is not necessary to draw any invidious inferences from intercorporate relationships to conclude that the 40-cent rate at the Denver gate was not a vigorously bargained one and was not much influenced by competitive considerations. The great economic advantages of natural gas to householders and the relative wastefulness of its industrial use are developed in my opinion in *Hope*.

I strongly suspect from the history of this transaction that there is an explanation of the difference in price—one which is not an uncommon argument used to justify a lower price to industrial than to household users. To supply Denver required laying a 20-inch pipe line, requires operating it, and requires most of the overhead of the business. To carry the additional Fuel and Iron business required only to lay the first 200 miles of pipe of 22-inch diameter instead of 20, and the additional revenue from industrial sales does not add the same proportion of capital investment, overhead, or operating expense. Thus, charging to Denver and other wholesale purchasers for resale to the public no more than would be charged if that service stood alone, the Company may justify its industrial

sales at low rates as good business from petitioner's management point of view.

But I do not think it can be accepted as a principle of public regulation that industrial gas may have a free ride because the pipe line and compressor have to operate anyway, any more than we can say that a big consumer should have a free ride for his coal because the trains run anyway. It is true that the Natural Gas Act forbids discrimination only as between regulated rates and does not forbid discriminations between the regulated and unregulated ones. 15 U. S. C. § 717c (b). But I do not think it precludes use of a voluntary, fairly bargained selling price as a standard of what is a "just and reasonable" price. By use of the unregulated price as a basis for comparison I think a reduction in the wholesale rates for resale to the public is in order. If this makes low price industrial business less desirable, it will be in the long-range public interest for reasons more fully stated by me in *Hope*.

I should like to reverse this case, not because I think the rate reduction is wrong, but because I think the real inwardness of the gas business as affects the future has been obscured by the Commission's preoccupation with bookkeeping and historical matter. Such considerations may be relevant to rate-base theories, but will not be very satisfying to a coming generation that will look back and judge our present regulatory method in the light of an exhausted and largely wasted gas supply. But as the matter stands I see no legal grounds for reversal.

MR. CHIEF JUSTICE STONE, dissenting in No. 380.

MR. JUSTICE ROBERTS, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER and I are of opinion that the Federal Power Commission, in making the rate order here under attack, exceeded its jurisdiction and reached a result which must be rejected because unauthorized by the applicable statute.

In fixing rates for petitioner's interstate business of transporting and selling natural gas for resale, the Commission included petitioner's gas wells and gas gathering facilities together with all its transportation and distribution facilities in a single rate base. It valued the wells and gathering facilities at their prudent investment cost of many years ago, a valuation drastically less than their present market value. It then restricted petitioner's return to 6½% of the rate base, including the wells and production facilities, constituting approximately two-thirds of the total rate base. It thus subjected petitioner's production and gathering property to the same regulation as that which the statute imposes upon petitioner's property used and useful in the interstate transportation and sale of gas for resale. This, we think, the Natural Gas Act in plain terms prohibits.

The Natural Gas Act of 1938, 52 Stat. 821, 15 U. S. C. § 717, *et seq.*, as amended February 7, 1942, 56 Stat. 83, declares, § 1 (a): "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and . . . 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." In the execution of this policy §§ 4 and 5 of the Act set up a complete scheme of regulation of rates and charges for the transportation and sale of natural gas by "natural gas companies" at wholesale in interstate commerce. Section 2 (6) defines a natural gas company as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." Section 1 (b) provides: "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale . . ., but shall not apply to any

other transportation or sale of natural gas . . . or to the production or gathering of natural gas."

The Court rejects petitioner's contentions that these provisions preclude the Commission from including the gas wells and gathering facilities in the rate base for petitioner's regulated business; that regulation begins only with the delivery of gas into petitioner's transmission pipe line and includes, as the statute provides, only the interstate transportation and sale of the gas for resale. Petitioner insists that, since the wells and gathering facilities are not subject to Commission regulation, the cost or value of the gas upon its delivery to petitioner's transmission line must, for purposes of rate regulation of the regulated business of transportation and sale, be taken at its fair market value.

This issue is now for the first time presented to this Court for decision. No such question was raised or decided in *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610–614. Although it was mentioned in the amicus brief of the State of West Virginia, which was not a party to the suit, no such issue was raised by the parties in the case. There the gas wells and gathering property were included in the rate base valued at its prudent investment cost, and the allowed return was restricted to 6½%. But no objection was taken to the inclusion of the production property in the rate base, either in the Circuit Court of Appeals or, so far as the record shows, in the application to the Commission for rehearing. Section 19 (b) provides that no objection to the Commission's order may be considered by the court unless raised in the application to the Commission for rehearing. The production property having been included in the rate base without objection, we could consider only the question which was raised with respect to property admitted to be properly a part of the rate base, namely, whether its valuation by the Commission and the allowed

rate of return were within constitutional limits. Cf. *Cohens* v. *Virginia,* 6 Wheat. 264, 399.

The Act speaks in terms of activities which are regulated and those which are not. It subjects the interstate transportation and sale of natural gas, an activity, to the jurisdiction of the Commission, which includes the exercise of its rate-making function as prescribed by §§ 4 and 5, and which concededly extends to the valuation of property used in interstate transportation and sale of natural gas and to the determination of a fair rate of return upon that value.

Even though production and gathering could be thought to be a part of the regulated transportation and sale, that possibility is precluded by the words of § 1 (b) which say: "The provisions of this Act [including those of §§ 4 and 5 which prescribe rate making for the activity of transporting and selling wholesale] shall not apply" to another activity, "the production or gathering of natural gas."

It does not seem possible to say in plainer or more unmistakable language that the one activity, interstate transportation and sale, is to be subjected to, and that the other, production or gathering, is to be excluded from, the valuation and rate-making powers of the Commission. To interpret the words "production or gathering" in § 1 (b) in the only way which the Court or the Government is able to suggest, as referring only to the physical activities of drilling and spacing the gas wells, and thus excluding such activities alone from regulation, seems hardly plausible. It is true that "production or gathering" are activities which may include the drilling and spacing of gas wells. But the "transportation and sale" referred to in the phrase of § 1 (b) "but shall not apply to any other transportation or sale of natural gas . . . or to the production or gathering of natural gas," is also an activity. Yet the Court and the Government concede that by the command of the Act

that it "shall not apply" to the activity of "any other transportation or sale," petitioner's property used in the transportation and sale of gas to industrial consumers is excluded from the rate base. They thus reach the surprising conclusion that property used in one sort of activity to which the provisions of the Act are declared not to apply, may nevertheless be included in the rate base, while holding that another sort of property, also used in an activity to which the provisions of the Act are by the same phrase declared not to apply, is nevertheless excluded from the rate base.

Nor is the plausibility of the Government's construction aided by reference to the provisions of the Act[1] giving the Commission power to make investigations, to regulate accounts, to gather information and to find values of property of natural gas companies and their depreciation. These provisions are obviously directed at aiding the Commission in the exercise of various powers which are conferred upon it but which are unrelated to the regulation of the production or gathering of natural gas. Section 5 (b), for example, authorizes the Commission to procure the information of costs of production or transportation of

[1] Section 5 (b) authorizes investigation by the Commission of the cost of production of natural gas, where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. Section 6 (a) empowers the Commission to ascertain the cost of the property of every natural gas company and other facts bearing on the determination of such cost "when found necessary for rate making purposes." Section 9 (a) authorizes the Commission to determine the proper "rates of depreciation and amortization" of the several classes of property of each natural gas company "used or useful in the production, transportation, or sale of natural gas." Section 10 (a) gives the Commission authority to require reports from natural gas companies of their "cost of maintenance and operation of facilities for the production" of natural gas. Section 14 (a) gives the Commission power to determine the "adequacy or inadequacy of the gas reserves held or controlled" by them.

natural gas in aid of state commissions, and such was its purpose. H. Rep. No. 709, p. 5, 75th Cong., 1st Sess., on H. R. 6586. Sections 9 (a) and 10 (a) give authority essential to the Commission's admitted power to regulate the interstate sale of gas at wholesale, to determine whether the cost of or charge for the gas acquired by a natural gas company, whose rates are regulated, are excessive because unrelated to fair or market value, especially where the relations between the producer and the interstate wholesale distributor are not at arm's length. *United Fuel Gas Co.* v. *Railroad Comm'n,* 278 U. S. 300, 320; *Smith* v. *Illinois Bell Tel. Co.,* 282 U. S. 133, 144; *Western Distributing Co.* v. *Public Service Comm'n,* 285 U. S. 119; *Dayton Power Co.* v. *Public Utilities Comm'n,* 292 U. S. 290; *Natural Gas Co.* v. *Slattery,* 302 U. S. 300, 306–308; *Arkansas Gas Co.* v. *Dept.,* 304 U. S. 61; cf. *Interstate Commerce Comm'n* v. *Goodrich Transit Co.,* 224 U. S. 194, 211. And the determination of the Commission permitted by § 14 (a) with respect to the amount of gas reserve is essential to the determination of the rate of depreciation and amortization of the gas company's regulated transmission line, since its useful life is normally limited by the available gas supply.

No reason, founded upon the language of the statute or its purpose, is advanced for disregarding the plain command of § 1 (b) excluding the production or gathering of the gas from those other activities, the transporting and selling, which are subject to the regulatory provisions of §§ 4 and 5. The language was well chosen to accomplish exactly what the legislative history shows was intended to be accomplished. The report of the House Committee (H. Rep. No. 709, 75th Cong., 1st Sess.), recommending adoption of the bill which became the Natural Gas Act, shows beyond doubt that the purpose of the legislation was to bring under federal regulatory control the interstate transportation and sale of natural gas which had

been held not to be subject to state regulation, in *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298; cf. *Public Utilities Comm'n* v. *Attleboro Co.*, 273 U. S. 83, but to leave undisturbed all other matters which were then subject to state regulation, which included rate-making for production and gathering. See *Illinois Natural Gas Co.* v. *Central Illinois Co.*, 314 U. S. 498, 506; *Federal Power Comm'n* v. *Hope Natural Gas Co., supra,* 609. And upon the floor of the Senate the sponsor of the bill declared: "It does not attempt to regulate the producers of natural gas or the distributors of natural gas; only those who sell it wholesale in interstate commerce." 81 Cong. Rec., p. 9312. That the exemption of the production of natural gas from regulation was thought by the regulatory authorities themselves to exclude regulation, by the Commission, of the price of gas in the producing field, appears from the hearings upon the predecessor bill,[2] which contained provisions identical with or substantially equivalent to §§ 5 (b), 6 (a), 9 (a), and 10 (a) of the Act as finally passed, and § 1 (b) of which declared that the provisions of the bill should not apply "to the production of natural gas."

[2] In the hearings upon the earlier bill, Mr. DeVane, Solicitor of the Federal Power Commission, stated: "Section 1 (b) also provides that the Commission shall have no jurisdiction over the gathering or gathering rates for natural gas." "Gathering rates," he explained as "The rates that are paid in the gathering field." He further stated, "There is no control of the gathering rate; the Commission would not have jurisdiction. That price is fixed by competitive conditions that exist in the field." He said that the Commission does not have any power over the price "that is paid to the gatherer, to the man that produces it; that is binding if the transaction is at arm's length. If the transaction is not at arm's length, of course, its reasonableness may be inquired into, under the decisions of the Supreme Court." There is nothing in the subsequent legislative history to indicate that this understanding with respect to § 1 (b) in the earlier Act was changed at a later stage, and § 1 (b) as finally adopted indicates no such change. Hearings on H. R. 11662, 74th Cong., 2d Sess., pp. 28, 42–3.

The exclusion of production and gathering of natural gas from the regulatory authority of the Commission is a command to the Commission not to regulate that which is excluded. Otherwise powers reserved to the states would be encroached upon contrary to the words and purpose of the Act, and a pretended government would be set up by Commission action, without the authority of Congress.

The Commission did not deny the command, but justified disregard of it only by saying that "Canadian's production and gathering operations are an integral part of its total operations, including transportation in interstate commerce and the sale of natural gas for resale in interstate commerce." And it added: "The investigation of Canadian's production and gathering property and operations is indispensable in regulating Canadian's rates and charges for the sale of natural gas in interstate commerce for resale." Such an investigation was undoubtedly proper and necessary in order to ascertain the fair unregulated value of the natural gas produced in an unregulated field, on its delivery into petitioner's transmission pipe line, in order to enable the Commission to regulate appropriately the sales price of the gas.

But this does not mean that in fixing rates for a regulated business which derives its distributed product from an unregulated business that the property of the latter is not to be segregated from the regulated property, or that there can rightly be applied to it standards of valuation and rate of return which are applicable only to a regulated business. *Interstate Commerce Comm'n* v. *Goodrich Transit Co., supra,* 211; *Smith* v. *Illinois Bell Tel. Co., supra,* 151; *Western Distributing Co.* v. *Public Service Comm'n, supra,* 123–124. Otherwise its exclusion from regulation would be meaningless. The standards to be applied in order to make certain that the regulated business is not paying too much for the product are those which

currently apply in the unregulated business. This, as we have pointed out, was recognized by the Solicitor of the Commission in the hearings on proposed legislation culminating in the present Act. He said that the unregulated field price was controlling upon the Commission "if the transaction is at arm's length. If the transaction is not at arm's length, of course, its reasonableness may be inquired into, under the decisions of the Supreme Court." [3]

It is one thing to say that such investigation is necessary to ascertain the fair unregulated value of petitioner's gas when produced. But it is quite another to say, and the Commission did not say, that it is necessary or permissible for the Commission to fix the value of petitioner's production property and the gas which it produces far below their market value, and to restrict petitioner's return from its unregulated business below that which would be produced if the gas production were unregulated. Such restrictions can be justified only by authorized rate regulation. From such regulation petitioner's gas wells and production facilities have been specifically exempted by command of the statute.

Where a regulated utility procures from an unregulated source the product which it distributes, the proper cost which the regulated company should be allowed to pay for it, when the Commission is not authorized to regulate the production, presents a problem not free from difficulties. But here the Commission has made no effort to meet these difficulties, if such there be, except by the one course which the statute forbids, by subjecting the production property to regulation.

A familiar and permissible way of meeting them, as petitioner points out, is by treating the property unregulable in law as unregulable in fact, and applying to it those standards of value and return which currently

[3] See footnote 2, *supra*.

prevail in an unregulated business when it is conducted at arm's length. Petitioner urges that there are other courses open to the Commission which will not violate the statute, and that there is uncontradicted evidence in the record showing that natural gas has a market value at the wellhead and at the point of delivery into petitioner's transmission line. Those conditions would indicate that gas production property in the area in question has an ascertainable market value on which, in the absence of regulation, petitioner is free to receive the return currently produced by such property.

Without an appropriate investigation we cannot know the fact, which is for the Commission and not for us to determine. If investigation discloses difficulties which only legislation can cope with, the answer is further legislation, not disregard of existing legislation. But the Commission has made no such determination or investigation and, so far as appears, has given no consideration to the evidence supporting petitioner's contentions. It is the duty of the Commission so to conduct its proceedings as to restrict its action within the jurisdiction conferred upon it. It is plain that it has not performed that duty here, and that it should be required to do so. Whether the facilities for the production of natural gas should be regulated and, if so, whether the regulation should be left to the states, as we think Congress has left it, are matters for Congress to determine. If it be thought that petitioner's profits from production of gas are too great because they are unregulated, and if it be thought to be important that they be reduced, it is immensely more important that that be not accomplished by lawless action.

It is no answer to cite our authorities involving state regulation,[4] in order to prove that the Commission here

[4] *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S. 655; *Newark Natural Gas Co.* v.

has acted within its statutory authority. In reviewing such cases we accept the state's construction of its statutes fixing the jurisdiction of state regulatory bodies. Nor is it any justification of the Commission's action to say, applying the *Hope* case, that the end result of the Commission's action is that petitioner's unregulated property is not being confiscated. Authorized utility regulation may, of course, result in a permissible diminution of property values and income, provided the regulation does not so exceed constitutional limitations as to be "confiscatory." Hence, loss or damage caused by authorized utility regulation gives rise to no actionable wrong if the regulation is within constitutional limitations. Such was the principle laid down in the *Hope* case.

But any such diminution in value or return, caused by unauthorized regulation, is unlawful without reference to constitutional principles. In the *Hope* case there was no contention that the utility's production property was not subject to regulation. The only question was whether the return upon it, as allowed by statutory authority, was confiscatory because it went beyond the constitutional limits of the power to regulate. Here the question is only of the deprivation of petitioner's property by the Commission's action in excess of its statutory power to regulate. That power, in the case of petitioner's production property, we think does not exist. So far as the unauthorized regulation deprives petitioner of its property, the deprivation cannot be justified by saying that, if authorized, it would not violate the Constitution. Absence of confiscation by authorized Commission regulation does not prove that the Commission has legislative authority to regulate.

Newark, 242 U. S. 405; *Public Utilities Comm'n* v. *Landon*, 249 U. S. 236; *Pennsylvania Gas Co.* v. *Public Service Comm'n*, 252 U. S. 23; *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U. S. 388; *Lone Star Gas Co.* v. *Texas*, 304 U. S. 224.

COLORADO-WYOMING GAS CO. *v.* FEDERAL POWER COMMISSION ET AL.

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

No. 575. Argued January 30, 1945.—Decided April 2, 1945.

1. Wholesales to distributors within a State of natural gas which the wholesaler purchases within the State, but which moves in a continuous stream across state lines to the local distributors, are in interstate commerce and subject to regulation under the Natural Gas Act. P. 630.
2. The rate reduction ordered by the Commission in this case is sustained to the extent that it reflects a valid reduction in the rates of a company from which the petitioner purchases gas; but as to the balance of the rate reduction, the judgment approving the rate reduction order is reversed because of inadequate findings by the Commission. P. 634.

142 F. 2d 943, affirmed in part; reversed in part.

CERTIORARI, 323 U. S. 701, to review the affirmance of a rate order of the Federal Power Commission under the Natural Gas Act.

Mr. Donald C. McCreery, with whom *Messrs. Paul W. Lee, George H. Shaw* and *Wm. A. Bryans, III* were on the brief, for petitioner.

Mr. Charles V. Shannon, with whom *Solicitor General Fahy, Assistant Attorney General Shea, Messrs. Chester T. Lane, Paul A. Sweeney, Harry S. Littman, Stanley M. Morley* and *Louis J. O'Marr,* Attorney General of Wyoming, for the Federal Power Commission et al., respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case is a companion case to *Colorado Interstate Gas Co.* v. *Federal Power Commission* and *Canadian River*

Gas Co. v. *Federal Power Commission, ante,* p. 581. Petitioner began operations in 1925. Until 1929 petitioner obtained its entire supply from the Wellington Field of the Continental Oil Co., near Ft. Collins, Colorado. Its transmission line ran from that point north to Cheyenne, Wyoming. The Wellington Field began to diminish. So petitioner, in October, 1929, entered into a twenty-year contract with Colorado Interstate to purchase gas from it, the gas to be delivered to petitioner at its metering station near Littleton, Colorado. Accordingly, in 1929 and 1930 petitioner constructed a pipeline between Ft. Collins, Colorado, and Littleton, Colorado, where connection was made with Colorado Interstate's transmission system. Between 1929 and 1939 branch lines were constructed to serve various cities, towns, and industrial customers in Colorado. At the present time all but two per cent of its gas is obtained from Colorado Interstate. Petitioner sells gas at the Cheyenne city gate to its affiliate Cheyenne Light, Fuel and Power Co. It also sells directly to industrial consumers in Colorado and to some extent in Wyoming. And it sells gas at various city gates in Colorado for resale.

The investigation and hearings on the interstate wholesale rates of Canadian, Colorado Interstate and petitioner were consolidated. As we have seen, the Commission ordered Canadian to reduce its rates by $561,000 per year. That amount made up part of the $2,065,000 annual reduction which the Commission ordered in the rates of Colorado Interstate. In the present case the Commission found that petitioner's revenues were $159,000 in excess of costs and a fair return and that $119,000 of that excess were allocable to petitioner's sales for resale. The Commission ordered petitioner to reduce its wholesale rates by $119,000 a year (43 P. U. R. (N. S.) 205, 234). That does not represent the net decrease in revenue, since the Commission ordered Colorado Interstate to reduce its

rates to petitioner by $98,000 a year. Accordingly, the net decrease in revenues of petitioner will be $21,000 if the Commission's order stands. The petition for certiorari which we granted to review the judgment of the Circuit Court of Appeals affirming the order of the Commission (142 F. 2d 943) was limited to the question whether the allocation of cost of service used by the Commission is without support in the record and contrary to law.

The Commission in this case as in *Colorado Interstate Gas Co.* v. *Federal Power Commission* and *Canadian River Gas Co.* v. *Federal Power Commission* did not make a separation of properties used in the regulated business from those used in the unregulated. It used instead the same method of allocation of costs as it did in those other cases. Petitioner contends that the Commission's method of allocation of costs included in the regulated business a part of its business which Congress has not subjected to regulation by the Commission. As we have noted, petitioner's transmission line commences in Colorado near Littleton where it connects with the pipeline of Colorado Interstate. Petitioner sells some of its gas in Colorado for resale to domestic users in certain towns in Colorado. The Commission held that those wholesale sales were subject to its jurisdiction. Petitioner contends that those sales are made in intrastate commerce and are not subject to the Commission's rate-making powers. Its position is that the one and only sale for resale by it in interstate commerce is the sale at the city gate in Cheyenne, since none of the Colorado sales involve interstate commerce so far as petitioner is concerned.

The answer turns on the meaning of § 1 (b) of the Act (52 Stat. 821, 15 U. S. C. § 717) which provides:

"(b) The provisions of this chapter shall apply 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, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

The Commission relied on *Illinois Gas Co.* v. *Central Illinois Co.*, 314 U. S. 498, in concluding that it had jurisdiction over the wholesale sales in Colorado. That case presented the question whether the Illinois Commission or the Federal Power Commission had authority to authorize a pipeline extension wholly within Illinois. The company proposing the extension (Illinois Gas Co.) owned a pipeline system wholly in Illinois which was connected at various points in that State with the pipeline of its parent company, Panhandle Eastern Pipe Line Co., which owned and operated a natural gas pipeline system from gas fields in Texas, Kansas and Oklahoma across Illinois and into Indiana. The Illinois company purchased its gas under a long term contract from Panhandle Eastern and transported it through its own lines to local gas distributing utilities in Illinois to which it sold the gas for distribution to consumers in various Illinois cities. We held that the Illinois company by virtue of § 7 (c) of the Act[1] could

[1] Sec. 7 (c) provides in part:

"No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: . . ."

A natural-gas company is defined in § 2 (6) as a "person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."

637582°—46——44

build an extension to connect with the facilities of a company distributing gas to consumers in Illinois only after obtaining a certificate of public convenience and necessity from the Federal Power Commission. We held that the Illinois company and Panhandle Eastern were engaged "in interstate commerce in the purchase and sale of the natural gas which moves in a continuous stream from points without the state" into the pipes of the Illinois company; and that "the particular point at which the title and custody of the gas pass to the purchaser, without arresting its movement to the intended destination, does not affect the essential interstate nature of the business." 314 U. S. pp. 503, 504. We pointed out that the purpose of the Act was to provide "an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation." *Id.*, p. 506. We reviewed the earlier decisions of the Court which adopted the mechanical test for determining when interstate commerce ends and intrastate commerce begins, viz., when the gas is introduced into the service pipes of the local distributor. We noted that it was to fit the pattern of state regulation reflected in those decisions that the Natural Gas Act was passed.

Accordingly, we conclude that if petitioner's pipeline were to be constructed today from Littleton, Colorado to the city gates of the Colorado towns where petitioner's gas is resold, § 7 (c) would require that a certificate of public convenience and necessity be obtained from the Commission. For in this case as in *Illinois Gas Co.* v. *Central Illinois Co., supra,* the gas which petitioner purchases from Colorado Interstate moves in a continuous stream across state lines to local distributing companies in Colorado as well as Wyoming. If petitioner is engaged in "the transportation of natural gas in interstate com-

merce" to those Colorado towns within the meaning of § 1 (b), its wholesale sales in Colorado are also sales "in interstate commerce of natural gas for resale for ultimate public consumption" as those words are used in § 1 (b). That commerce does not end until the gas enters the service pipes of the distributing companies.

Most of the other objections which petitioner raises to the Commission's method of allocation of costs have been considered in the cases of *Colorado Interstate Gas Co.* v. *Federal Power Commission* and *Canadian River Gas Co.* v. *Federal Power Commission.* We need not repeat what we said there. But there are a few distinct phases of this case which must be separately stated.

Petitioner says that the Commission treated it along with Canadian and Colorado Interstate as an integrated unit for purposes of the allocation of costs. The inference is that the Commission combined petitioner's costs with those of the other two companies and allocated the combined costs three ways. That is not the fact. Petitioner is independent in management and control from the other two. Its system was not constructed as part of Canadian's and Colorado Interstate's system but was started independently and connected with the others at a later stage. The Commission recognized that in operation the three-company project was a single one in the sense that an alteration in Canadian's rates affected the reasonableness of the rates of Colorado Interstate and in turn the reasonableness of the rates of petitioner. But when it came to an allocation of costs among petitioner's classes of business the Commission considered petitioner's costs alone.

Here as in the cases of Canadian and Colorado Interstate the findings of the Commission leave much to be desired. The findings are general and incorporate by reference the staff exhibits, on which reliance is put for the subsidiary findings. But in this case there are added dif-

ficulties. The staff used one system, the Commission another. As the Commission said, the staff "departed from the use of the system peak day for allocating demand (fixed) costs and combined the separate class peaks of resale customers and of main line industrial customers." 43 P. U. R. (N. S.) p. 233. The Commission thought a different method would be in keeping with petitioner's operations. It said: "The Colorado Portland Cement Company, the principal main line industrial user, is curtailed regularly during system peak days. Its demand on the system peak day is, in our opinion, a proper measure of its proportionate share of demand costs than its highest off-peak demand. Accordingly, the principles and methods of cost allocation presented by Commission staff are adopted with the modification that the coincident demands of all customers on the system peak day are used, and with exception of deliveries to Highway Gas Company." 43 P. U. R. (N. S.) p. 234. When we read that finding against the record there are ambiguities which we are unable to resolve were it our province to do so.

(1) The "system peak day" is February 9, 1939—the same day chosen for Canadian and Colorado Interstate. We know from our search of the record that is not the actual peak day in 1939 for petitioner's business. We are told by the Commission in its brief that it is the ratio of deliveries to the regulable and non-regulable customers rather than total deliveries that determines the allocation of capacity costs. But there are no findings which indicate why the system peak day for other companies should be taken as the system peak day for this company. Nor are there any findings which indicate that the ratio on the system peak day is a more reliable guide in the allocation of costs than the ratio on the actual peak day of this company.

(2) The Commission says it allocated capacity costs on the basis of the "coincident demands of all customers

on the system peak day." It said that Colorado Portland Cement Co. is "curtailed regularly during system peak days" and that its "demand" on that day is the proper measure of its proportionate share of capacity costs. We assume it meant by "coincident demands" on the system peak day, the amount of gas actually delivered on that day, not the customers' respective needs for gas on that day. But when we turn to the record there are ambiguities. The staff exhibit on which the Commission apparently relied designates as one classification the "maximum day deliveries on Colorado Interstate Gas Co. peak day—Thurs., Feb. 9, 1939." Under that heading we compute 1,777 Mcf to direct-sale customers and 9,009 Mcf to resale customers on February 9, 1939. The Commission in its brief tells us that that was the basis on which it allocated capacity costs, viz. 83.5 per cent to the resale gas, 16.5 per cent to the direct-sale gas. But there is evidence in the record that the direct-sale customers received on February 9, 1939 not 1,777 Mcf but only 522 Mcf. If we use 522 Mcf rather than 1,777 Mcf in our computations we shift to the interstate wholesale sales almost $21,000 additional costs. Now the net rate decrease ordered by the Commission in this case amounted to $21,000. Hence that net decrease substantially disappears if we take 522 Mcf rather than 1,777 Mcf as the amount of direct sales on Feb. 9, 1939. The choice of the lower figure would thus be fatal to the Commission's case.

We do not know why the lower figure was rejected. There are no findings to guide us. In the record there is testimony which may suffice as a partial reconciliation of the difference and which casts some doubts on the accuracy of the lower figure. But we have been unable completely to reconcile the difference. We do know from a reading of the record that the staff exhibit from which the 1,777 Mcf item was obtained was based at least in

part on averages or estimates, not on actual deliveries. It is not clear whether 1,777 Mcf rested on estimates or reflected actual deliveries by petitioner on Feb. 9, 1939. The caption "maximum day deliveries on Colorado Interstate Gas Co. peak day—Thurs., Feb. 9, 1939" is ambiguous. It may mean that the gas delivered to petitioner by Colorado Interstate on that day was apportioned among the several classes of customers according to their actual use on that day. It may mean actual deliveries by petitioner during that day. The figures may or may not be the same.

The review which Congress has provided for these rate orders is limited. Sec. 19 (b) says that the "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." But we must first know what the "finding" is before we can give it that conclusive weight. We have repeatedly emphasized the need for clarity and completeness in the basic or essential findings on which administrative orders rest. *Florida* v. *United States,* 282 U. S. 194, 215; *United States* v. *Baltimore & Ohio R. Co.,* 293 U. S. 454, 464; *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U. S. 499, 504–505, 510–511; *United States* v. *Carolina Carriers Corp.,* 315 U. S. 475, 488–489. Their absence can only clog the administrative function and add to the delays in rate-making. We cannot dispense with them for Congress has provided the standards for judicial review under this Act. § 19 (b). The courts cannot perform the function which Congress assigned to them in absence of adequate findings. Nor are they authorized under § 19 (b) to make findings and substitute them for those of the Commission.

We think it is plain that $98,000 of the rate decrease ordered by the Commission in this case is valid since it reflects the reduction in the rates of Colorado Interstate from whom petitioner purchases practically all of its gas. But the balance of the $119,000 rate decrease which was

ordered, viz. $21,000, is so shrouded in doubt that further findings by the Commission are necessary.

Accordingly, we affirm the judgment below insofar as it sustained the order of the Commission directing petitioner to reduce its rates by $98,000. As to the balance of the rate reduction, we reverse the judgment below, set aside the order of the Commission, and remand the cause for further proceedings in conformity with this opinion. See § 19 (b).

It is so ordered.

The CHIEF JUSTICE, MR. JUSTICE ROBERTS, MR. JUSTICE REED, and MR. JUSTICE FRANKFURTER are of the opinion that the case should be remanded to the Commission for separate allocation of investment and operating cost between the regulable and nonregulable properties, as well as for the clarification of findings directed in the opinion. They agree that the deliveries to wholesalers in Colorado are in interstate commerce.

PANHANDLE EASTERN PIPE LINE CO. ET AL. *v.* FEDERAL POWER COMMISSION ET AL.

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

No. 296. Argued January 29, 1945.—Decided April 2, 1945.

1. Under § 19 (b) of the Natural Gas Act, providing for review of orders of the Commission by the circuit courts of appeals, an objection that the natural gas company is not located and does not have its principal place of business in the circuit in which the proceeding was brought goes not to the jurisdiction but only to the venue, and is too late when raised for the first time after judgment. P. 638.
2. In the exceptional circumstances of this case, the Federal Power Commission, in determining reductions in interstate wholesale rates of a natural gas company whose business consisted of direct industrial sales (unregulated) as well as interstate wholesales (regulated),

did not exceed the limits of its discretion when it allocated to the regulated business all excess earnings of the entire business over 6½ per cent. P. 646.

3. It was not error for the Commission to construct a natural gas company's rate base on the actual legitimate cost of the company's property, or to include in the rate base the company's producing properties and gathering facilities. *Canadian River Gas Co.* v. *Federal Power Comm'n, ante,* p. 581. P. 648.
4. Having failed to object in its application for rehearing before the Commission to the inclusion of its producing properties and gathering facilities in the rate base, petitioner is precluded by § 19 (b) of the Act from attacking the order of the Commission on the ground that they are included. P. 649.
5. Since the issue in a rate case under the Natural Gas Act is whether the rate fixed is "just and reasonable," the question on review is not the method of valuation but the end result obtained. P. 649.
6. Upon the undisputed facts of this case, the Court can not say that the rate of return allowed by the Commission is not commensurate with the risks, that confidence in the company's financial integrity has been impaired, or that the company's ability to attract capital, to maintain its credit, and to operate successfully and efficiently has been impeded. *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591. P. 650.

143 F. 2d 488, affirmed.

CERTIORARI, 323 U. S. 808, to review the affirmance of an order of the Federal Power Commission under the Natural Gas Act.

Messrs. Ira Lloyd Letts and *John S. L. Yost,* with whom *Messrs. D. H. Culton* and *Samuel H. Riggs* were on the brief, for petitioners.

Messrs. Chester T. Lane and *Charles V. Shannon,* with whom *Solicitor General Fahy, Assistant Attorney General Shea, Messrs. Paul A. Sweeney, Harry S. Littman, Stanley M. Morley, William E. Dowling, James H. Lee, Harold Goodman, Herbert J. Rushton,* Attorney General, and *James W. Williams,* Assistant Attorney General, of Michigan, were on the brief, for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Panhandle Eastern Pipe Line Co. (whom we will call Panhandle Eastern) owns properties which constitute a natural gas production, transportation, and marketing system.[1] The system extends from gas fields in Texas, Oklahoma and Kansas through Missouri, Illinois, Indiana and Ohio and into Michigan.[2] The City of Detroit and the County of Wayne, Michigan, filed a complaint with the Federal Power Commission alleging that Panhandle Eastern's rates on gas sold to a distributing company in Michigan for resale there were unjust and unreasonable. The Commission on its own motion instituted an investigation under the Natural Gas Act of 1938, 52 Stat. 821, 15 U. S. C. § 717, of all of the interstate wholesale rates of Panhandle Eastern.[3] Following extended hearings the Commission entered an interim order, here under review, finding petitioner's interstate wholesale rates to be excessive and requiring petitioner to reduce them on and after November 1, 1942, as to reflect, when applied to petitioner's 1941 transportation and sales, a reduction of not less than $5,094,384 per annum below the 1941 consolidated gross operating revenues of $17,789,573. See 45 P. U. R. (N. S.) 203, 223. That order was affirmed by

[1] The other petitioners, Illinois Natural Gas Co. and Michigan Gas Transmission Corp., were wholly owned subsidiaries of Panhandle Eastern. They sold all of their properties to Panhandle Eastern after these proceedings were instituted and were then dissolved. Accordingly, we will refer throughout to the three companies as "petitioner."

[2] The Commission found that the aggregate lines in this system constitute "the longest natural-gas pipe line in the world, serving more than 200 cities, towns, and communities with more than 700,000 retail customers in Texas, Kansas, Missouri, Illinois, Indiana, Michigan, and Ohio." 45 P. U. R. (N. S.) 203, 208.

[3] The investigation also included Illinois Natural Gas Co. and Michigan Gas Transmission Corp. See note 1, *supra*.

the Circuit Court of Appeals for the Eighth Circuit, one judge dissenting in part. 143 F. 2d 488. The case is here on a petition for a writ of certiorari which we granted limited to the two questions which we will discuss. But before we reach them we must dispose of a challenge made by the City of Cleveland, as *amicus curiae,* to the jurisdiction of the Circuit Court of Appeals for the Eighth Circuit over the subject matter of this litigation. Panhandle Eastern sought review in that court of the Commission's order under § 19 (b) of the Act which so far as material here provides:

"Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia . . ."

The petition for review stated that petitioner had its principal place of business in Kansas City, Missouri. That was not denied by the Commission and at no time prior to the entry of the judgment affirming the Commission's order was the jurisdiction of the Circuit Court of Appeals challenged. After the judgment of affirmance had been entered, however, the City of Cleveland filed a motion in the Circuit Court of Appeals for leave to intervene and challenged the jurisdiction of that court on the ground that petitioner did not have its principal place of business in that circuit. The same objection is pressed here.

If the objection is to the jurisdiction of the court, it does not come too late. *Industrial Addition Assn.* v. *Commissioner,* 323 U. S. 310. But we think it goes to venue, not to jurisdiction. We read § 19 (b) to invest all intermediate federal courts with the power to review orders of the Commission, provided, however, that if a Circuit Court of

Appeals, rather than the Court of Appeals for the District of Columbia, is chosen, the parties may object that the particular circuit lacks the specified qualifications. Venue relates to the convenience of litigants. *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165. The provisions of § 19 (b) plainly are of that character. Review in the Court of Appeals for the District of Columbia where the Commission must maintain its principal office and hold its general sessions (46 Stat. 797, 16 U. S. C. § 792) is convenient for the Commission. Review in any circuit where the natural gas company is located or has its principal place of business is designed to serve the convenience of the company. The general grant of authority in § 19 (b) to all the courts of appeal suggests that the question of which one should exercise the power in a particular case is a question of venue. None of the respondents objected at any time to the venue of the court below. The right to have a case heard in the court of proper venue may be lost unless seasonably asserted. *Industrial Addition Assn.* v. *Commissioner, supra.* It may be waived by any party, including the government. *Peoria & P. U. R. Co.* v. *United States,* 263 U. S. 528, 535–536; *Industrial Addition Assn.* v. *Commissioner, supra.* The objection of the City of Cleveland, which came after judgment had been rendered, came too late. Cf. *United States* v. *California Canneries,* 279 U. S. 553, 556. Hence, we need not decide whether the suit was brought in the proper circuit.

Segregation of the Regulated and Unregulated Businesses. Panhandle Eastern makes direct industrial sales as well as sales to distributing companies for resale. The Commission made no segregation or separation of the properties used in these two classes of business. Nor did it make an allocation of costs between the regulated and unregulated phases of the business as it did in *Colorado Interstate Gas Co.* v. *Federal Power Commission, Canadian River Gas Co.* v. *Federal Power Commission,* and *Colorado-Wyoming Gas Co.* v. *Federal Power Commission,*

ante, pp. 581, 626. The reasons which the Commission advanced for its failure to make any allocation are so crucial to the disposition of the case that we quote from the opinion:

"Upon the record before us, we consider it unnecessary to make an allocation of the respondents' business as between sales for resale and direct sales. The direct sales are made to nineteen industrial customers on an interruptible basis and at prices fixed in competition with other fuels.

"According to respondents' own evidence, no capacity has ever been constructed or provided in their gas plant for these direct industrial customers. It is equally clear that deliveries are made to them only when there is available excess off-peak capacity not required by the other wholesale customers. As evidence of this fact, in 1941 the volume of gas sold to the direct industrial customers amounted to 13.2 per cent of the total system sales, whereas on the system peak day of the 1941–1942 winter the direct industrial sales constituted only 2.69 per cent of the total deliveries, due to interruptions and curtailments brought about by the necessity for meeting the wholesale customer requirements.

"Testimony of respondents' witnesses discloses that only $128,848 of the entire investment in plant (less than one-sixth of one per cent) is used exclusively in the service of the direct industrials. Moreover, the respondents themselves treat their entire business as a unit and make no segregation of costs or profits on their books as between the two classes of sales. Indeed, Panhandle Eastern's president testified quite clearly on cross-examination that any attempt to allocate would be 'theoretical,' 'unrealistic,' and 'not practical' because of the unified character of the business.

"Deliveries to the direct industrials are made only when the plant is not fully used in serving the requirements of

the wholesale business, and are curtailed or interrupted when the capacity is required by the wholesale customers. It is apparent that the incidental direct industrial business is in reality a by-product of the wholesale business, comparable to the respondents' gasoline extraction business. All parties are agreed that the expenses and revenues in connection with the sale of gasoline extracted from the natural gas should be treated as an integral part of the respondents' entire operations. Thus, it is manifest from the evidence that the direct industrial sales are purely incidental to the main or principal enterprise, viz.: the wholesale business of the respondents." 45 P. U. R. (N. S.) p. 218.

Petitioner contends that these reasons do not justify the failure of the Commission to make a formal allocation either of the property or the costs between the regulated and unregulated business. It says that the direct sales are beyond the jurisdiction of the Commission even though they are comparatively small. It asserts that the fact that the direct sales are on an interruptible basis merely emphasizes the relatively small amount of the cost of construction and operation attributable to such sales. It says that no waiver of the statutory right to have the direct sales free from regulation can be inferred and that in any event the Commission's jurisdiction cannot be enlarged by waiver. And it contends that the Commission's finding that the direct industrial business is "in reality a by-product of the wholesale business" is not supported in reason or in fact.

We agree that the Commission must make a separation of the regulated and unregulated business when it fixes the interstate wholesale rates of a company whose activities embrace both. Otherwise the profits or losses, as the case may be, of the unregulated business would be assigned to the regulated business and the Commission

would transgress the jurisdictional lines which Congress wrote into the Act.[4] The Commission recognizes this necessity. As it stated in *Re Cities Service Gas Co.*, 50 P. U. R. (N. S.) 65, 89: "The company's facilities and operations are devoted in part to natural gas service which is not subject to our jurisdiction. This service consists principally of gas sales made directly to large industrial consumers. The necessity arises, therefore, for making an allocation of costs as between the jurisdictional and non-jurisdictional sales." The question is whether a formal allocation was necessary under the exceptional circumstances of this case.

We state the question that narrowly because the dispute in this case reflects not a rejection by the Commission of the principle of allocation but a disagreement over the propriety of the procedure followed here.

What the Commission did was to allocate to the interstate wholesale business all of the earnings from the entire business in excess of a 6½ per cent return. Insofar as that procedure allocated to the interstate wholesale business any earnings from the direct industrial sales in excess of 6½ per cent, it is said to be justified by the use which the direct industrial business made of the main transmission line and its facilities. If that was unfair, the order must be set aside. If it was fair, no reversible error is shown.

A witness for petitioner testified at the hearing that under petitioner's allocation of costs the unregulated busi-

[4] Sec. 1 (b) provides:

"The provisions of this chapter shall apply 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, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

ness has the use of facilities of the company without any charge. He testified that there should be a charge against the unregulated business for the use of that property. Another witness for petitioner stated that the company did not make any allocation between the regulated and unregulated business—"that is, allocation of jointly used assets"—in determining what would be charged to the unregulated sales. He stated, "It may be heresy to say so but we try to charge our nonregulated customers all the traffic will bear." It was conceded that the company attempts no allocation in the conduct of its business. The business is operated as a unit. And one of petitioner's officers testified:

"Q. That is, any attempt to allocate return, as between regulated business and unregulated business: is that what you meant was unrealistic?

"A. That is correct . . . If you are going to allocate it theoretically you should allocate it on the basis of the investment and the expenses incident to each part of the business.

"Q. But it is theoretical?

"A. That is correct.

"Q. And not practical?

"A. That is what I am trying to say."

Petitioner presented evidence showing that in the test year 91.57 per cent of its total revenues, or $16,289,045, was received from its wholesale sales and 8.43 per cent, or $1,500,527, was received from its direct industrial sales. It presented a study showing total operating expenses of about $7,900,000 (not including federal income taxes and return) and assigning $499,699 to the direct industrial sales. Thus an apparent profit of $1,000,828 before income taxes was shown for the direct industrial sales. But that study did not allocate any of the annual depreciation expense of the main transmission line ($2,238,589) to the direct industrial sales. Of the $633,270 ad valorem taxes

on transmission lines, only $1,738 applicable to the laterals used exclusively for direct industrial sales were allocated to them. None of the main transmission line operating and maintenance costs was charged to the direct industrial sales.

Petitioner recognized the unfairness of attributing to the direct industrial sales all of the apparent profit of $1,000,828. One of petitioner's witness testified:

"Q. Is there any engineering basis for a division, from an engineering standpoint?

"A. Not as an engineering matter. I do not know of any basis. As a business matter, I think there are ways in which it could be fairly decided. I think it requires some judgment based upon business experience to make a fair allocation of it but there is a little over a million dollars, some portion of which could, in all fairness, be set aside as a charge against operations on the non-regulated sales and a credit against operations on the regulated sales."

He went on to indicate what he thought a fair allocation would be:

"A. It is my opinion that that $1,000,828.98 should be divided fifty-fifty.

"Q. Why?

"A. It is just my judgment as a businessman that that would be a fair allocation of it.

"Q. You mean fifty-fifty as between regulated and non-regulated business?

"A. That is correct. I think that would be a fair allocation.

"Q. That is a business judgment estimate, not a mathematical estimate?

"A. That is right. In that way, this non-regulated business has contributed half a million dollars a year towards the reduction in cost of the regulated business

and if it does not contribute something, I do not think there is any justification for having the business."

Petitioner requested the Commission to find that it had built no capacity for its direct industrial sales which were "incremental" in nature and that it was reasonable to allocate "50 per cent of the net earnings from nonregulated sales as a credit to net earnings from regulated sales, as compensation for the temporary use of such facilities provided for regulated sales but used from time to time in transporting the gas for direct, interruptible, nonregulated sales, when not required for regulated sales." Petitioner asserts that it also requested the Commission to make a segregation of the properties used in the two classes of business. No such request, however, was included in the petition for rehearing. At that stage the petitioner merely asserted that the Commission erred (1) in taking the proceeds from the direct industrial sales into consideration in determining the amount of its profits and in ordering the rate reduction; and (2) in failing reasonably to allocate petitioner's earnings between regulated sales and unregulated sales. That precludes an attack in the courts on the Commission's order for failure to make a segregation of property. For § 19 (b) of the Act provides that "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do." No such excuse has been tendered.

On these facts we cannot say that the Commission transgressed the jurisdictional requirements of the Act when it failed to make a formal allocation of costs or of property. All agreed that an allocation on the basis of investment or costs would be impractical. All agreed that some division of the apparent profit from the direct industrial business had to be made. All agreed that the fair division was a matter of judgment, not mathematics.

In view of those concessions by petitioner, the manner in which it conducted its business, its failure to insist on a segregation of property in its petition for rehearing, and its own failure to keep accounts which reflected a segregation of the properties or an allocation of costs among the two classes of business, we do not think it can now be asserted that the Commission erred in forsaking a formula and using its informed judgment instead.

We do not mean to imply that such concessions would warrant a departure of the Commission from the statutory scheme of regulation. The issue is a much narrower one. The Commission did not undertake to fix industrial rates. The Commission, as was its duty, merely determined what earnings were properly allocable to the unregulated business. Petitioner disagrees with the result. The use of a formula for an allocation of costs or a segregation of property might or might not have been more favorable to petitioner. But once the use of such a formula is waived or is conceded to be impractical or theoretical, there must be some discretion in the Commission to make that determination through the exercise of its informed judgment. We cannot say that the Commission abused its discretion by concluding on the basis of the special circumstances here presented that earnings of the entire business in excess of a 6½ per cent return should be allocated to the interstate wholesale business. The small investment in the direct industrial business, the incremental nature of it, the extent of the interruptions in service to the direct industrial customers, the manner in which the management has treated it afford a basis for the refusal of the Commission to credit it with a larger share of the earnings than 6½ per cent.

The Commission, while it lacks authority to fix rates for direct industrial sales, may take those rates into consideration when it fixes the rates for interstate wholesale sales which are subject to its jurisdiction. For § 5 (a) provides

that whenever the Commission "shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, *or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential,* the Commission shall determine the just and reasonable rate." (Italics added.) It is clear that contracts covering direct industrial sales come within that italicized clause of § 5 (a).[5] The industrial rates in force here produce revenues of $1,500,527 with expenses of $499,699 which, according to petitioner, result in earnings of $1,000,828 before income taxes. That is an apparent profit of more than 200 per cent. It is a fairly obvious indication that the regulated business is being saddled with costs which in fairness should be borne by direct industrial sales. That is an extremely relevant consideration for the Commission to take into account when it determines what costs are fairly attributable to each business and what the resultant rate for the wholesale business should be. Sec. 5 (a) does not of course give the Commission authority to disregard the jurisdictional lines which Congress has drawn between interstate wholesale sales and direct industrial sales so as to level the profits between the two classes of business. But § 5 (a) reinforces our conclusion that in the exceptional circumstances of this case the Commission did not exceed the limits of its discretion when it allocated to the regulated business

[5] There must be filed with the Commission not only schedules of rates subject to the jurisdiction of the Commission but "the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." § 4 (c). By Rule 54.30 the Commission requires the filing with it of all contracts for direct industrial sales involving sales in excess of 100,000 Mcf per year. See 8 Fed. Reg. 16101.

all excess earnings of the entire business over 6½ per cent.

Producing and Gathering Facilities. The Commission constructed a rate base on the actual legitimate cost of petitioner's property in service on December 31, 1941, which it found to be $78,814,292. It deducted $12,596,987 for accrued depreciation, depletion and amortization. It added $920,000 for working capital. The result was a rate base of $67,137,305 on which the Commission allowed a return of 6½ per cent which it found to be "fair and liberal." It included in the rate base petitioner's producing properties [6] and gathering facilities. Petitioner claims that was error. It contends that it was incumbent on the Commission to determine the field price or actual field value of natural gas in the areas in which petitioner produces gas, to eliminate petitioner's leaseholds and producing and gathering facilities from the rate base, to disallow expenses of gathering and production, and to allow petitioner as an expense item the field price or actual field value for all gas produced by it and taken into the pipeline system. Evidence was offered to show what the market price or actual field value of the gas was. The argument is that the procedure followed by the Commission extends its jurisdiction over "the production or gathering of natural gas" contrary to the mandate of § 1 (b).[7] Petitioner suggests moreover that if its leaseholds are to be included in the rate base they should not be included at cost but at what petitioner claims to be the market value.[8]

---

[6] Petitioner produces approximately 50 per cent of the gas which it transports and sells, the remainder being purchased. The payments for gas purchased were allowed by the Commission as an operating expense.

[7] See note 4, *supra*.

[8] The market value is alleged to be about $8,400,000 as compared with some $955,000 which the Commission found to be the actual legitimate cost.

This phase of the case is controlled by *Canadian River Gas Co.* v. *Federal Power Commission, supra.* We need not repeat what we said there. It is clear that the value of producing properties and gathering facilities is affected whenever rates are fixed. That is inevitably true whether the leaseholds are put into the rate base or whether as petitioner urges the gas is valued as a commodity. That result is not avoided unless Congress puts a floor under production properties and gathering facilities of natural gas companies and fixes a minimum return on them. That Congress has not done. As Judge Sanborn aptly stated in the opinion of the Circuit Court of Appeals: "If there is an infirmity in the Commission's determination of the amount which should be included in the rate base as the cost or value of such facilities, we think the infirmity arises from the method used in making the valuation, and not from any lack of jurisdiction." 143 F. 2d 495. Petitioner, moreover, failed to object in its application for rehearing before the Commission to the inclusion of its producing properties and gathering facilities in the rate base. It is accordingly precluded by § 19 (b) of the Act from attacking the order of the Commission on the ground that they are included.

Federal Power Commission v. *Hope Natural Gas Co.*, 320 U. S. 591, holds that the Commission is not bound to use any single formula for the fixing of rates. It is not precluded from using actual legitimate cost as it did here. The question on review is not the method of valuation which was used but the end result obtained since the issue is whether the rate fixed is "just and reasonable." § 5. In the present case the 6½ per cent return allowed by the Commission will permit petitioner to earn $4,363,925 annually on the basis of the test year after meeting all operating expenses which include depreciation, exploratory and development costs, and federal income taxes. The cost of servicing petitioner's long-term debt is $957,786 or

2.88 per cent. The cost of meeting the requirements of the preferred stock is $939,000 or 5.8 per cent. That leaves $2,467,139 for $20,184,175 of common stock—a return of 12 per cent. The return would be 9 per cent figured on the basis of common stock and surplus of $27,650,000. We are unable to say on these undisputed facts that the return is not commensurate with the risks, that confidence in petitioner's financial integrity has been impaired, or that petitioner's ability to attract capital, to maintain its credit, and to operate successfully and efficiently has been impeded.[9] See *Federal Power Commission* v. *Hope Natural Gas Co., supra,* p. 603.

Affirmed.

MR. CHIEF JUSTICE STONE, concurring.

MR. JUSTICE ROBERTS, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER and I concur for the following reasons only.

Petitioners did not raise objections in their application for rehearing to the Commission to the inclusion of their

---

[9] The Commission stated on this phase of the case:

"The evidence discloses that the respondents' business is exceptionally free from serious business hazards. The gas supply is assured for at least thirty to thirty-five more years. We have made ample provision in the annual depreciation allowance for the restoration of the capital investment in the property over the claimed life of the gas supply. The respondents' markets are rapidly expanding and embrace the large metropolitan area of Detroit, which alone takes 40 per cent of the entire output under a long-term contract. Panhandle Eastern's president testified that the demand for service is so great that within the next year the respondents will be called upon to sell every cubic foot of gas that can possibly be delivered through the lines, and that the capacity factor will increase from 70 per cent to 90 per cent.

"It is likewise apparent from respondents' own evidence that Panhandle Eastern has been able to raise considerable capital at low cost. Only recently it successfully completed a financing program at remarkably low rates which resulted in a substantial reduction in its annual

producing and gathering facilities in the rate base. By § 19 (b) of the Natural Gas Act "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do." No reason appears for the failure of petitioners here to make objection on rehearing to the inclusion of the production and gathering facilities in the rate base.

---

cost of capital. In February, 1941, Panhandle Eastern sold $18,250,000 of first mortgage and first lien bonds and $5,000,000 of serial notes at an average annual interest cost of 2.74 per cent. In February, 1942, it sold an additional $10,000,000 of first mortgage bonds at an interest cost of 3.13 per cent and $15,000,000 of preferred stock at a cost of 5.86 per cent. After the financing, Panhandle Eastern's annual cost of long-term debt was 2.88 per cent and preferred stock was 5.87 per cent, a combined annual cost of only 3.85 per cent for these securities.

"Panhandle Eastern has earned an average of 10.64 per cent on its net investment over the past five years, and Michigan Gas an average of 8.5 per cent during approximately the same period." 45 P. U. R. (N. S.) p. 215.

HOOVEN & ALLISON CO. *v.* EVATT, TAX COMMISSIONER OF OHIO.

CERTIORARI TO THE SUPREME COURT OF OHIO.

No 38. Argued November 7, 8, 1944.—Decided April 9, 1945.

1. Where, upon review here of state court decisions, the existence of an asserted federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity, as applied, this Court is free to reexamine the facts as well as the law in order to determine for itself whether the asserted right or immunity is to be sustained. P. 659.
2. Since it appears on consideration of petitioner's course of business and of the circumstances attending the importation that petitioner was the inducing and efficient cause of bringing the fibers into the country, which is importation, petitioner, not the foreign sellers or the agents, was the importer of fibers brought from the Philippine Islands and other places outside the United States, and the constitutional immunity from state taxation of the imported fibers survived their delivery to petitioner. Pp. 659, 664.
3. For the purpose of determining whether petitioner was the importer in the constitutional sense, it is immaterial whether title to the merchandise vested in the petitioner at the time of shipment or only after its arrival in this country. P. 662.
4. When merchandise is brought here from another country, the extent of its immunity from state taxation turns on the essential nature of the transaction, considered in the light of the constitutional purpose, and not on the formalities with which the importation is conducted or on the technical procedures by which it is effected. P. 663.
5. The purpose of the constitutional prohibition of state taxes on imports is to protect the exclusive power of the national government to tax imports and to prevent what in matter of substance would amount to the imposition of additional import duties by States in which the property might be found or stored before its sale or use. P. 664.
6. The constitutional immunity of the imports from state taxation was not lost by their storage (in the original packages) in ware-

houses at petitioner's factory, pending their use in petitioner's manufacturing operations for which they were imported. Pp. 664, 668.

7. For the purpose of the constitutional immunity, it is immaterial whether the imported merchandise is stored (in the original packages) in the importer's warehouse at the port of entry or in an interior State. P. 664.
8. Upon the record in this case, there is no reason to consider whether, for purposes of the constitutional immunity, the mere presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported. P. 667.
9. Such discriminations as there may be against domestic and in favor of foreign producers of goods in this situation are implicit in the constitutional provision and in its purpose to protect imports from state taxation. P. 667.
10. The difficulty of ascertaining in particular cases when an original package is broken arises out of the original package rule itself. P. 668.
11. Reconciliation of the competing demands of the constitutional immunity of imports and of the state's power to tax is an extremely practical matter. P. 668.
12. In view of the constitutional authority of Congress to consent to state taxation of imports and hence to lay down its own test for determining when the immunity ends, there is no convincing practical reason for abandoning the original package rule, or, if it is to be retained in the case of imports for sale, for rejecting it in the case of imports for manufacture. P. 668.
13. Articles brought from the Philippine Islands into the United States are imports subject to the constitutional provisions relating to imports,—both because they are brought into the United States and because the place whence they are brought is not a part of the United States in the constitutional sense to which the provisions with respect to imports are applicable. Pp. 668, 679.

142 Ohio St. 235, 51 N. E. 2d 723, reversed.

CERTIORARI, 321 U. S. 762, to review a judgment sustaining an assessment of state taxes.

Messrs. Luther Day and *Curtis C. Williams, Jr.*, with whom *Mr. Frederick Woodbridge* was on the brief, for petitioner.

Aubrey A. Wendt, Assistant Attorney General of Ohio, with whom *Thomas J. Herbert,* Attorney General, was on the brief, for respondent.

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

Respondent, a tax official of the State of Ohio, has assessed for state ad valorem taxes certain bales of hemp and other fibers belonging to petitioner. The fibers had been brought from the Philippine Islands or from other places outside the United States. When assessed for the tax, they were stored in the original packages in which they had been imported, in petitioner's warehouse at its factory at Xenia, Ohio, preliminary to their use by petitioner in the manufacture of cordage and similar products.

The State Board of Tax Appeals sustained the assessment for the three years in question, 1938, 1939, and 1940. Petitioner then brought the present proceeding in the Supreme Court of Ohio to review the Board's determination. That court rejected petitioner's contention that the fibers are imports, immune from state taxation under Article I, § 10, Cl. 2, of the Constitution, which prohibits state taxation of imports or exports; and it sustained the tax. 142 Ohio St. 235, 51 N. E. 2d 723.

The State Court recognized that *Brown* v. *Maryland,* 12 Wheat. 419, established the rule that imports in their original packages may not be taxed by a state. But it thought that the present case fell within the qualification upon that rule laid down in *Waring* v. *The Mayor,* 8 Wall. 110. The *Waring* case held that since a purpose of importation is sale, imports are immune from state taxation only so long as they are in the hands of the importer, and lose their immunity upon being sold by him. The Supreme Court of Ohio held that petitioner acquired title to the merchandise here taxed after its arrival in this country. It concluded from this that the foreign

sellers or their agents, and not petitioner, were the importers, and that the merchandise, after the sale to petitioner, had ceased to be an import constitutionally immune from state taxation.

In any case, the Ohio court thought that even if petitioner were the importer and the merchandise were immune from taxation on its receipt by petitioner, it nevertheless ceased to be an import, and lost its immunity as such, upon its storage at petitioner's warehouse, awaiting its use in manufacturing. The Court thought that *Brown* v. *Maryland, supra,* laid down a rule applicable only to imports for the purpose of sale, and that imports for use became, upon storage, even if still in the original package, so intermingled with the common mass of property within the state as to be subject to the state power of taxation.[1] The Court found it unnecessary to decide whether the fibers brought from the Philippine Islands, which are not a foreign country, could be imports within the meaning of the constitutional immunity, since they would be taxable in any event upon the two grounds already stated.

We granted certiorari, 321 U. S. 762, because of the novelty and importance of the constitutional questions raised. The questions for decision are (1) whether, with respect to the fibers brought from foreign countries, petitioner was their importer; if so, (2) whether, as stored in petitioner's warehouse, they continued to be imports at the time of the tax assessment; and (3) whether the fibers brought from the Philippine Islands, despite the place of their origin, are likewise imports rendered immune from taxation by the constitutional provision.

The Constitution confers on Congress the power to lay and collect import duties, Art. I, § 8, and provides that "No

[1] The Supreme Court of Washington has held contrary to the decision of the Ohio Court. See *Washington Chocolate Co.* v. *King County,* 21 Wash. 2d 630, 152 P. 2d 981.

State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws . . ." Art. I, § 10, Cl. 2. These provisions were intended to confer on the national government the exclusive power to tax importations of goods into the United States. That the constitutional prohibition necessarily extends to state taxation of things imported, after their arrival here and so long as they remain imports, sufficiently appears from the language of the constitutional provision itself and its exposition by Chief Justice Marshall in *Brown* v. *Maryland, supra.* We do not understand anyone to challenge that rule in this case.

It is obvious that if the states were left free to tax things imported after they are introduced into the country and before they are devoted to the use for which they are imported, the purpose of the constitutional prohibition would be defeated. The fears of the framers, that importation could be subjected to the burden of unequal local taxation by the seaboard, at the expense of the interior states, would be realized, as effectively as though the states had been authorized to lay import duties.[2] It is evident, too, that if the tax immunity of imports, commanded by the Constitution, is to be reconciled with the right of the states to tax goods after their importation has become complete and they have become a part of the common mass of property within a state, "there must be a point of time when the prohibition ceases, and the power of the state to tax commences." *Brown* v. *Maryland, supra,* 441.

In *Brown* v. *Maryland, supra,* the state sought to impose a license tax on the sale by the importer of goods stored in his warehouse in the original packages in which they

---

[2] See Madison, Debates in the Federal Convention of 1787, August 28, 1787 (Hunt & Scott ed.).

were imported. In holding the levy to be a prohibited tax on imports, Chief Justice Marshall said (pp. 441–442): "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution."

Although one Justice dissented in *Brown* v. *Maryland, supra,* from that day to this, this Court has held, without a dissenting voice, that things imported are imports entitled to the immunity conferred by the Constitution; that that immunity survives their arrival in this country and continues until they are sold, removed from the original package, or put to the use for which they are imported. *Waring* v. *The Mayor, supra,* 122–123; *Low* v. *Austin,* 13 Wall. 29, 32–33; *Cook* v. *Pennsylvania,* 97 U. S. 566, 573; *May* v. *New Orleans,* 178 U. S. 496, 501, 507–508; *Burke* v. *Wells,* 208 U. S. 14, 21–22, 24; *Gulf Fisheries Co.* v. *MacInerney,* 276 U. S. 124, 126–127; *McGoldrick* v. *Gulf Oil Corp.,* 309 U. S. 414, 423.

All the taxed fibers, with the exception of those brought from the Philippine Islands, which will presently be separately considered, were brought to this country from foreign lands and were undoubtedly imports, clothed as such with a tax immunity which survived their importation, until the happening of some event sufficient to alter their character as imports. As we have said, the Supreme Court of Ohio found such events in what it deemed to be a sale of the merchandise to petitioner after it had been landed in the United States, and in the further cir-

cumstance that by storing the merchandise in the warehouse at petitioner's factory, it had become a part of the common mass of property subject to state taxation and so could no longer be regarded as an import.

Resolution of either point in favor of respondent is decisive of the case. Hence we must first consider whether petitioner, rather than the foreign producers or shippers acting through their American agents, was the importer. If so, the tax immunity of the imported merchandise survived its receipt by petitioner and we must determine the further question whether petitioner's subsequent treatment of the merchandise deprived it of its character, and hence its immunity, as an import.

I

Petitioner's relationship to the merchandise at the time of importation and afterward is of significance only in determining whether, as the state court has found, the relationship was so altered after importation that it can be said that the purpose of the importation had been fulfilled. If it had, there was no longer either occasion or reason for the further survival of the immunity from taxation. That relationship is to be ascertained by reference to all the circumstances attending the importation, particularly as shown by the long established course of business by which petitioner's supply of fibers has been brought into the country for use in manufacturing its finished product.

The state introduced no evidence, and there is no dispute in point of substance as to petitioner's evidence. The latter consists of the oral testimony of petitioner's general manager, some examples of the contracts by which petitioner procured the merchandise to be brought to this country, and two stipulations containing statements, admitted to be true, which were made by the American agents of the producers and shippers of the merchandise.

Both the Board of Tax Appeals and the state court, without specially finding some of the facts which we regard as of controlling significance, contented themselves with stating the facts generally. They inferred from these facts that petitioner technically was but a purchaser of the merchandise, after it had been imported into this country. They concluded that petitioner was not the importer, and the fibers had ceased to be imports after the sale to petitioner.

In all cases coming to us from a state court, we pay great deference to its determinations of fact. But when the existence of an asserted federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity, as applied, we are free to reexamine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained. *Kansas City Southern R. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 591; *Truax* v. *Corrigan*, 257 U. S. 312, 325; *First National Bank* v. *Hartford*, 273 U. S. 548, 552, and cases cited; *Fiske* v. *Kansas*, 274 U. S. 380, 385–386; *Norris* v. *Alabama*, 294 U. S. 587, 589–590.

In this case it appears without contradiction that petitioner, in the regular course of its business, contracts for its manufacturing requirements of hemp, jute, sisal and other fibers, before their shipment to this country, and sometimes even before they are produced in the various foreign countries of their origin. Petitioner's negotiations for the purchase are carried on with brokers located in New York City, who represent the foreign producers. After an agreement as to price, petitioner enters into a firm contract to purchase the fibers. A standard form of contract is executed in duplicate or triplicate by petitioner and the broker who signs as agent for or "for account of" his named principal. The contract specifies

the kind and amount of fibers purchased, the time of shipment, the American port to which the shipment is to be made, and frequently the steamship company, designated by petitioner, upon whose vessel the merchandise is to be shipped. While the contract gave the seller the option to make deliveries from merchandise warehoused in the United States, no such deliveries were made of any of the merchandise here in question.

The price is a "landed price," which includes as its components the contract cost of the goods at point of origin, the normal charges for ocean freight, marine and war risk insurance and United States customs clearance (including customs duties in the case of hemp, which alone of the purchased merchandise is subject to import duties), and the expense of arranging for transshipment from the port of entry to petitioner at Xenia, Ohio. Any variation from the normal rates for these components (other than the contract cost of the goods at point of origin) is for account of petitioner. "Extra value" insurance covering any increase in value of the merchandise over the contract price during the voyage, is effected, if petitioner requests, at its expense.

Upon shipment the merchandise is consigned to the broker in this country or to a banker, either on an order or a straight bill of lading, in either case with directions to "Notify The Hooven & Allison Co." When the bales of purchased merchandise are loaded for shipment on board vessel at the point of origin, they are given distinctive markings referable to petitioner's contract. A declaration is then cabled to the New York broker referring to the contract upon which the shipment is made, stating the name of the vessel, the approximate number of bales shipped, their identification marks, and the approximate date of arrival in the United States. The broker communicates this information to petitioner and sometimes follows it before arrival of the shipment at the port of entry, with

a *pro forma* invoice, which states the approximate tonnage and value of the shipment. Petitioner then gives instructions to the broker for the shipment from the port to Xenia.

The broker enters the shipment at the custom house in its own name as an accommodation to the petitioner, which has no facilities for clearance of the goods through the customs. The broker then ships the merchandise upon a straight bill of lading to Xenia, where it is delivered by the carrier to petitioner. At that time petitioner pays the freight, and ten to fifteen days after the receipt of the final invoice, it pays the purchase price to the broker. It is stipulated that the sale is upon the unsecured credit of petitioner and it does not appear that there is any retention of a security title either by the foreign seller, the broker, or any intervening banker, to secure payment by petitioner of the purchase price.

From all this it is clear that from the beginning, after the contract of purchase is signed, the foreign producer is obligated to sell the merchandise on credit, to ship it to an American port and to deliver it to petitioner, which is obligated to accept and pay for it. Performance of the contract calls for, and necessarily results in, importation of the merchandise from its country of origin to the United States. Petitioner's contracts of purchase are the inducing and efficient cause of bringing the merchandise into the country, which is importation. Examination of the documents and consideration of the course of business can leave no doubt that the petitioner not only causes the importation but that the purpose and necessary consequence of it are to supply petitioner with the raw material for its manufacture of cordage at its factory in Ohio.

From the moment of shipment the taxed merchandise was identified and appropriated to the purchase contract and to that ultimate purpose, by both the seller and the buyer. Petitioner could resell the merchandise while it

was in transit. The risk of loss from change in market value was on petitioner, save as it might insure against such loss at its own expense. The right to demand, receive and use the merchandise, subject only to the payment of the contract "landed price," was in petitioner. And obviously if the possibility of the seller's right of stoppage *in transitu,* the carrier's lien or the necessity of payment of customs duties are to be regarded as inconsistent with importation, there would be few importations and few importers in the constitutional sense. For there are few who are not subject to some or all of these contingencies.

Here it is agreed that the sale was on credit. So far as appears in those instances where the merchandise was consigned to a banker, it was for the purpose of financing the producer or shipper, pending receipt of the merchandise and payment for it by petitioner, which appears always to have purchased on credit and to have received the merchandise before payment, and never to have given security for its payment. There was therefore no occasion for an implied reservation of a security "title" as against petitioner in either the sellers or their agents, or the banker in those cases where the goods were consigned on shipment to a banker.

For the purpose of determining whether petitioner was the importer in the constitutional sense, it is immaterial whether the title to the merchandise imported vested in him who caused it to be brought to this country at the time of shipment or only after its arrival here.[3] Decision in *Waring* v. *The Mayor, supra,* upon which the Supreme Court of Ohio relied, did not turn on technical questions

[3] Section 1483 (1) of 19 U. S. C. provides that merchandise imported into the United States "shall be held to be the property of the person to whom the same is consigned." We do not deem this provision to be significant here, since it is designed merely to identify the person liable for the payment of customs duties, and since, as we have said, the time when title passes to petitioner is immaterial to decision.

of passage of title.[4] For in determining the meaning and application of the constitutional provision, we are concerned with matters of substance, not of form. When the merchandise is brought from another country to this, the extent of its immunity from state taxation turns on the essential nature of the transaction, considered in the light of the constitutional purpose, and not on the formalities with which the importation is conducted or on the technical procedures by which it is effected. It is common knowledge to lawyers and businessmen that vast quantities of merchandise are annually imported into this country by purchasers resident here, for sale or manufacture here. Sometimes the buyer completes the purchase abroad, in person, and ships to this country; sometimes, as in this case, the purchase is on unsecured credit, but more often it is under contracts by which the vendor reserves in himself or his agent or a banker a lien or title as security for payment of the purchase price on or after arrival. To say that the purchaser is any the less an importer in the one case than in the others, is to ignore

[4] In the *Waring* case, the purchaser, claiming tax immunity as the importer, purchased the merchandise, after its shipment from abroad, from the American consignee, sometimes before and sometimes after its arrival in the port of entry. Risk of loss was to be on the seller until the merchandise was entered at the customhouse and delivered from the vessel into the purchaser's lighters alongside. The Court thought it immaterial whether the purchase contract was entered into before or after arrival. Since the risk of loss remained on the shipper until the customhouse entry and delivery to the purchaser, it held that the shipper or the consignee was the importer; that the purchaser's sale of the goods, which was taxed, was the second sale after importation, and for that reason was not free of tax. In these circumstances it is clear that the purchaser was not the cause of the importation, that the purchaser had no control over or right to demand the merchandise before arrival in port and that the foreign shipper, who bore the risk of loss and retained control of the merchandise and the right to control it until its delivery to petitioner, was the importer.

the constitutional purpose and substitute form for substance.

As we have said, the constitutional purpose is to protect the exclusive power of the national government to tax imports and to prevent what in matter of substance would amount to the imposition of additional import duties by states in which the property might be found or stored before its sale or use. It is evident that the constitutional prohibition envisages the present transaction, quite as much as if the petitioner had sent his own agent abroad where he had purchased and paid for the merchandise and shipped it to petitioner in this country. The purpose and result of the transaction are the same in either case. The apprehended evils of the local taxation of imports after their arrival here are the same.

It is enough for present purposes that the merchandise in this case was imported; and that petitioner was the efficient cause of its importation, the purpose and effect of which was petitioner's acquisition of the merchandise for its manufacture into finished goods. We conclude that petitioner was the importer, and that the merchandise in its hands was entitled to the constitutional tax immunity, surviving delivery of the imports to it.

II

We turn now to the question whether the immunity was lost by the storage of the merchandise in the original packages in petitioner's warehouse at its factory, pending its use in petitioner's manufacturing operations. For the purpose of the immunity it has not been thought, nor is there reason for supposing, that it matters whether the imported merchandise is stored in the original package in the importer's warehouse at the port of entry or in an interior state. The reason for the original package doctrine, as fully expounded in *Brown* v. *Maryland, supra,* is that un-

less the immunity survives to some extent the arrival of the merchandise in the United States, the immunity itself would be destroyed. For there is no purpose of taxing importation, itself, even its ultimate suppression, which could not be equally accomplished by laying a like tax on things imported after their arrival and while they are in the hands of the importer.

On the other hand, the immunity is adequately protected and the state power to tax is adequately safeguarded if, as has been the case ever since *Brown* v. *Maryland, supra,* an import is deemed to retain its character as such "while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported," see *Brown* v. *Maryland, supra,* 442, or until put to the use for which it was imported. Chief Justice Marshall, in *Brown* v. *Maryland, supra,* pp. 442–443, rejected the suggestion that "an importer may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation." Plainly if and when removed from the package in which they are imported or when used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end. It is quite another matter to say, and Chief Justice Marshall did not say, that because they may be taxed when used, the importer may not hold them tax free until the original packages are broken or until they are put to the use for which they are imported. He said, p. 443: "The same observations [i. e., the importer has mixed the goods with the common mass of property, rendering them taxable] apply to plate, or other furniture *used* by the importer." (Italics added.)

We have often indicated the difference in this respect between the local taxation of imports in the original package and the like taxation of goods, either before or after their shipment in interstate commerce. In the one case

the immunity derives from the prohibition upon taxation of the imported merchandise itself. In the other the immunity is only from such local regulation by taxation, as interferes with the constitutional power of Congress to regulate the commerce, whether the taxed merchandise is in the original package or not. The regulatory effect of a tax, otherwise permissible, is not in general affected by retention of the merchandise in the original package in which it has been transported. *Woodruff* v. *Parham,* 8 Wall. 123; *Brown* v. *Houston,* 114 U. S. 622; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 521; *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, 508–513; *Baldwin* v. *Seelig,* 294 U. S. 511, 526–527.

This Court has pointed out on several occasions that imports for manufacture cease to be such and lose their constitutional immunity from state taxation when they are subjected to the manufacture for which they were imported, *May* v. *New Orleans, supra,* 501; *Gulf Fisheries Co.* v. *MacInerney, supra,* 126; *McGoldrick* v. *Gulf Oil Corp., supra,* 423, or when the original packages in which they were imported are broken, *Low* v. *Austin, supra,* 34; *May* v. *New Orleans, supra,* 508–509. But no opinion of this Court has ever said or intimated that imports held by the importer in the original package and before they were subjected to the manufacture for which they were imported, are liable to state taxation. On the contrary, Chief Justice Taney, in affirming the doctrine of *Brown* v. *Maryland,* in which he appeared as counsel for the State, declared, as we now affirm: "Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the state usually taxed for the support of state government." *License Cases,* 5 How. 504, 575.

In *Brown* v. *Maryland, supra,* the imported merchandise held in original packages in the importer's warehouse for sale, was deemed tax immune. We do not perceive upon what grounds it can be thought that imports for manufacture lose their character as imports any sooner or more readily than imports for sale. The constitutional necessity that the immunity, if it is to be preserved at all, survive the landing of the merchandise in the United States and continue until a point is reached, capable of practical determination, when it can fairly be said that it has become a part of the mass of taxable property within a state, is the same in both cases.

It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original packages. And it is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original packages. Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question.

It is said that our decision will result in discrimination against domestic and in favor of foreign producers of goods. But such discriminations as there may be are implicit in the constitutional provision and in its pur-

pose to protect imports from state taxation. It is also suggested that it will be difficult to ascertain in particular cases when an original package is broken, a difficulty which arises, not out of the present decision, but out of the original package rule itself, which we do not understand to be challenged here. Moreover, this supposed difficulty does not seem to have baffled judicial decision in any case in the more than a hundred years which have followed the decision in *Brown* v. *Maryland, supra.*

As was emphasized in *Brown* v. *Maryland, supra,* the reconciliation of the competing demands of the constitutional immunity and of the state's power to tax, is an extremely practical matter. In view of the fact that the Constitution gives Congress authority to consent to state taxation of imports and hence to lay down its own test for determining when the immunity ends, we see no convincing practical reason for abandoning the test which has been applied for more than a century, or why, if we are to retain it in the case of imports for sale, we should reject it in the case of imports for manufacture. Unless we are to ignore the constitutional prohibition we cannot say that imports for manufacture are not entitled to the immunity which the Constitution commands, and we see no theoretical or practical grounds for saying, more than in the case of goods imported for sale, that the immunity ends while they are in the original package and before they are devoted to the purpose for which they were imported.

III

There remains the question whether the fibers which petitioner brought from the Philippine Islands and stored in its warehouse in the original packages are also imports, constitutionally immune from state taxation.

Respondents argue that the Philippine Islands are not a foreign country and that only articles brought here

from foreign countries are imports within the meaning of the constitutional provision. Goods transported from one state to another are not imports, since they are articles originating in the United States and not brought into it. *Woodruff* v. *Parham, supra; Sonneborn Bros.* v. *Cureton, supra; Baldwin* v. *Seelig, supra.* It is petitioner's argument that merchandise brought from the Philippines to the United States is an import because it is brought into the United States from a place without, even though not from a foreign country. Implicit in this argument is the contention that the Philippines, while belonging to the United States as a sovereign, are not part of it; and that merchandise brought from the Philippines is an import because it originates outside of and is brought into the territory comprising the several states which are united under and by the Constitution, territory in which the constitutional prohibition against the state taxation of imports, is alone applicable.

The Constitution provides us with no definition of the term "imports" other than such as is implicit in the word itself. Imports were defined by Chief Justice Marshall in *Brown* v. *Maryland, supra,* 437, as "things imported" and "articles brought into a country." He added: "If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country."

He thus defined imports by reference not to their foreign origin but to the physical fact that they are articles brought into the country from some place without it. Since most imports originate in foreign countries, courts have not unnaturally fallen into the habit of referring to imports as things brought into this country from a foreign country. *Waring* v. *The Mayor, supra; Woodruff* v. *Parham, supra; Pittsburgh & Southern Coal Co.* v. *Louisiana,* 156 U. S. 590, 600; *Patapsco Guano Co.* v. *North Carolina,*

171 U. S. 345, 350; *May* v. *New Orleans, supra.*[5] But the Constitution says nothing of the foreign origin of imports, and in none of these cases was it necessary to decision to formulate the rule in terms of origin in a foreign country. In each case the result would have been the same if the Court had treated imports merely as articles brought into the country from a point without.

Chief Justice Marshall's definition has received support in cases holding or suggesting that fish caught in the open sea and brought into this country are imports entitled to the constitutional protection, although they did not come from a foreign country. *Gulf Fisheries Co.* v. *Darrouzet,* 17 F. 2d 374, 376; *Booth Fisheries Corp.* v. *Case,* 182 Wash. 392, 395, 47 P. 2d 834. In *Gulf Fisheries Co.* v. *MacInerney, supra,* we found it unnecessary to decide the point. In that case the fish had been subjected to a manufacturing process after their arrival in port and before they were taxed. Hence, even if originally imports, they had ceased to be such and were no longer immune from the challenged state tax. See also *Fishermen's Cooperative Assn.* v. *State,* 198 Wash. 413, 88 P. 2d 593. The definition of imports as articles brought into the country finds support also in the circumstance that it has never been seriously doubted that merchandise brought into the United States from without is subject to the power of Congress to impose customs duties, even though the merchandise is not of foreign origin. And the occasion for protecting the

[5] In *Dooley* v. *United States,* 183 U. S. 151, the Court sustained under the Foraker Act of April 12, 1900, c. 191, 31 Stat. 77, the levy and collection of a tax in Puerto Rico upon goods brought there from New York. The tax was held to be a valid exercise of the power of Congress to enact laws for the government of a dependency acquired by treaty, see *Downes* v. *Bidwell,* 182 U. S. 244. The Court stated also as an alternative ground, but one unnecessary for decision, that the levy was not a prohibited tax on exports, since Puerto Rico was not a foreign country.

power of the national government to lay and collect customs duties upon such merchandise, is precisely the same as in the case of that of foreign origin. Hence it is plain that such importations, although not of foreign origin, are within the design and purpose of the constitutional prohibition against the local taxation of imports.

We find it impossible to say that merely because merchandise, brought into the country from a place without, does not come from a foreign country, it is not an import envisaged by the words and purpose of the constitutional prohibition. The interpretation in *Brown* v. *Maryland, supra,* the occasional judicial decisions that foreign origin is not a necessary characteristic of imports so long as they are brought into the country from a place without it, and the purpose of the constitutional prohibition, are alike persuasive that there may be imports in the constitutional sense which do not have a foreign origin.

The fact that the merchandise here in question did not come from a foreign country, if the contention be accepted that the Philippines are not to be regarded as such, is therefore without significance. It is material only whether it came from a place *without* the "country." Hence, in determining what are imports for constitutional purposes, we must ascertain the territorial limits of the "country" into which they are brought. Obviously, if the Philippines are to be regarded as a part of the United States in this sense, merchandise brought from the Philippines to the United States would not be brought into the United States from a place without, and would not be imports, more than articles transported from one state to another.

The term "United States" may be used in any one of several senses. It may be merely the name of a sovereign occupying the position analogous to that of other sovereigns in the family of nations. It may designate the territory over which the sovereignty of the United States ex-

tends, or it may be the collective name of the states which are united by and under the Constitution.[6]

When *Brown* v. *Maryland, supra,* was decided, the United States was without dependencies or territories outside its then territorial boundaries on the North American continent, and the Court had before it only the question whether foreign articles brought into the State of Maryland could be subjected to state taxation. It seems plain that Chief Justice Marshall, in his reference to imports as articles brought into the country, could have had reference only to articles brought into a state which is one of the states united by and under the Constitution, and in which alone the constitutional prohibition here involved is applicable.

The relation of the Philippines to the United States, taken as the collective name of the states which are united by and under the Constitution, is in many respects different from the status of those areas which, when the Constitution was adopted, were brought under the control of Congress and which were ultimately organized into states of the United States. See *Balzac* v. *Porto Rico,* 258 U. S. 298, 304–305, and cases cited. Hence we do not stop to inquire whether articles brought into such territories or brought from such territories into a state, could have been regarded as imports, constitutionally immune from state taxation. We confine the present discussion to the question whether such articles, brought from the Philippines and introduced into the United States, are imports so immune.

We have adverted to the fact that the reasons for protecting from interference, by state taxation, the consti-

[6] See Langdell, "The Status of our New Territories," 12 Harv. L. Rev. 365, 371; see also Thayer, "Our New Possessions," 12 Harv. L. Rev. 464; Thayer, "The Insular Tariff Cases in the Supreme Court," 15 Harv. L. Rev. 164; Littlefield, "The Insular Cases," 15 Harv. L. Rev. 169, 281.

tutional power of the national government to collect customs duties, apply equally whether the merchandise brought into the country is of foreign origin or not. The Constitution has not made the foreign origin of articles imported the test of importation, but only their origin in a place over which the Constitution has not extended its commands with respect to imports and their taxation. Hence our question must be decided, not by determining whether the Philippines are a foreign country, as indeed they have been held not to be within the meaning of the general tariff laws of the United States, *Fourteen Diamond Rings* v. *United States,* 183 U. S. 176; cf. *De Lima* v. *Bidwell,* 182 U. S. 1; *Dooley* v. *United States,* 182 U. S. 222, and within the scope of other general laws, *Faber* v. *United States,* 221 U. S. 649; cf. *Huus* v. *New York & P. R. S. S. Co.,* 182 U. S. 392; *Gonzales* v. *Williams,* 192 U. S. 1; *West India Oil Co.* v. *Domenech,* 311 U. S. 20, but by determining whether they have been united governmentally with the United States by and under the Constitution.

That our dependencies, acquired by cession as the result of our war with Spain, are territories belonging to, but not a part of, the Union of states under the Constitution, was long since established by a series of decisions in this Court beginning with *The Insular Tax Cases* in 1901; *De Lima* v. *Bidwell, supra; Dooley* v. *United States, supra,* 182 U. S. 222; *Downes* v. *Bidwell,* 182 U. S. 244; *Dooley* v. *United States,* 183 U. S. 151; and see also *Public Utility Commissioners* v. *Ynchausti & Co.,* 251 U. S. 401, 406–407; *Balzac* v. *Porto Rico, supra.* This status has ever since been maintained in the practical construction of the Constitution by all the agencies of our government in dealing with our insular possessions. It is no longer doubted that the United States may acquire territory by conquest or by treaty, and may govern it through the exercise of the power of Congress conferred by § 3 of Article IV of the Constitution "to dispose of and make all needful Rules and Regu-

lations respecting the Territory or other Property belonging to the United States." *Dooley* v. *United States, supra,* 183 U. S. at 157; *Dorr* v. *United States,* 195 U. S. 138, 149; *Balzac* v. *Porto Rico, supra,* 305; *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308, 323.

In exercising this power, Congress is not subject to the same constitutional limitations, as when it is legislating for the United States. See *Downes* v. *Bidwell, supra; Hawaii* v. *Mankichi,* 190 U. S. 197; *Dorr* v. *United States, supra; Dowdell* v. *United States,* 221 U. S. 325, 332; *Ocampo* v. *United States,* 234 U. S. 91, 98; *Public Utility Commissioners* v. *Ynchausti & Co., supra,* 406–407; *Balzac* v. *Porto Rico, supra.* And in general the guaranties of the Constitution, save as they are limitations upon the exercise of executive and legislative power when exerted for or over our insular possessions, extend to them only as Congress, in the exercise of its legislative power over territory belonging to the United States, has made those guaranties applicable. See *Balzac* v. *Porto Rico, supra.* The constitutional restrictions on the power of Congress to deal with articles brought into or sent out of the United States, do not apply to articles brought into or sent out of the Philippines. Despite the restrictions of §§ 8 and 9 of Article I of the Constitution, such articles may be taxed by Congress and without apportionment. *Downes* v. *Bidwell, supra.* It follows that articles brought from the Philippines into the United States are imports in the sense that they are brought from territory, which is not a part of the United States, into the territory of the United States, organized by and under the Constitution, where alone the import clause of the Constitution is applicable.

The status of the Philippines as territory belonging to the United States, but not constitutionally united with it, has been maintained consistently in all the governmental relations between the Philippines and the United

States. Following the conquest of the Philippines, they were governed for a period under the war power. After annexation by the Treaty of Paris of December 10, 1898, military government was succeeded by a form of executive government. By the Spooner Amendment to the Army Appropriation Bill of March 2, 1901, c. 803, 31 Stat. 895, 910, it was provided that "all military, civil, and judicial powers necessary to govern the Philippine Islands . . . shall, until otherwise provided by Congress, be vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct, for the establishment of civil government and for maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property, and religion . . ." On July 1, 1902 Congress provided for a complete system of civil government by the original Philippine Organic Act, c. 1369, 32 Stat. 691. Step by step Congress has conferred greater powers upon the territorial government, and those of the federal government have been diminished correspondingly, although Congress retains plenary power over the territorial government until such time as the Philippines are made independent. This process culminated in the Act of March 24, 1934, c. 84, 48 Stat. 456, providing for the independence of the islands. The adoption by the Philippines and approval by the United States of a constitution for the Commonwealth of the Philippine Islands, as provided by the Act, have prepared the way for their complete independence.

The Act of 1934 made special provisions for the relations between the two governments pending the final withdrawal of sovereignty of the United States from the Philippines and in particular provided for a limit on the number and amount of articles produced or manufactured in the Philippine Islands that might be "exported" to the United States free of duty. § 6. It provided for the complete withdrawal and surrender of all right of posses-

sion, supervision, jurisdiction, control or sovereignty of the United States over the Philippines on the 4th of July following the expiration of ten years from the date of the inauguration of the new government, organized under the Constitution provided for by the Independence Act.[7] § 10 (a). The new Philippine Constitution was adopted on February 8, 1935, and the new government under it was inaugurated on November 14, 1935. By the provisions of the Independence Act, the United States retained certain powers with respect to our trade relations with the Islands, with respect to their financial operations and currency, and the control of their foreign relations. The power of review by this Court of Philippine cases is continued and extended to all cases involving the Constitution of the Commonwealth of the Philippine Islands. § 7 (6). Thus by the organization of the new Philippine government under the constitution of 1935, the Islands have been given, in many aspects, the status of an independent government, which has been reflected in its relations as such with the outside world.[8]

---

[7] Since the war with Japan and that country's temporary occupation of the Philippines, Congress has provided that the date of the independence of the Philippines may be advanced by the President of the United States, upon his proclamation of their liberation and the restoration of the normal functions of government. Act of June 29, 1944, c. 322, 58 Stat. 625.

[8] The Philippine Commonwealth participated as a signatory in the following: Agreement and Protocol Regarding Production and Marketing of Sugar of May 6, 1937; Universal Postal Convention of May 23, 1939; Declaration by United Nations of January 1, 1942 (the Philippines signed the Declaration on June 14, 1942); Agreement for United Nations Relief and Rehabilitation Administration of November 9, 1943; United Nations Monetary and Financial Conference at Bretton Woods, New Hampshire, of July 1 to 22, 1944; The Protocol Prolonging the International Agreement Regarding the Regulation of Production and Marketing of Sugar of August 31, 1944; The International Civil Aviation Conference of November 1 to December 7, 1944.

In the meantime, and ever since *The Insular Tax Cases, supra,* Congress has often treated as imports, articles brought to the United States from the Philippines. By the Act of August 29, 1916, c. 416, 39 Stat. 548, 48 U. S. C. § 1042, the territorial government of the Philippines was authorized to enact tariff laws. The Sugar Quota Law, 7 U. S. C. § 608a (1), defined as imports the amounts of sugar permitted to be brought into the United States from the Philippines, and prohibited such importation in excess of prescribed quotas. The Act of June 14, 1935, c. 240, 49 Stat. 340, 48 U. S. C. § 1236a, provided for restriction of the amount of hard fibers and its products which could be brought annually from the Philippines to the United States. See also 48 U. S. C. § 1236. And the Independence Act, *supra,* 48 U. S. C. § 1236 (a) (b), also regulated the amount of "export tax" which might be levied by the Philippines on articles shipped to the United States from the Philippine Islands.[9]

The Independence Act, while it did not render the Philippines foreign territory, *Cincinnati Soap Co.* v. *United States, supra,* 318–320, treats the Philippines as a foreign country for certain purposes. In 48 U. S. C. § 1238 (a) (1), it established immigration quotas for Filipinos coming to the United States, as if the Philippines were a separate country, and in that connection extended to Filipinos the immigration laws relating to the exclusion or expulsion of aliens. It also provided, 48 U. S. C. § 1238 (a) (2), that citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens. For purposes of 8 U. S. C. §§ 154 and 156, relating to deportation, the Philippine Islands are declared to be a foreign country. 48 U. S. C. § 1238 (a) (4). Foreign

[9] This Court has referred to goods brought here from the Philippines as "imports." See *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308, 320.

service officers of the United States may be assigned to the Philippines, and are to be considered as stationed in a foreign country. 48 U. S. C. § 1238a. And the Independence Act, § 6, 48 Stat. 456, 460, provides that "when used in this section in a geographical sense, the term 'United States' includes all Territories and possessions of the United States, except the Philippine Islands, the Virgin Islands, American Samoa, and the island of Guam." As we have said, the Philippines have frequently dealt with other countries as a sovereignty distinct from the United States.

The United States acquired the Philippines by cession without obligation to admit them to statehood or incorporate them in the Union of states or to make them a part of the United States, as distinguished from merely belonging to it. As we have seen, they are not a part of the United States in the sense that they are subject to and enjoy the benefits or protection of the Constitution, as do the states which are united by and under it. In particular, the constitutional provisions governing imports and exports and their taxation, do not extend to articles brought into or out of the Philippines. The several acts of Congress providing for the government of the Philippines have not altered their status in these respects, and Congressional legislation governing trade relations of the United States with the Philippines has not only been consistent with that status, but has often treated articles brought from the Philippines to the United States as imports. Our tariff laws in their practical operation have in general placed merchandise brought from the Philippines into the United States in the same relationship to the constitutional taxing power of the national government and the states as articles brought here from foreign countries.

The national concern in protecting national commercial relations, by exempting imports from state taxation, would seem not to be essentially different or less in the

case of merchandise brought from the Philippines, which are not included in the territory organized under the Constitution, but for which we have assumed a national responsibility, than in the case of articles originating on the high seas or in foreign countries. As we have said, the reasons for protecting from state taxation articles thus brought into the territorial United States are the same in either case. The advantages and disadvantages, if any, which result from the tax immunity, are inherent in the import clause. But those advantages and disadvantages in the case of the Philippines are no more beyond the reach of Congress than in the case of other imports. Congress is left free by the terms of the import clause to remove the prohibition of state taxation of imports and with it the advantages or disadvantages, whatever they may be, arising from the tax immunity. Congress, through the commerce clause, possesses the same power of control of state taxation of all merchandise moving in interstate or foreign commerce. And Congress is free, as in the case of other imports, to regulate the flow of merchandise from the Philippines into the United States by the imposition of either customs duties or internal revenue taxes.

We conclude that practical as well as theoretical considerations and the structure of our constitutional system require us to hold that articles brought from the Philippines into the United States are imports, subject to the constitutional provisions relating to imports both because, as was said in *Brown* v. *Maryland,* they are brought into the United States, and because the place from whence they are brought is not a part of the United States in the constitutional sense to which the provisions with respect to imports are applicable.

Reversed.

MR. JUSTICE REED, dissenting in part.

My disagreement with the Court is confined to that portion of the opinion which determines that the Philippine

Islands is not a part of this "country" as that word is defined in the opinion.

The practical effect of the decision is to place the products of those territories and possessions which have not been incorporated into our "country" as integral parts thereof—Puerto Rico, the Philippines, Guam, Canal Zone, and perhaps other territories or possessions—at a considerable advantage over the competing products of states of the continental United States. It enables importers, whether for manufacture or sale, from these possessions to keep on hand, tax free, quantities of non-taxable original packages of imported goods, such as clothing, embroideries, liquors, tobacco, sugars, vegetable oils and fibres. Freedom from taxation has today become an appreciable advantage. Furthermore this freedom from state taxation is gained through an interpretation of Constitutional power and therefore is beyond the reach of equalization by the states alone in all circumstances and by the Congress except by complex tariff legislation which would only reach warehoused imports from dependencies. The Congressional relief to producers of the several states of the Union, therefore, is an awkward approach, which will create irritation with the importing territories by reason of countervailing tariff increases.

These are only practical disadvantages of today's decision which should not override a Constitutional requirement; but as it does not seem to me the Constitution clearly calls for this sacrifice of markets by producers in the states, I would not construe the Constitution to put the Philippines entirely beyond the pale of the American economic union. I do not see the necessity for such a ruling and, in fact, I think the Constitution calls for precisely the opposite conclusion for the following reasons.

(1) In the consideration of the taxability by Ohio of shipments from the Philippines which have completed

their journey from the Philippines but remain intact in their original packages, the significant Constitutional provision is Article I, § 10, Clause 2, which reads as follows:

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

The Constitution contains no definition of the word "imports" and nothing appears in its history or in the decisions of this Court which indicates that the word was used otherwise in this section than in its normal meaning of a thing brought into the limits of the nation which possesses power over the external commerce which may flow into a state or states which are subject to the prohibition of the quoted Constitutional provision. Normally these imports are from foreign countries and hence there are many references to imports in legislation and decisions which indicate that the source of imports is foreign countries.[1]

Lands are either within the sovereign power of the United States or are outside and beyond that power. When conquest ripens into cession, lands lose their for-

---

[1] Products of the sea brought in as imports are a minor variation. Tariff Act of 1930, 46 Stat. 590, provides that dutiable articles are those "imported from any foreign country." The Philippines is not a foreign country under a tariff act which prohibits importation from a foreign country of goods made by convict labor. 28 Op. Atty. Gen. 422. The Philippines is not foreign country under the tariff laws. *De Lima* v. *Bidwell,* 182 U. S. 1, 197; *Fourteen Diamond Rings* v. *United States,* 183 U. S. 176; *Dooley* v. *United States,* 182 U. S. 222, 234; *Dooley* v. *United States,* 183 U. S. 151; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 520.

eign character and become a part of the territories of the victor.[2] The United States has been content to leave its possessions with a large measure of self-government. To the Philippines it has promised full independence but the time for fulfillment of that promise has not arrived. Until that date, the United States has responsibilities toward the Philippines and has exercised power unilaterally to make further concessions to the Islands.[3] Until complete independence is reached, the citizens of the Philippines owe allegiance to the United States and every Philippine official recognizes this duty. 48 Stat. 456. The interrelation between the United States and the Philippines is for both a basis for amicable relations after complete dissolution of the existing ties.[4]

(2) This Court, however, determines that an import under Article I, § 10, Clause 2, is a commodity brought into this "country" and that the Philippines is not a part of this "country" within the meaning which the Court attributes to that word. The Court is of the view that this "country" includes only those sections of the lands under our jurisdiction which have been so incorporated into our system by act of Congress as to be entitled to government under all provisions of the Constitution rather than by Clause 2, § 3, Article IV, regarding "Territory . . . belonging to the United States." *Downes* v.

---

[2] *American Insurance Co.* v. *Canter,* 1 Pet. 511, 542; *Fleming* v. *Page,* 9 How. 603, 614; *Dooley* v. *United States,* 182 U. S. 222, 223.

[3] Philippine Independence Act of March 24, 1934, 48 Stat. 456; amending the Philippine Independence Act as to trade and financial relations and rights of Philippine citizens in the United States and all places subject to its jurisdiction, act of August 7, 1939, 53 Stat. 1226; suspending the export tax on Philippine products, act of December 22, 1941, 55 Stat. 852; Filipino Rehabilitation Commission Act of June 29, 1944, 58 Stat. 626.

[4] Address of President Sergio Osmena on the occasion of the Re-establishment of the Commonwealth Government in Manila, February 27, 1945.

Bidwell, 182 U. S. 244. As a basis for this distinction, the Court depends upon a statement in *Brown* v. *Maryland,* 12 Wheat. at 437, that a "duty on imports is a custom or a tax levied on articles brought into a country." The Court must make this argument to support its position as of course the Philippines is not a foreign country. *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308, 319.

There are a number of reasons why I think that this reliance on this language of *Brown* v. *Maryland* leaves the opinion without support in its conclusion that shipments from the Philippines are imports. In the first place, in *Brown* v. *Maryland,* there was no occasion to distinguish between articles brought into the country and articles brought from foreign places. The words used are descriptive of commerce from foreign lands. Secondly, *Woodruff* v. *Parham,* 8 Wall. 123, interprets the meaning of "brought into the country" as used in *Brown* v. *Maryland* as follows, pp. 131–32:

"In the case of *Brown* v. *Maryland,* the word imports, as used in the clause now under consideration, is defined, both on the authority of the lexicons and of usage, to be articles brought into the country; and impost is there said to be a duty, custom, or tax levied on articles brought into the country. In the ordinary use of these terms at this day, no one would, for a moment, think of them as having relation to any other articles than those brought from a country foreign to the United States, and at the time the case of *Brown* v. *Maryland* was decided—namely, in 1827—it is reasonable to suppose that the general usage was the same, and that in defining imports as articles brought into the country, the Chief Justice used the word country as a synonyme for United States."

See also *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 520. Thirdly, the writer of the opinion in *Brown* v. *Maryland* referred, p. 439, to the purpose of the prohibition against state taxation of imports as a thing de-

sirable "to preserve . . . our commercial connexions with foreign nations." The dissent referred repeatedly to foreign merchandise as did counsel in their argument. Fourthly, the suggestion that the Court's view is supported by the decisions that sea products are imports seems to me unfounded. Deep-sea products come from waters beyond the national sovereignty or jurisdiction and hence are imports under any definition. American fisheries even may require, unless American bottoms are American territory, legislation to relieve their catch of general tariff charges. *Procter & Gamble Mfg. Co.* v. *United States,* 19 C. C. P. A. (Customs) 415. The required conclusion, it seems to me, is that an import is an article brought from beyond the sovereignty or jurisdiction of the United States. *De Lima* v. *Bidwell,* 182 U. S. 1, 180.

(3) Land within the jurisdiction of the United States cannot export to the United States under § 10, Article I, any more than one state can export to or import from another state. 192 U. S. at 520. When the *Insular Cases* determined that articles from the lands Spain ceded to us were subject to tariff duties at the will of Congress, the decisions were based on the power of Congress to impose duties unequally, i e., without uniformity, despite Article I, § 8, Clause 1, of the Constitution,[5] on commodities from lands under our flag because these lands had not been incorporated by act of Congress into the Union as an integral part of the United States. *Downes* v. *Bidwell,* 182 U. S. 244, 298 *et seq.; Dorr* v. *United States,* 195 U. S. 138, 149; *Balzac* v. *Porto Rico,* 258 U. S. 298, 305. The question as to the meaning of imports or imported was

[5] Article I, § 8, Clause 1: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; . . ."

not discussed. Whether or not the articles were imports, so long as the lands of their origin were not an integral part of the United States, the Congress could put such duties as it chose on the products. It does not follow that because the Philippines is not an integral part of the United States its shipments are imports under Article I, § 10, unless the view of the Court's opinion of today is adopted that an import is an article brought into the United States as that country is defined in the Court's opinion. The argument advanced by the Court to sustain its declaration that the articles brought from the Philippines are imports would have made shipments from the Louisiana Purchase, *Downes* v. *Bidwell,* 182 U. S. 244, 322–33; Florida, *id.* pp. 333–34, and Hawaii, *Hawaii* v. *Mankichi,* 190 U. S. 197, 219, also imports until these territories were incorporated into the United States. History refutes such a position.

We are thus left to define the word import as used in § 10, Article I, in its normal sense to accomplish the purpose of the section. It may have had several purposes. *Brown* v. *Maryland, supra,* at p. 439. Whether it was to grant the Union a source of revenue, to preserve harmony among its members or to avoid state tariffs which would affect relations with foreign governments, the purpose is not advanced by molding Philippine shipments into imports in the Constitutional sense. Revenue may be exacted by the federal government from Philippine products brought into the states and a state cannot collect a duty from such articles if they are not imports. *Downes* v. *Bidwell,* 182 U. S. 244; *Woodruff* v. *Parham,* 8 Wall. 123, 133; *Coe* v. *Errol,* 116 U. S. 517, 526. No light can come from the history of the adoption of the section. The idea of an American possession was not in being. But since the Founding Fathers were creating a commercial as well as a political entity, it seems more consonant with their purpose to define imports under the section as things

brought into the territory under the jurisdiction or sovereignty of the American government.

(4) Such a conclusion probably meant little to the Philippines. Congress has provided for their early independence. But the principle established by this decision will persist for the other lands which became American by the Treaty of Paris. The Court's opinion disclaims determination of any rights beyond the Philippines but the basis upon which the decision rests supports similar rights for all lands covered by the Treaty of Paris. Similar articles covered all the ceded lands.[6] Puerto Rico is in the same status as the Philippines. *Balzac* v. *Porto Rico,* 258 U. S. 298, 305. Today's decision thus assumes a continuing importance which justifies setting out my reasons for dissenting.

MR. JUSTICE BLACK, dissenting.

In *Brown* v. *Maryland,* 12 Wheat. 419, 442, Marshall, C. J., pointedly rejected the argument that the rule announced in that case would permit an importer "to bring in goods . . . for his own use, and thus retain much valuable property exempt from taxation."[1] Today, this Court,

---

[6] Treaty of Paris, December 10, 1898, 30 Stat. 1754:

"Article II. Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones.

"Article III. Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within the following line: . . ."

[1] Counsel for Maryland had argued that to permit state tax immunity in that case would result in granting immunity to "an importer who may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation." In reply to this argument, Marshall rejected the assumption that the principles then announced would grant state tax exemptions to imports that had reached their ultimate destination and were being used or held for use by the importer. "The tax," he said, "finds the article already incorporated with the mass of property by the act of the importer. He has used the

in holding that an Ohio manufacturer may escape payment of a non-discriminatory state *ad valorem* tax on goods imported from abroad and held for use in its factory, interprets Marshall's opinion in a manner which squarely conflicts with his own interpretation of the rule he announced.

It has, from the very beginning, been recognized that " . . . there must be a point of time when the prohibition [to tax] ceases, and the power of the state to tax commences"; although the task of drawing this line is so difficult that no general rule "universal in its application" can be stated, yet that line nevertheless ". . . exists, and must be marked as the cases arise." *Brown* v. *Maryland, supra,* 441. The Court did there draw an arbitrary line of demarcation marking the boundary of a state's power to tax property "imported for sale." It held that, as to property imported for sale, "while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." *Brown* v. *Maryland, supra,* at 442. The right to sell, it was there said, was an element of the right to import, and thus a state tax imposed before, or as a condition upon, the sale, would substantially impair the right of sale granted by the government to importers. The Court reinforced its conclusion by referring to its belief that a state tax on the importer would increase the cost to the ultimate domestic purchasers, and that the effect of this would be to enable the great seaport states indirectly to levy tribute upon consumers of imported articles living in the nonseaport states, a practice which the constitutional clause here invoked was intended to prevent.[2]

---

privilege [i. e., of sale] he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer." p. 443.

[2] To the same effect, see *Woodruff* v. *Parham,* 8 Wall. 123, 134–136.

While the rule announced in *Brown* v. *Maryland* has at times been severely criticized, see e. g. *License Cases,* 5 How. 504, opinion of Mr. Justice Daniel, 615–617, and has in some cases been narrowly restricted in its application,[3] it has been, and still is, the general rule of decision in this Court, as regards imports for sale from foreign countries. But neither the rule nor the reasoning in *Brown* v. *Maryland,* nor any of the cases which followed it, support the Court's holding that one who imports an article for his own use or consumption can enjoy the full benefits of ownership, and simultaneously claim an immunity from state taxation on the ground that it is still an import. The Court, in *Brown* v. *Maryland,* was in reality treating goods in the hands of an importer for sale, as though they were still in transit until the first sale had been made. This was in accord with the interpretation of the rule by Chief Justice Taney in the *License Cases, supra,* 575. He there said that while imported articles "are in the hands of the importer for sale . . . they may be regarded as merely *in transitu,* and on their way to the distant cities, villages and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported."

But the fibers here were not *in transitu* in any possible sense of the phrase. Every conceivable relationship they had once borne to the process of importation had ended. They were at rest in the petitioner's factory along with its other raw materials, having arrived at the point where they were "to be used and consumed" in current produc-

[3] See e. g. *May* v. *New Orleans,* 178 U. S. 496; *Burke* v. *Wells,* 208 U. S. 14; *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506; *Gulf Fisheries Co.* v. *MacInerney,* 276 U. S. 124; *Baldwin* v. *Seelig,* 294 U. S. 511, 526. See also *Mexican Petroleum Corp.* v. *South Portland,* 121 Maine 128, 115 A. 900, 26 A. L. R. 965, 971–980; *Tres Ritos Ranch Co.* v. *Abbott,* 44 N. Mex. 556, 105 P. 2d 1070.

tion, and kept as a "backlog" to assure constant operation of the plant.

Brown v. *Maryland* and the cases which followed it stand for the rule that one who pays import duties on goods intended for sale thereby purchases the right to sell the goods, free from state taxation so long as the goods are held in the original package. Until today, none of this Court's decisions have ever held or even intimated that one who imports goods for his own use purchases from the federal government, by payment of import duties, a right to hold them free from liability for state taxes, after they have reached the end of their import journey and are being held for use in the importer's factory. Neither the "purchase-of-a-right-to-sell" argument nor any of the other reasons deemed relevant to support the "import-for-sale-original-package" doctrine call for its extension to goods imported for use.

It is clear under the doctrine of *Brown* v. *Maryland,* that after sale by an importer, imported goods are subject to state taxation. The opinion of the Court today, holding that goods held for use are immune from state taxation, results in this rather odd situation: One who imports goods himself and holds them for his own use in his factory is not liable to state taxes on such goods; but if he bought the goods from one engaged in the business of importing, he *would* be liable to taxation on the same goods. The artificiality of this tax distinction suggests grave reasons to question the soundness of the Court's interpretation of the rule. Furthermore, implicit in Marshall's opinion is a recognition of the importance of protecting goods imported for sale from discrimination in the form of taxes. The net effect of today's opinion is to accomplish just such discrimination, in favor of goods imported for use, and against goods imported for sale.

Again, state taxation of previously imported goods held for use in manufacturing does not afford the great seaport

states an opportunity to tax imports to the detriment of other states. This was one of the apprehended evils which the "import for sale" rule in *Brown* v. *Maryland* was fashioned to prevent. The most fertile imagination would be hard put to prove that it would injure or threaten any other state for Ohio to collect its non-discriminatory *ad valorem* tax on fibers held for use in that state. Certainly the Court advances no persuasive argument in this respect. On the contrary, it does appear that Ohio, as well as other states, will be injured by a constitutional interpretation which denies Ohio the right to collect the tax. Ohio is injured by the Court's new rule because it cannot apportion its tax fairly upon all who carry on business under the protection of Ohio's laws.

The rule announced by the Court also discriminates against other states. Their products held for use are subject to state taxation. Products from abroad are not. Wines offer an illustration. Wines, stocked in one's private cellar, produced from California or New York grapes, and held for future use in the original package or otherwise, are subject to state taxation. Today's rule renders a state wholly powerless to tax wines imported from abroad and held for future use side by side with taxable wines made in the United States. Thus, through constitutional interpretation, all foreign products are granted a tax subsidy at the expense of the individual states affected. If I thought the Constitution required such tax discriminations against American products, I should agree to the Court's opinion. The whole history of events leading up to the Constitution, and this Court's opinions in construing it, persuade me that no such consequence was ever contemplated by those who wrote or approved our Constitution.

A final word as to today's new constitutional doctrine. Precisely how it is to be applied the Court does not tell

us. From one part of the Court's opinion it appears that the state can never tax these fibers at all, since it seems to be said the state can never tax until they "are subjected to the manufacture for which they were imported." Another part of the opinion indicates they can be taxed when the original package is broken. Previous opinions of this Court have indicated the difficulties and defects of an original package doctrine.[4] Are these fibers to be taxed when the "reed" which covers them is removed, or must the state wait until it can prove one of the steel bands has been broken? Other questions suggest themselves in regard to wine imported for use and stored in one's private cellar for individual consumption. When, if at all, can a state tax it? Is it when the wine reaches the cellar or must the state withhold its taxing hand until the wine is "subjected to the [consumption] for which it was imported"? Or can the state tax each crate when the owner, or someone for him, removes the crate's top with a crowbar? If the wine is imported in large casks, does it become taxable when the stopper is removed from the bunghole or only when a part or all of it has been consumed? The states are entitled to have a definite answer to these practical questions.

MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE join in this opinion. MR. JUSTICE DOUGLAS is of the view that, accepting the Court's ruling that these products are "imports," the rule should be applied without discrimination against the Philippines.

MR. JUSTICE MURPHY, concurring in part.

With MR. JUSTICE BLACK's view that whatever constitutional tax immunity the merchandise in question may have had was lost by virtue of its storage in petitioner's

[4] Note 3, *supra.*

warehouse pending its use in petitioner's manufacturing operations I agree. But the Court holds otherwise on that issue. We therefore are met with the further issue as to whether the fact that the merchandise was shipped from the Philippine Islands to the United States made the merchandise an import within the meaning of Article I, § 10, Clause 2 of the Constitution and therefore immune from state taxation. As to that problem I am convinced that the affirmative answer given by the CHIEF JUSTICE is the correct one and I concur in that portion of his opinion.

That affirmative answer, in my estimation, is compelled in good measure by practical considerations. The moral and legal obligations owed the Philippine Islands by the United States are, so far as I am aware, matchless and unique. The United States is committed to a policy of granting complete independence to the Philippines. It has already granted their people and their officials a large measure of autonomy. But until the sovereignty of the United States is finally withdrawn, the United States retains plenary and unrestricted powers over them and is responsible for their welfare.

We have as a nation exhibited an ideal and a selfless concern for the well-being of the Philippine people, a concern that has been deepened by the devastation that war has brought to their land. Since the Islands were ceded to us, we have at once fostered their economic development through preferential trade agreements and encouraged their desires for freedom and independence. Their industries and their agriculture have gradually been adjusted in contemplation of their eventual sovereign independence. But war has stricken their land and their peoples. Their growing economy has been largely decimated by over three years of ruthless invasion and occupation. Filipinos in countless numbers have yielded up

not only their property but their lives and their liberties. Their economic and social structure has fallen about them in ruins.

Now, with the Islands liberated, our moral and legal obligations are greater than ever before. Our responsibility for providing urgent relief and rehabilitation has been readily assumed. But the more complex and difficult duty of helping to reconstruct the Philippine economic structure remains to be fulfilled. It is clear that the Philippines cannot safely be thrown into the world market and left to shift for themselves. For the foreseeable future, at least, their economy must be closely linked to that of the United States, without either country abandoning or retreating from the common ideal of independence for the Philippines.

Accordingly it is my view that if it is reasonably possible to do so we should avoid a construction of the term "imports," as used in Article I, § 10, Clause 2 of the Constitution, that would place Philippine products at a disadvantage on the American market to the advantage of products from other countries or that might be a means of impeding the economic rehabilitation of the Philippines. If we can justifiably construe that term to prohibit state taxation on shipments from the Philippines we shall to that extent have conformed to the national policy of aiding the Philippine reconstruction. Any taxation or tariff on Philippine shipments that may be felt to be necessary from the standpoint of the United States would then become a matter solely for Congress, which could properly balance any conflicting interests of the two nations.

Such a construction, in my estimation, is entirely fair and reasonable. There are, to be sure, statements by this Court to the effect that the term "imports" refers only to those goods brought in from a country foreign to the United States. *Woodruff* v. *Parham,* 8 Wall. 123, 136;

Dooley v. *United States*, 183 U. S. 151, 154. But such statements, as pointed out by the Court today, were unnecessary to the decision of the issues there involved and cannot control the problem presented here. It has also been held that the Philippine Islands are not a foreign country within the meaning of tariff laws specifically referring to any "foreign country." *Fourteen Diamond Rings* v. *United States*, 183 U. S. 176; *De Lima* v. *Bidwell*, 182 U. S. 1. The inapplicability of these cases is obvious.

It further appears that Congress has usually avoided the use of the term "imports" in the enactment of legislation affecting trade with the Philippines and other dependencies and that the term has been regarded by certain government agencies as inapplicable to articles coming from the Philippines. But such usage clearly cannot affect our interpretation of a constitutional provision.

As appears more fully in the Court's opinion, there is thus no controlling authority requiring us to hold that shipments from the Philippines are not imports within the meaning of Article I, § 10, Clause 2 of the Constitution. Under such circumstances the interpretation of this constitutional provision adopted by the CHIEF JUSTICE is a permissible one. And, in view of what I conceive to be the practical considerations, it is a highly necessary and desirable one. Only under that interpretation can this part of the Constitution be consistent with our duties as trustee for the Philippines.

COMMISSIONER OF INTERNAL REVENUE *v.* SMITH.

ON PETITION FOR REHEARING.

No. 371. Decided April 9, 1945.

The conclusion of the Tax Court upon the facts of this case that the option to purchase stock was effectively exercised and taxable compensation was received, not when the optionee made his election and paid the option price, but when the shares were delivered to him, is supported by the record. P. 696.

Rehearing denied.

ON PETITION for rehearing of *Commissioner* v. *Smith,* 324 U. S. 177.

Mr. Clarence D. Phillips for respondent.

Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key and *J. Louis Monarch* for petitioner.

Messrs. Roswell Magill and *George G. Tyler* filed a brief, as *amici curiae,* in support of the petition.

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

Respondent, on motion for rehearing in this Court, for the first time contends that if he is taxable at all after the receipt of the option in 1934, he is taxable as of the date in March, 1938, when he exercised his option, and not when he received the stock in later years. The only later year in question is 1939 in which he received a substantial part of the stock. Before the delivery in 1939 and after the exercise of the option in 1938 there was a substantial increase in the value of the stock. He argues that the tax should be measured by the value of the stock in 1938 less

the option price. Cf. *Palmer* v. *Commissioner*, 302 U. S. 63, 73.

It is true that respondent gave notice of his exercise of the option and paid the option price in 1938. But at that time Western, under its contract with Hawley, had a right to receive but a part of the stock subject to respondent's option; its right to the remainder was conditioned upon its making further payments of Hawley's indebtedness. Respondent's option contemplated delivery to him of Hawley's stock only if and when Western became entitled to receive the stock from Hawley. In fact deliveries of the stock were made to respondent upon each occasion only a day or two after Western received it from Hawley.

The Tax Court found that respondent received compensation "when [he] exercised his option and received the stock." We take it that the Tax Court regarded fulfillment of the conditions upon the right of Western to receive the stock, and therefore of the conditions upon the derivative right of respondent to receive it under his option, as prerequisite to the effective exercise of the option; and that the taxable compensation to respondent intended to be secured by the option was in fact received by respondent as and when the shares of stock were delivered to him, since prior to that time there was no certainty that he would receive the stock. This conclusion of the Tax Court finds ample support in the record, and we concur in it.

We do not have before us a case where by the exercise of an option in one year the taxpayer acquires an unconditional right to receive the stock in a later year. We express no opinion upon the question whether, in such a case, compensation would be received and would be taxable in the earlier or the later year.

The petition for rehearing is denied.

MR. JUSTICE ROBERTS adheres to his dissent.

BROOKLYN SAVINGS BANK *v.* O'NEIL.

NO. 445. CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.*

Argued February 5, 6, 1945.—Decided April 9, 1945.

1. In the absence of a bona fide dispute between the employer and the employee as to liability, an employee's written waiver of his right to liquidated damages under § 16 (b) of the Fair Labor Standards Act does not bar a subsequent action by the employee to recover such liquidated damages. P. 707.
2. The legislative policy behind the provision of § 16 (b) for liquidated damages, as evidenced by the legislative history of the provision and by other provisions and the structure of the Act, shows that Congress did not intend that an employee should be allowed to waive his right to liquidated damages. P. 706.
3. Exceptional circumstances of the kind held to justify a waiver agreement such as was upheld in *Fort Smith & Western R. Co.* v. *Mills*, 253 U. S. 206, are not here involved. P. 709.
4. The right of the employee to liquidated damages under § 16 (b) does not depend on whether the employee is compelled to sue for minimum wages due. P. 711.
5. Absence from the Fair Labor Standards Act of a specific provision prohibiting waivers of rights under the Act is not to be construed as permitting such waivers. P. 712.
6. An employee's release and waiver of rights to minimum wages and liquidated damages under the Fair Labor Standards Act, in consideration of a sum known by both employer and employee to be less than the statutory minimum wages due, is void. P. 713.
7. It is unnecessary here to determine questions of the validity and effect of agreements between employer and employee in settlement of claims arising under the Act where there is a bona fide dispute between the parties. P. 714.

---

*Together with No. 554, *Dize* v. *Maddrix*, on certiorari to the Circuit Court of Appeals for the Fourth Circuit, argued February 6, 1945, and No. 421, *Arsenal Building Corp. et al.* v. *Greenberg*, on certiorari to the Circuit Court of Appeals for the Second Circuit, argued February 2, 5, 1945.

8. The question of the right to interest on sums recoverable under § 16 (b) of the Fair Labor Standards Act is one of federal, not local, law. P. 715.
9. An employee recovering minimum wages and liquidated damages under § 16 (b) of the Fair Labor Standards Act is not entitled to interest on the sums so recovered. P. 715.

293 N. Y. 666, 56 N. E. 2d 259, affirmed.

144 F. 2d 584, affirmed.

144 F. 2d 292, reversed in part.

CERTIORARI, 323 U. S. 698, 702, to review decisions in three cases under the Fair Labor Standards Act.

Messrs. Homer Cummings and *Sedgwick Snedeker,* with whom *Messrs. Joseph V. Lane, Jr.* and *Carl McFarland* were on the brief, for petitioner in No. 445; *Mr. Hyman Ginsberg,* with whom *Mr. Harry Leeward Katz* was on the brief, for petitioner in No. 554; *Mr. Robert R. Bruce,* with whom *Messrs. Kenneth C. Newman* and *John J. Boyle* were on the brief, for petitioners in No. 421.

Mr. Max R. Simon for respondent in No. 445; *Mr. Paul Berman,* with whom *Messrs. Eugene A. Alexander, III,* and *Theodore B. Berman* were on the brief, for respondent in No. 554; *Mr. Aaron Benenson,* with whom *Mr. James L. Goldwater* was on the brief, for respondent in No. 421.

Solicitor General Fahy, Messrs. Robert L. Stern, Douglas B. Maggs, George M. Szabad, Albert A. Spiegel and *Miss Bessie Margolin* filed a brief in Nos. 445 and 554, and with *Mr. Jerome H. Simonds* a brief in No. 421, on behalf of the Administrator of the Wage and Hour Division, U. S. Department of Labor, as *amicus curiae.*

MR. JUSTICE REED delivered the opinion of the Court.

The writs of certiorari granted in these three cases present questions as to the interpretation of Section 16 (b) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, at 1069, which provides that an employer who violates the

minimum wage and maximum hour provisions of the Act " . . . shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . ." [1] Cases No. 445 and No. 554 raise the question whether an employee subject to the terms of the Act can waive or release his right to receive from his employer liquidated damages under § 16 (b). Case No. 421 presents the issue of whether in a suit brought pursuant to the provisions of § 16 (b) the employee is entitled to interest on sums recovered as wages and liquidated damages under that section. Since these three cases involve similar problems relating to the interpretation of § 16 (b) and the Congressional policy behind its adoption, all three cases will be dealt with in one opinion. See also No. 462, *post,* p. 720.

No. 445.

The petitioner, Brooklyn Savings Bank, owned and operated an eleven-story office building in which the respondent was employed as a night watchman during a two-year period from November 5, 1938, to August 30, 1940. Since a substantial portion of that building was

[1] Section 16 (b) provides:

"Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

devoted to the production of goods for commerce,[2] the respondent was entitled to overtime compensation under the provisions of § 7 of the Fair Labor Standards Act.[3] 52 Stat. 1063. No such compensation was paid at that time. However, in November, 1942, over two years after the respondent had left petitioner's service, the petitioner computed the statutory overtime compensation due the respondent and offered him a check for $423.16 in return for a release of all of his rights under the Act. The respondent signed the release and took the check. Since this sum did not include any payment for liquidated damages provided for in § 16 (b) of the Act, the respondent subsequently instituted the present proceeding in a New York City Municipal Court to recover liquidated damages due him under § 16 (b). The complaint was dismissed on the grounds that respondent failed to prove a cause of action and also that the respondent "released any claim for liquidated damages or counsel fees." The Appellate Term reversed, per curiam, holding that respondent was employed in the production of goods for commerce within

---

[2] The New York Appellate Term held that the Fair Labor Standards Act applied to the petitioner's operation of its building. This holding was affirmed by the Appellate Division and the Court of Appeals. See notes 5 and 6. Petitioner did not raise this issue in his petition for certiorari.

[3] Section 7 (a) provides:

"No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

the meaning of the Fair Labor Standards Act and was entitled therefore to recover liquidated damages by reason of petitioner's default in making overtime payments as required by § 7 of the Act.[4] This decision was affirmed by the New York Appellate Division,[5] and by the New York Court of Appeals.[6] Since the New York Court of Appeals decided a federal question of substance not heretofore determined by this Court, we granted certiorari [7] limited to the question of whether the respondent's release of all claims and damages under the Act, given at the time he received payment of the overtime compensation due under the Act, is a defense to an action subsequently brought solely to recover liquidated damages. The jurisdiction of this Court rests on § 237 (b) of the Judicial Code.

No. 554.

The petitioner in this second case operated a box factory in which he employed the respondent during the period from October, 1938, the effective date of the Fair Labor Standards Act, to November, 1942, when respondent was discharged. During this period the respondent worked hours in excess of the statutory maximums in effect during this period. Petitioner failed to pay respondent time and one-half for overtime as required by the Act. In September, 1942, the Wage and Hour Administration procured an injunction, by consent, prohibiting the petitioner from violating the Act. In November, 1942, the petitioner tendered the respondent $500 for wages due and owing under the Act, the latter accepting the money and signing a

[4] *O'Neil* v. *Brooklyn Savings Bank,* 180 Misc. 542, 43 N. Y. S. 2d 25.

[5] *O'Neil* v. *Brooklyn Savings Bank,* 267 App. Div. 317, 46 N. Y. S. 2d 631.

[6] Affirmed without opinion, 293 N. Y. 666, 56 N. E. 2d 259.

[7] 323 U. S. 698.

general release of all claims against petitioner under the Act. Both parties knew at this time that more than $500 was due to respondent for minimum wages and overtime pay under the Act. Shortly thereafter, the respondent engaged counsel to recover the balance due him under the Act. Petitioner, before suit was filed, tendered the balance of the statutory wages due, but respondent refused to accept it because it did not include an equal sum for liquidated damages. Thereupon the respondent brought suit for $276.05, the balance of the statutory wages due respondent, and $776.05, being liquidated damages equal to the whole amount ($500 plus $276.05) which had originally been unlawfully withheld. In his answer, the petitioner pleaded settlement of respondent's claim for $500, the release given by respondent pursuant to such settlement, and the petitioner's subsequent tender of a check for the deficiency in statutory minimum and overtime wages due. The District Court granted judgment for the respondent relying on *Guess* v. *Montague,* 140 F. 2d 500, which held invalid a settlement agreement on the part of employees to accept less than the statutory minimum wage.[8] The Circuit Court of Appeals for the Fourth Circuit affirmed.[9]

Because the decision of the Circuit Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court, we granted certiorari[10] limited to the question of whether there had been a compromise of respondent's claim. Jurisdiction of this Court rests on § 240 (a) of the Judicial Code.

The petition in No. 445 raises the question of whether an employee, accepting from his employer a delayed pay-

[8] *Maddrix* v. *Dize,* 7 Wage Hour Rep. 313 (Jan. 31, 1944, not officially reported).

[9] *Dize* v. *Maddrix,* 144 F. 2d 584.

[10] 323 U. S. 702.

ment of the basic statutory wages due under the Act, can validly release and waive any further right to recover liquidated damages under the provisions of § 16 (b).[11] A preliminary question arises as to whether respondent's release was given in settlement of a bona fide dispute between the parties with respect to coverage or amount due under the Act or whether it constituted a mere waiver of his right to liquidated damages. The state courts made no findings of fact on this issue. Where a state court fails to pass on evidence or make findings of fact because under their respective views the facts referred to are immaterial, we are not relieved from the duty of examining the evidence for the purpose of determining what facts reasonably might be and presumably would be found therefrom by the state court. *Merchants' National Bank* v. *Richmond,* 256 U. S. 635, 638; *Carlson* v. *Curtiss,* 234 U. S. 103, 105. Cf. *United Gas Co.* v. *Texas,* 303 U. S. 123, 143; *Creswill* v. *Knights of Pythias,* 225 U. S. 246, 261. We think the record in this case shows that the release was not given in settlement of a bona fide dispute between employer and employee. Petitioner undertook to pay the respondent after our decision in *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, which determined the applicability of the Fair Labor Standards Act to building operators like the petitioner. Petitioner's answer in the Municipal Court merely relied upon payment of the statutory liability and the release of other claims. With the exception of the recital in the release, there is nothing in the record which shows that the respondent's release was obtained as the result of the settlement of a bona fide dispute between the parties with respect to coverage or amount.[12] Moreover, the decision by the New York Appellate Division was based on *Rigopoulos*

[11] See note 1 *supra.*

[12] The respondent, employee, was informed by a third person some two years after he left the petitioner's employment that petitioner had some money for him. Respondent went to petitioner's offices. According to respondent's testimony, there was no discussion or dispute prior

v. *Kervan,* 140 F. 2d 506, which involved waiver of right to liquidated damages in the absence of a bona fide dispute and which expressly reserved decision on the question of validity of a settlement where there was such a dispute between the parties. The issue presented in No. 445 therefore is whether in the absence of a bona fide dispute between the parties as to liability, respondent's written waiver of his right to liquidated damages under § 16 (b) bars a subsequent action to recover liquidated damages. We are of the opinion that it does not bar such claim.[13]

It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. *Mid-state Horticultural Co.* v. *Pennsylvania R. Co.,* 320 U. S. 356, 361; *Phillips* v. *Grand Trunk R. Co.,* 236 U. S. 662, 667. Cf. *Young* v. *Higbee Co.,* 324 U. S. 204, 212. Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.[14] With respect to private rights

to his acceptance of the check given him by the petitioner either as to the existence of liability under the Act or as to the amount of such liability. Viewed most favorably petitioner's witness' testimony was merely to the effect that the petitioner had subjective doubts as to the existence and amount of its liability.

[13] For a general discussion of the problem raised by this case, see Herman, The Administration and Enforcement of the Fair Labor Standards Act, 6 Law and Contemp. Probs. 368; Tepper, Consent Judgments and Contempt Cases under the Fair Labor Standards Act of 1938, 22 Boston Univ. L. Rev. 390; Determination of Wages under Fair Labor Standards Act, 43 Col. L. Rev. 355; 57 Harv. L. Rev. 257.

[14] See *United States* v. *Morley Construction Co.,* 98 F. 2d 781, 788; *Labor Board* v. *American Potash & Chemical Corp.,* 113 F. 2d 232, 118 F. 2d 630; *Labor Board* v. *Stackpole Carbon Co.,* 128 F. 2d 188, 190; *Waterman S. S. Corp.* v. *Labor Board,* 119 F. 2d 760; *Perry* v.

created by a federal statute, such as § 16 (b), the question of whether the statutory right may be waived depends upon the intention of Congress as manifested in the particular statute. As was stated in *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356, 360, ". . . whether the policy of . . . [the] legislation contemplates the one result or the other . . . is the controlling question."

Neither the statutory language, the legislative reports [15] nor the debates[16] indicates that the question at issue was

---

W. L. Huffman Automobile Co., 104 Neb. 211, 175 N. W. 1021, reversed on rehearing, 104 Neb. 214, 179 N. W. 501; *Harrington* v. *Dept. of Labor & Industry*, 252 Mich. 87, 233 N. W. 361.

[15] The provisions of § 16 (b) appeared for the first time in the bill reported by a Conference Committee of both Houses. The Committee report simply stated, H. Rep. No. 2738, 75th Cong., 3d Sess., p. 33:

"Section 16 of the conference agreement provides a fine of not more than $10,000, or imprisonment for not more than 6 months, or both, for violations of the act. No person is to be imprisoned upon conviction for a first offense. This section also provides for civil reparations for violations of the wages and hours provisions. If an employee is employed for less than the legal minimum wage, or if he is employed in excess of the specified hours without receiving the prescribed payment for overtime, he may recover from his employer twice the amount by which the compensation he should have received exceeds that which he actually received."

There were three legislative reports on predecessor bills but these bills did not contain any provision analogous to § 16 (b). S. Rep. No. 884, 75th Cong., 1st Sess.; H. Rep. No. 1452, 75th Cong., 1st Sess.; H. Rep. No. 2182, 75th Cong., 3d Sess.

[16] As indicated in note 15, *supra*, § 16 (b) was first incorporated into the Fair Labor Standards Act of 1938 in the bill reported out of the Conference Committee of both Houses. The debates in both Houses prior to adoption of the Conference report were quite brief, 83 Cong. Rec. 9158–78, 9246–67. The only reference to § 16 (b) was by Representative Keller who stated, 83 Cong. Rec. p. 9264:

"Among the provisions for the enforcement of the act an old principle has been adopted and will be applied to new uses. If there shall

specifically considered and resolved by Congress. In the absence of evidence of specific Congressional intent, it becomes necessary to resort to a broader consideration of the legislative policy behind this provision as evidenced by its legislative history and the provisions in and structure of the Act. See *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590, 597; *United States* v. *Darby,* 312 U. S. 100, 117–18, 122–23. Such consideration clearly shows that Congress did not intend that an employee should be allowed to waive his right to liquidated damages.

The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce.[17] The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in inter-

---

occur violations of either the wages or hours, the employees can themselves, or by designated agent or representatives, maintain an action in any court to recover the wages due them and in such a case the court shall allow liquidated damages in addition to the wages due equal to such deficient payment and shall also allow a reasonable attorney's fees and assess the court costs against the violator of the law so that employees will not suffer the burden of an expensive lawsuit. The provision has the further virtue of minimizing the cost of enforcement by the Government. It is both a common-sense and economical method of regulation. The bill has other penalties for violations and other judicial remedies, but the provision which I have mentioned puts directly into the hands of the employees who are affected by violation the means and ability to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the act."

[17] H. Rep. No. 2738, 75th Cong., 3d Sess., pp. 1, 13, 21 and 28.

state commerce.[18] To accomplish this purpose standards of minimum wages and maximum hours were provided. Neither petitioner nor respondent suggests that the right to the basic statutory minimum wage could be waived by any employee subject to the Act. No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act. We are of the opinion that the same policy considerations which forbid waiver of basic minimum and overtime wages under the Act also prohibit waiver of the employee's right to liquidated damages.

We have previously held that the liquidated damage provision is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572. It constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living "necessary for health, efficiency and general well-being of workers" [19] and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being.[20] Em-

[18] The legislative debates indicate that the prime purpose of the legislation was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage. 81 Cong. Rec. 7652, 7672, 7885; 82 Cong. Rec. 1386, 1395, 1491, 1505, 1507; 83 Cong. Rec. 7283, 7298, 9260, 9265. See also H. Rep. No. 1452, 75th Cong., 1st Sess., p. 9; S. Rep. No. 884, 75th Cong., 1st Sess., pp. 3–4.

[19] § 2 (a), 52 Stat. 1060.

[20] The necessity of prompt payment to workers of wages has long been recognized by Congress as well as by state legislatures. Numerous statutory provisions have been adopted to insure prompt payment. See for example, 33 U. S. C. § 914 (e) and (f); 46 U. S. C.

ployees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their well-being and efficiency until such sums are paid at a future date. The same policy which forbids waiver of the statutory minimum as necessary to the free flow of commerce requires that reparations to restore damage done by such failure to pay on time must be made to accomplish Congressional purposes. Moreover, the same policy which forbids employee waiver of the minimum statutory rate because of inequality of bargaining power, prohibits these same employees from bargaining with their employer in determining whether so little damage was suffered that waiver of liquidated damage is called for. This conclusion is in accord with decisions of the majority of the federal courts that have considered this question.[21] This result,

---

§ 596; Wis. Rev. Stat. 1941, § 103.39; N. Y. Labor Law, c. 31, § 196; Calif. Labor Code, 1937, §§ 204, 205, 219.

As to the importance to the worker of receiving prompt payment, see Labor Laws and their Administration, 1936 Bull. No. 629, U. S. Dept. of Labor, Bureau of Labor Statistics, p. 139.

[21] *Fleming* v. *Post,* 146 F. 2d 441; *Seneca Coal & Coke Co.* v. *Lofton,* 136 F. 2d 359; *Rigopoulos* v. *Kervan,* 140 F. 2d 506; *Birbalas* v. *Cuneo Printing Industries,* 140 F. 2d 826; *Travis* v. *Ray,* 41 F. Supp. 6; *Hutchinson* v. *William C. Barry, Inc.,* 44 F. Supp. 829. Contra: *Guess* v. *Montague,* 140 F. 2d 500.

There has been less unanimity over the right to compromise claims under the statute in cases involving a bona fide dispute. See *Atlantic Co.* v. *Broughton,* 146 F. 2d 480; *Fleming* v. *Post, supra; Fleming* v. *Warshawsky & Co.,* 123 F. 2d 622; *Donahue* v. *Susquehanna Collieries Co.,* 138 F. 2d 3; *Rigopoulos* v. *Kervan, supra; David* v. *Atlantic Co.,* 69 Ga. App. 643, 26 S. E. 2d 650. For discussion of the release and settlement problem as it has arisen under the state Workmen's Compensation Acts, see Dodd, Administration of Workmen's Compensation, 186 *et seq.*

For lower federal court decisions holding that rights to unpaid minimum wages and overtime compensation constitute a single right, see *Fleming* v. *Post, supra; Birbalas* v. *Cuneo Printing Industries, supra.* Cf. *Buckley* v. *Oceanic S. S. Co.,* 5 F. 2d 545.

moreover, avoids the difficult problems of allocation that would arise in numerous cases where a lump sum was paid for back wages and waiver of right to liquidated damages and where issue was subsequently raised as to whether there had been full payment of the basic minimum and overtime wages specified in the Act. Nor does the instant case involve exceptional circumstances of the kind held to justify a waiver agreement such as was upheld in *Fort Smith & Western R. Co.* v. *Mills,* 253 U. S. 206.

The private-public character of this right is further borne out by an examination of the enforcement provisions of the Act. Although the difficulties of enforcement under the Act were recognized,[22] the Administrator was given limited enforcement powers. Criminal prosecution was available only for willful violations—difficult to prove. § 16 (a). The Administrator's civil remedy lay by way of suit for an injunction, which by its nature tends to be prospective in operation. No power was vested in the Administrator to bring an action at law to obtain payment of minimum wages left unpaid and to recover damages arising from delay in payment. Sole right to bring such suit was vested in the employee under § 16 (b). Although this right to sue is compensatory, it is nevertheless an enforcement provision.[23] And not the least effective aspect of this remedy is the possibility that an employer who gambles on evading the Act will be liable for payment not only of the basic minimum originally due but also damages equal to the sum left unpaid. To permit an employer to secure a release from the worker

[22] See statement by Secretary of Labor, Joint Hearings, Committee on Education and Labor, United States Senate, and Committee on Labor of House of Representatives, 75th Cong., 1st Sess., on S. 2475 and H. R. 7200, Part 1, p. 181. See also note 16, *supra.*

[23] Joint Hearings, *op. cit., supra,* note 22, Part 2, p. 457. See also note 16, *supra.*

637582°—46——49

who needs his wages promptly will tend to nullify the deterrent effect which Congress plainly intended that § 16 (b) should have. Knowledge on the part of the employer that he cannot escape liability for liquidated damages by taking advantage of the needs of his employees tends to insure compliance in the first place. To allow contracts for waiver of liquidated damages approximates situations where courts have uniformly held that contracts tending to encourage violation of laws are void as contrary to public policy.[24]

Prohibition of waiver of claims for liquidated damages accords with the Congressional policy of uniformity in the application of the provisions of the Act to all employers subject thereto, unless expressly exempted by the provisions of the Act. An employer is not to be allowed to gain a competitive advantage by reason of the fact that his employees are more willing to waive claims for liquidated damages than are those of his competitor.[25] The same considerations calling for equality of treatment which we found so compelling in *Midstate Horticultural Co., supra,* exist here.

The provisions of the statute reflect the policy considerations discussed above which prohibit waiver of the right to liquidated damages. Sections 7 (a) and 16 (b) are mandatory in form. In terms they direct that the

---

[24] See *Sage* v. *Hampe,* 235 U. S. 99, 105; *Smith* v. *McCullough,* 270 U. S. 456, 465; *Muschany* v. *United States,* 324 U. S. 49, 64.

[25] H. Rep. No. 2182, 75th Cong., 3d Sess., pp. 6–7, states: "There are to be no differentials either between sections of the United States, between industries, or between employers. No employer in any part of the United States in any industry affecting interstate commerce need fear that he will be required by law to observe wage and hour standards higher than those applicable to his competitors. No employee in any part of the United States in any industry affecting interstate commerce need fear that the fair labor standards maintained by his employer will be jeopardized by oppressive labor standards maintained by those with whom his employer competes."

employer shall not employ a worker longer than the specified time without payment of overtime compensation and that, upon violation of this provision, the employer shall be liable for statutory wages and liquidated damages. One section, § 16 (b), creates the obligation for the entire remedy. Collection of both wages and damages is left to the employee.[26]

Respondent argues that § 16 (b) indicates that the right to liquidated damages arises only if the employee is compelled to sue for minimum wages due. Section 16 (b) in no way bears out this interpretation.[27] It provides absolutely that the employer shall be liable for liquidated damages in an amount equal to minimum wages overdue; liability is not conditioned on default at the time suit is begun. It is also argued that the elimination from a predecessor bill of a provision prohibiting waiver of the provisions of the Act indicates a Congressional intent to allow an employee to waive his claim to liquidated damages.[28]

---

[26] § 16, 52 Stat. 1069.

[27] See note 1, *supra*.

[28] Section 20 (a) and (b) of the original bills introduced into the House and Senate provided as follows:

"SEC. 20. (a) Any contract, agreement, or understanding for the employment of any person in violation of any provision of this Act or of a regulation or order thereunder shall be null and void.

"(b) Any contract, agreement, understanding, condition, stipulation, or provision binding any person to waive compliance with any provision of this Act or with any regulation or order thereunder shall be null and void."

S. 2475, 75th Cong., 1st Sess., introduced May 24, 1937; H. R. 7200, 75th Cong., 1st Sess., introduced May 24, 1937.

Except for renumbering of the section and one slight change in language, this provision remained in the bill and its various amendments, apparently until it was eliminated by the Conference Committee. Section 17, S. 2475, Calendar No. 905 (Report No. 884), 75th Cong., 1st Sess., reported with an amendment, July 6, 1937; § 17, S. 2475, Union Calendar No. 535 (Report No. 1452), 75th Cong., 1st Sess., reported with amendment, Aug. 6, 1937; § 16, S. 2475, 75th

But such a contention proves too much. It applies with equal force to the right to minimum wages. Such an interpretation would nullify the effectiveness of the Act. It is also suggested that the failure to impose criminal sanctions for the violation of the liquidated damage provisions or to authorize an injunction to prevent their violation manifests a difference in Congress' attitude toward the waiver of the employee's right to the basic statutory wage as compared with his right to liquidated damages. But there is no reason for making an employer subject to a criminal penalty or an injunction for failure to pay liquidated damages. They are collectible as private damages by the employee for failure to obey the same requirements as to wages which are punished and controlled, so far as the purely public interest is concerned, by criminal sanctions and injunction.

Petitioner relies on the fact that various other federal statutes authorizing employees to sue for wages or for damages arising from injuries sustained in the course of employment contain specific provisions prohibiting waiver of rights under the acts involved, or provide means by which compromises and settlements can be approved.[29]

Cong., 2d Sess., amended and recommitted, Dec. 17, 1937. The reason for eliminating this provision from the final bill does not appear. It was done in the course of the general revision of the bill in the Conference Committee.

[29] The following federal statutes contain express provisions relating to the waiver or settlement of claims under them: Longshoremen's and Harbor Workers' Comp. Act, 33 U. S. C. §§ 908 (i), 915 (b), 916; Federal Employers' Liability Act, 45 U. S. C. § 55; Jones Act, 46 U. S. C. § 688; settlement of wage claims of merchant seamen, 46 U. S. C. §§ 597, 644. The federal courts have interpreted these provisions strictly so as to protect the employee. *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239; *Duncan* v. *Thompson*, 315 U. S. 1; *Pacific Mail S. S. Co.* v. *Lucas*, 258 U. S. 266; *Arrow Stevedore Co.* v. *Pillsbury*, 88 F. 2d 446; *Pacific Employers Ins. Co.* v. *Pillsbury*, 130 F. 2d 21; *Henderson* v. *Glens Falls Indemnity Co.*, 134 F. 2d 320; *Westenrider* v. *United States*, 134 F. 2d 772.

There is no indication why Congress did not embody a similar provision in the Act under consideration in this case. Absence of such provisions, however, has not prevented the courts from invalidating waivers where the legislative policy would be thwarted by permitting such contracts.[30] The decision in the instant case is based on the legislative policy behind this enactment and issues arising under other acts having different legislative backgrounds are not conclusive in determining the legislative intent with respect to the Fair Labor Standards Act. Failure to provide a method of waiving claims under the Act can support contrary inferences, that such waivers were to be allowed or that the provisions of the Act state a settled policy which cannot be modified by private contracts. We are of the opinion that the legislative history and provisions of the Act support a view prohibiting such waiver. As was stated in *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 397, " 'while in individual cases hardship may result, the restriction will enure to the benefit of the general class of employees in whose interest the law is passed and so to that of the community at large.' [*Adkins* v. *Children's Hospital,* 261 U. S. 525.] *Id.,* p. 563."

The invalidity of the release or waiver in No. 445 makes the release and waiver involved in No. 554 *a fortiori* invalid. In the latter case both the federal District Court [31] and the Circuit Court of Appeals [32] found "that both parties knew more than $500.00 was due . . ." at the time the petitioner tendered $500 to the respondent in return for a comprehensive release covering all of the respondent's claims against the petitioner employer. Thus in that case the employer and employee attempted by means of that release to waive the right to the basic statutory minimum as well as the right to liquidated damages. This

[30] See note 14, *supra.*

[31] 7 Wage Hour Rep. 313.

[32] 144 F. 2d 584, 585.

attempted release and waiver of rights under the Act was absolutely void. See *Smith* v. *McCullough,* 270 U. S. 456, 465. When petitioner attempted to pay the additional sum due as a statutory minimum, the respondent refused to accept payment, thus there was no valid settlement which would operate to bar the respondent employee's right to recover the balance of the statutory minimum wage still due and liquidated damages equal in amount to the entire sum of wages which the employer had not paid promptly.

Our decision of the issues raised in No. 445 and No. 554 has not necessitated a determination of what limitation, if any, § 16 (b) of the Act places on the validity of agreements between an employer and employee to settle claims arising under the Act if the settlement is made as the result of a bona fide dispute between the two parties, in consideration of a bona fide compromise and settlement. Neither of the above-mentioned cases presented such issues for our consideration. Cf. *Duncan* v. *Thompson,* 315 U. S. 1, 7; *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239; *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590, 603.

There remains to be considered the question whether an employee recovering minimum wages and liquidated damages under the provisions of § 16 (b) is also entitled to interest on the sums so recovered.[33] We granted certiorari in No. 421 [34] to the Circuit Court of Appeals for

---

[33] In No. 445 the New York Appellate Term allowed interest on unpaid liquidated damages. *O'Neil* v. *Brooklyn Savings Bank,* 180 Misc. 542, 43 N. Y. S. 2d 25. This was affirmed on subsequent appeals to higher state courts. See notes 5 and 6 *supra.* Since petitioner in No. 445 did not seek certiorari on this issue, we have not examined it. *Connecticut Ry. Co.* v. *Palmer,* 305 U. S. 493, 495.

The federal District Court and Circuit Court of Appeals in No. 554 did not award the employee in that case interest on sums adjudged due as unpaid overtime wages and liquidated damages.

[34] 323 U. S. 698.

the Second Circuit, limited to the question of the propriety of allowing interest on recoveries of unpaid overtime compensation and liquidated damages under the Act. Certiorari was granted because that court decided an important federal question of substance which had not previously been determined by this Court. The jurisdiction of this Court in No. 421 rests on § 240 (a) of the Judicial Code.

We are of the opinion that the question of the right to interest on sums recoverable under the provisions of § 16 (b) of the Act constitutes a question of federal, not local, law. *Board of Commissioners* v. *United States,* 308 U. S. 343, 349–50; see *Prudence Corp.* v. *Geist,* 316 U. S. 89, 95; *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239. Interest is not recoverable in judgments obtained under § 16 (b). As was indicated in our decision in *Overnight Motor Co.* v. *Missel, supra,* § 16 (b) authorizes the recovery of liquidated damages as compensation for delay in payment of sums due under the Act. Since Congress has seen fit to fix the sums recoverable for delay, it is inconsistent with Congressional intent to grant recovery of interest on such sums in view of the fact that interest is customarily allowed as compensation for delay in payment. To allow an employee to recover the basic statutory wage and liquidated damages, with interest, would have the effect of giving an employee double compensation for damages arising from delay in the payment of the basic minimum wages. See *Royal Indemnity Co.* v. *United States,* 313 U. S. 289, 296. Allowance of interest on minimum wages and liquidated damages recoverable under § 16 (b) tends to produce the undesirable result of allowing interest on interest. See *Cherokee Nation* v. *United States,* 270 U. S. 476, 490. Congress by enumerating the sums recoverable

in an action under § 16 (b) meant to preclude recovery of interest on minimum wages and liquidated damages.[35]

The judgments in No. 445 and No. 554 are hereby affirmed. The judgment in No. 421 is reversed in so far as it included interest.

MR. CHIEF JUSTICE STONE, dissenting in No. 445 and concurring in No. 554.

MR. JUSTICE ROBERTS, MR. JUSTICE FRANKFURTER and I think the judgment should be reversed in *Brooklyn Savings Bank* v. *O'Neil,* No. 445, and affirmed in *Dize* v. *Maddrix,* No. 554.

No. 445.

Respondent was employed by petitioner in New York, and in New York gave to petitioner, without consideration, a purported written release of its obligation to pay the statutory liquidated damages prescribed by § 16 (b) of the Fair Labor Standards Act. Section 243 of the Debtor and Creditor Law of New York declares a written instrument purporting to release "all claims, debts, demands or obligations . . . shall not be invalid because of the absence of consideration or of a seal." Counsel are agreed that, unless the words or policy of the Fair Labor Standards Act preclude, the written release was as effective to discharge the obligation for liquidated damages as was the release under seal at common law.

We find nothing in the Fair Labor Standards Act to prevent the effective operation of such a release upon the cause of action for liquidated damages more than any other. Section 16 (b) of the Act authorizes the employee to recover liquidated damages from an employer who violates the duty imposed by §§ 6 and 7 of the Act to pay the prescribed minimum and overtime wages. That duty is expressed in §§ 6 and 7 in terms of a command to the

[35] See note 1, *supra.*

employer. Willful failure to obey it is made a criminal offense by §§ 15 (a) (2) and 16 (a), and authority to enjoin violations of §§ 6 and 7 is given by §§ 15 and 17.

These provisions and these alone afford some basis for inferring a Congressional policy against the release of minimum and overtime wages. But the Act places the right to recover liquidated damages authorized by § 16 (b) on a very different footing. That section expresses no command. It merely imposes a civil liability on the employer and gives an action to the employee to enforce the liability. Failure by the employer to pay the prescribed liquidated damages is not made a criminal offense by §§ 15 and 16 and may not be enjoined under §§ 15 and 17.

The studious avoidance of any provision making the non-payment of the liquidated damages a public wrong, by the omissions of sanctions which the statute does impose for the failure to pay minimum and overtime wages, is the most persuasive kind of evidence that it was the Congressional purpose to leave undisturbed the general policy of the law that a mere private claim for damages may be released at the will of the claimant. It is not an answer to say that "there is no reason for making an employer subject to a criminal penalty or an injunction for failure to pay liquidated damages," since they are "collectible as private damages." It is precisely because the statute in this case has in every respect treated the claim for liquidated damages as a private claim while imposing sanctions, as for a public wrong, for non-payment of minimum and overtime wages, that we must infer that Congress intended that the claim for liquidated damages should have the status of private claims, which are subject to release, a status which the statute denied to minimum and overtime wages.

This pointed difference in the treatment of the two classes of claims is underscored by the complete lack of

any legislative history suggesting that there was any Congressional purpose to treat alike the two classes of claims which it treated so differently in the statute. In its progress through Congress there was stricken from the bill, which was finally enacted as the Fair Labor Standards Act, a clause providing that any agreement for waiver of compliance with any provision of the Act should be void. Section 17 (b), S. 2475, as passed by Senate, 75th Cong., 1st Sess., 1937. With this provision eliminated, the mandatory terms of §§ 6 and 7, the criminal penalties of the Act, and its provision for relief in equity, afford the sole ground to be found either within or without the statute for any inference of a Congressional policy against the release of claims arising under the Act. These factors concern only the minimum and overtime wages. They neither support nor suggest any Congressional policy against release of liquidated damages to which they are inapplicable and wholly unrelated.

If such an undeclared policy is to be inferred, it must be inferred from the statute, read in its appropriate setting. The statute is silent as to any exceptional policy with respect to claims for unliquidated damages—a silence which is given meaning by the provisions affirmatively making non-payment of minimum and overtime wages a public wrong. Any inference that a release of minimum and overtime wages is invalid must be because the release is an aggravation of the public wrong. But to draw that inference is to foreclose the possibility of a like inference with respect to liquidated damages, the non-payment of which is not made a public wrong.

We held in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, that the provision for liquidated damages is not punitive. Hence it cannot in itself be said either to have created or sanctioned a public right or interest in the recovery of liquidated damages. In view of the uncer-

tain coverage of the Act we cannot ignore the fact that the statutory liability may be harsh in its application and enable the employee to recover an amount far in excess of any damage which he has in fact suffered. All these considerations persuasively suggest that Congress has adopted no policy which precludes the employee from releasing, as in the case of other claims, the claim for liquidated damages when the release conforms to local law and is procured without overreaching or unfairness.

On the contrary the provisions of the Act show, and the legislative history emphasizes, that Congress intended to treat the liquidated damage obligation differently from its command to pay minimum and overtime wages. Because of this difference we cannot say that it intended to place the employee so far in tutelage as not to be free to give, and the employer to obtain, a release of what is by the terms of the statute nothing more than a cause of action for damages which in fact he may or may not have suffered.

No. 554.

There appears to have been no accord and satisfaction in this case, and for the reasons stated in our opinion in *Brooklyn Savings Bank* v. *O'Neil,* No. 445, the attempted release by respondent of his claim for overtime wages was void as against the policy of the Fair Labor Standards Act. Because of petitioner's failure to pay overtime wages as directed by § 7 of the Act, respondent is entitled to recover liquidated damages as provided by § 16 (b), and the judgment should be affirmed.

J. F. FITZGERALD CONSTRUCTION CO. *v.* PEDERSEN.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 462. Argued February 5, 1945.—Decided April 9, 1945.

1. An employee is not entitled to interest on sums recovered in an action for overtime compensation and liquidated damages under § 16 (b) of the Fair Labor Standards Act. *Arsenal Bldg. Corp.* v. *Greenberg, ante,* p. 697. P. 724.
2. The uncontested facts of record show that the employees in question were engaged in repairing abutments and substructures of bridges which were part of the line of an interstate railroad, sustaining the conclusion that they were "engaged in (interstate) commerce" and covered by the Fair Labor Standards Act. P. 724.

293 N. Y. 126, 56 N. E. 2d 77, affirmed in part.

CERTIORARI, 323 U. S. 698, to review the affirmance of a judgment for the plaintiffs in a suit for overtime compensation and liquidated damages under the Fair Labor Standards Act.

Mr. Henry E. Foley for petitioner.

Mr. William E. J. Connor for respondent.

Solicitor General Fahy, Messrs. Robert L. Stern, Jerome H. Simonds, Douglas B. Maggs, George M. Szabad, Albert A. Spiegel and *Miss Bessie Margolin* filed a brief on behalf of the Administrator of the Wage and Hour Division, U. S. Department of Labor, as *amicus curiae.*

MR. JUSTICE REED delivered the opinion of the Court.

The writ of certiorari in the instant case raises two questions for consideration: the first, whether an employee who obtains a judgment for unpaid overtime wages

and liquidated damages under § 7 (a) [1] and § 16 (b) [2] of the Fair Labor Standards Act of 1938 is entitled to interest on such sums; the second, a narrow question with respect to the interpretation of a judgment of this Court, which was entered in its per curiam opinion on a prior writ of certiorari, reversing a prior state court judgment in this same case.

The proceedings leading to the first writ began when the respondent, Pedersen, an employee of the petitioner, a construction company, instituted an action in the Supreme Court of the State of New York, in behalf of himself and

[1] Section 7 (a), 52 Stat. 1063, provides:

"No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

[2] Section 16 (b), 52 Stat. 1069, provides:

"Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

other employees, to recover overtime compensation and liquidated damages alleged to be due by virtue of §§ 7 and 16 (b) of the Fair Labor Standards Act. The action was tried on an agreed statement of facts which stated that the New York Central Railroad Company operated interstate trains over four bridges located on its right of way in the State of New York; that abutments supporting two bridges were destroyed and that the substructures of the two other bridges were damaged by a flood. The stipulation also stated:

"Thereafter, the railroad company entered into a contract with the defendant, an independent contractor engaged in general construction work, for the construction of entirely new abutments under the two bridges where the abutments had been washed out and destroyed, as aforesaid, and for repairing the substructures of the other two bridges which had been damaged, as aforesaid.

. . . . .

"Defendant employed plaintiffs, together with other individuals, as its employees in doing work under said contract and paid them at the rates per hour, as shown on Schedule 'A' annexed hereto."

After making findings of fact in conformity with the stipulation, the trial court dismissed the respondents' complaint.[3] The Appellate Division [4] and Court of Appeals [5] affirmed the lower court decision on the theory that the nature of the employer's general business activity—not the activities of employees on a particular job—determined whether an employee was "engaged in [interstate] commerce" within the meaning of § 7 (a) of the Act. Since the petitioner, an independent contractor not itself engaged in interstate commerce, was employed by the rail-

[3] *Pedersen* v. *Fitzgerald Construction Co.*, 173 Misc. 188, 18 N. Y. S. 2d 920.

[4] *Id.*, 262 App. Div. 665, 30 N. Y. S. 2d 989.

[5] *Id.*, 288 N. Y. 687, 43 N. E. 2d 83, affirming without opinion.

road to perform work local in character, it was felt petitioner's employees were not subject to the Act. On petition for certiorari, this Court reversed [6] the judgment of the state courts dismissing the complaint, on the authority of *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, in which the Fair Labor Standards Act was held to apply to employees engaged in the actual repair of a facility of interstate commerce. On petition for rehearing by the petitioner in the instant case, our judgment was amended by adding:

"and without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit has been brought." 318 U. S. 742.

This left open for trial the question of whether each member of the class was engaged in interstate commerce as alleged in the petition.

After remand to the state courts, the petitioner moved in the trial court to dismiss the complaint on the record of the prior proceedings apparently on the theory that the agreed statement of facts in the prior proceedings were insufficient to prove that the respondents, employees, were "engaged in [interstate] commerce." Petitioner did not attempt to introduce any evidence rebutting any inference to the contrary that might be drawn from the stipulation of facts in the record. Respondents thereupon moved for summary judgment under Rule 113 of the New York Rules of Civil Practice. The lower court entered judgment for the respondents, employees, for statutory wages and liquidated damages, with interest on such sums from April 1, 1939.[7] The Appellate Division [8] and Court of Appeals affirmed this decision.[9] Because the allowance of

[6] *Id.*, 318 U. S. 740.

[7] Opinion unreported.

[8] *Pedersen* v. *Fitzgerald Construction Co.*, 266 App. Div. 1032, 44 N. Y. S. 2d 595.

[9] *Id.*, 293 N. Y. 126, 56 N. E. 2d 77.

interest by the Court of Appeals raised a federal question of substance not heretofore determined by this Court, and in order to clarify doubts as to the meaning of our previous judgment in this case, we granted certiorari.[10] Jurisdiction of this Court rests on § 237 (b) of the Judicial Code.

In *Arsenal Building Corp.* v. *Greenberg,* No. 421, *ante,* p. 697, we held that an employee was not entitled to interest on sums recovered in an action brought under § 16 (b) of the Fair Labor Standards Act. This question is discussed in that opinion and for the reasons set forth therein, we hold that the New York Court of Appeals erred in allowing interest on the sums recovered by the respondents in the instant case.

Petitioner contends that the state courts erred in sustaining a judgment for respondents. It is argued that the latter failed to satisfy the burden of proof that the particular activities of the respondents constituted engaging "in [interstate] commerce." We are of a contrary opinion. The agreed statement of facts, which was part of the record both for purposes of petitioner's motion to dismiss and respondents' motion for summary judgment, constitutes sufficient evidence to support the state courts' ruling in this matter.[11] The agreed statement of facts states that the petitioner entered into a contract with the railroad "for the construction of entirely new abutments under the two bridges . . . and for repairing the substructures of the other two bridges," all four of these bridges being part of the railroad's interstate line. It was also stipulated that the respondents were "doing work under said contract." It is clear that employees who actually repair abutments or substructures of bridges on which are laid tracks used in interstate transportation are "engaged in [interstate] commerce." *Overstreet* v. *North Shore*

[10] 323 U. S. 698.

[11] See *supra,* p. 722.

Corp., 318 U. S. 125, 130; *McLeod* v. *Threlkeld*, 319 U. S. 491, 494. The stipulation of facts in this case recites specifically and precisely that the contract was for such work and also that the respondents were engaged in doing work under said "contract." The stipulation of facts would not seem to embrace activities not essential and a part of the main work of repair. This interpretation of the stipulation accords with that adopted by the state trial court.[12] In amending our judgment on rehearing[13] when this case was previously before us on writ of certiorari, the way was opened to petitioner to contest the issue of whether each respondent was himself actually engaged in interstate commerce. A doubt had arisen as to whether this could be done because our judgment of reversal was based explicitly on the *Overstreet* case, and in that decision we conclusively determined that the particular employees there involved were covered by the Act. On the remand to the state courts, petitioner did not contest respondents' claim on this issue although it appears it could have done so when the respondents moved for summary judgment.[14] Since the uncontested facts in the record are to the effect that the respondents were actually engaged in repairing the abutments and substructure, the

[12] The New York trial court stated in its opinion (unreported):

"The fair import of these conceded facts is that defendant was engaged in certain work, and that plaintiff and his associates were its employees, not generally, but in doing *this particular work*. . . . But in any event the conceded facts, in my judgment, embrace no activities not essential to the main work of repair (*Pedersen* v. *Delaware, L. & W. R. Co.*, 229 U. S. 146). Such, I think, was the fair import of the facts as contemplated by the parties when the agreed statement was made. . . ."

[13] 318 U. S. 742.

[14] The trial court stated in its opinion (unreported):

"It was no more a direction to the plaintiff than it was a permission to the defendant to reopen the matter, if either so desired, and could so do under our practice, for the purpose of getting further proof as to the precise activities of plaintiff and his associates."

judgment of the state court must be sustained in this respect.

The judgment of the state court is affirmed except in so far as it provides for recovery of interest on the sums adjudged to be due respondents under the Act; in this latter respect the judgment is reversed.

CORN PRODUCTS REFINING CO. ET AL. *v.* FEDERAL TRADE COMMISSION.

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

No. 680. Argued February 28, March 1, 1945.—Decided April 23, 1945.

1. By petitioners' basing-point system of pricing in their sales of glucose, their product was sold at delivered prices computed by adding to a base price at Chicago the published freight tariff from Chicago to the delivery points, even though deliveries were in fact made from their Kansas City factory as well as from their Chicago factory. On shipments from Kansas City, the delivered price to the purchaser thus depended not only on the base price plus the actual freight from Kansas City, but also upon the difference between the actual freight paid and the freight rate from Chicago. *Held:*

(A) The price discriminations resulting from petitioners' basing-point system violated § 2 (a) of the Clayton Act, as amended. Pp. 732, 737.

(a) It is immaterial that there was no discrimination between buyers at the same points of delivery. P. 734.

(b) There is nothing in the legislative history of the Clayton Act or the amendatory Robinson-Patman Act which confines their application to discriminations between buyers at the same destination. P. 734.

(c) The contention that basing-point systems were well known prior to the enactment of the Robinson-Patman Act and were considered by Congress to be legal, and that their legality should be sustained in the absence of a clear command to the contrary, is rejected. P. 734.

(d) *Maple Flooring Assn.* v. *United States*, 268 U. S. 563, and *Cement Manufacturers Assn.* v. *United States*, 268 U. S. 588, distinguished. P. 735.

(B) The findings and the evidence support the Federal Trade Commission's determination that petitioners' discriminations in price have the effect on competition which brings the discriminations within the prohibition of § 2 (a) of the Act. P. 738.

(a) Under § 2 (a) discriminations need not in fact have had a "substantially" adverse effect on competition; it is sufficient that they "may" have that effect. P. 738.

(b) The weight to be attributed to the facts proven or stipulated, and the inferences to be drawn from them, are for the Commission to determine, not the courts. P. 739.

2. Petitioners also violated § 2 (a) of the Clayton Act, as amended, by permitting certain favored customers to secure options for the purchase of glucose, and to take delivery at the former lower prices, for periods longer than those usually permitted to other customers; and by permitting certain tank wagon customers to book orders at the lower prices charged for tank car deliveries and to take deliveries by tank wagon over extended periods of time. P. 740.

(a) Even assuming that the practices prohibited by § 2 (a) are discriminations in price and not in the terms and conditions of sale other than price, the present discriminations in the terms of sale operated to permit the favored customers to purchase at a lower price than other customers, so that their only practical effect was to establish discriminations in price, precisely the evil at which the statute was aimed. P. 740.

(b) Section 2 (a) applies to indirect as well as direct discriminations in price. P. 740.

(c) Petitioners failed to sustain the burden of showing that the price discriminations were granted for the purpose of meeting the "equally low" prices of competitors and that they were therefore excepted from the prohibition of § 2 (a) of the Clayton Act by the proviso of subsection (b) of § 2 of that Act. P. 741.

(d) The stipulated facts support the Commission's finding that the practices in question have the effect on competition which brings them within the prohibition of the Act. P. 741.

3. The price discriminations which resulted from petitioners' allowance of discounts to certain favored purchasers of gluten feed and meal, by-products of petitioners' refining of corn, and allowance of discounts to certain favored purchasers of starch and starch products, violated § 2 (a). P. 742.

(a) The statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they "may" have such an effect. P. 742.

(b) From the evidence it was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition. P. 742.

4. Petitioners' arrangement with the Curtiss Company for advertising dextrose, on terms not proportionally accorded other purchasers, violated § 2 (e) of the Clayton Act. P. 743.

(a) The arrangement was made with the Curtiss Company as a "purchaser" within the meaning of the Act. The statute does not require that the discrimination in favor of one purchaser against another shall be provided for in a purchase contract or be required by it. It is enough if the discrimination be made in favor of one who is a purchaser and denied to another purchaser or other purchasers of the commodity. P. 743.

(b) The Curtiss Company, which purchased dextrose from petitioners and converted it with other ingredients into candy which it sold, was a purchaser of a commodity bought for "resale," after "processing," within the meaning of the Act. P. 744.

(c) The evidence shows that the discrimination in favor of the Curtiss Company was a discrimination against sales in interstate commerce. P. 745.

(d) The advertising furnished by petitioners was a service or facility "connected with the processing . . . sale, or offering for sale" of the commodity purchased by the Curtiss Company upon terms not accorded to other purchasers. P. 745.

144 F. 2d 211, affirmed.

CERTIORARI, 323 U. S. 706, to review a judgment sustaining an order of the Federal Trade Commission.

Mr. Parker McCollester, with whom *Messrs. George deForest Lord, Frank H. Hall* and *Samuel A. McCain* were on the brief, for petitioners.

Solicitor General Fahy, with whom *Assistant Attorney General Berge, Messrs. Charles H. Weston, Paul A. Freund, Sigmund Timberg, W. T. Kelley* and *Walter B. Wooden* were on the brief, for respondent.

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

Petitioners, a parent corporation and its sales subsidiary, use a basing point system of pricing in their sales

of glucose. They sell only at delivered prices, computed by adding to a base price at Chicago the published freight tariff from Chicago to the several points of delivery, even though deliveries are in fact made from their factory at Kansas City as well as from their Chicago factory. Consequently there is included in the delivered price on shipments from Kansas Cty an amount of "freight" which usually does not correspond to freight actually paid by petitioners.

The Federal Trade Commission instituted this proceeding under § 11 of the Clayton Act, c. 323, 38 Stat. 730, 15 U. S. C. § 21, charging that petitioners' use of this single basing point system resulted in discriminations in price between different purchasers of the glucose, and violated § 2 (a) of the Act, as amended by § 1 of the Robinson-Patman Act, c. 592, 49 Stat. 1526, 15 U. S. C. § 13. The complaint also charged petitioners with other discriminations in prices, or in services rendered to favored customers, which will presently be stated in detail, all in violation of § 2 (a) or § 2 (e) of the Clayton Act, as amended.

Section 2 (a) provides in part:

"(a) . . . it shall be unlawful for any person engaged in commerce . . ., either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . ."

After hearings, at which much of the evidence was stipulated, the Commission made its findings of fact. It concluded that petitioners had violated § 2 of the Clayton Act, as amended, and ordered them to cease and desist from such violations. On petition to review the Commission's order, the Circuit Court of Appeals for the Seventh Circuit sustained the order, except in particulars not material here. 144 F. 2d 211.

We granted certiorari, 323 U. S. 706, because the questions involved are of importance in the administration of the Clayton Act in view of the widespread use of basing point price systems. The principal questions for decision are whether, when shipments are made from Kansas City, petitioners' basing point system results in discriminations in price between different purchasers of glucose, within the meaning of § 2 (a); and, if so, whether there is support in the evidence for the finding of the Commission that these discriminations have the effect on competition defined by that section. Further questions are raised as to whether the other discriminations charged violate § 2 (a) and § 2 (e).

I. *Basing Point Practices.*

The evidence as to petitioners' basing point system for the sale of glucose was stipulated. The Commission found from the evidence that petitioners have two plants for the manufacture of glucose or corn syrup, one at Argo, Illinois, within the Chicago switching district, and the other at Kansas City, Missouri. The Chicago plant has been in operation since 1910, and that at Kansas City since 1922. Petitioners' bulk sales of glucose are at delivered prices, which are computed, whether the shipments are from Chicago or Kansas City, at petitioners' Chicago prices, plus the freight rate from Chicago to the place of delivery. Thus purchasers in all places other than Chicago pay a higher price than do Chicago purchasers. And in the case of all shipments from Kansas City to purchasers in cities

having a lower freight rate from Kansas City than from Chicago, the delivered price includes unearned or "phantom" freight, to the extent of the difference in freight rates. Conversely, when the freight from Kansas City to the point of delivery is more than that from Chicago, petitioners must "absorb" freight upon shipments from Kansas City, to the extent of the difference in freight.

The Commission illustrated the operation of the system by petitioners' delivered prices for glucose in bulk in twelve western and southwestern cities, to which shipments were usually made from Kansas City. On August 1, 1939, the freight rates to these points of delivery from Chicago were found to exceed those from Kansas City by from 4 to 40 cents per hundred pounds, and to that extent the delivered prices included unearned or phantom freight. As petitioners' Chicago price was then $2.09 per hundred pounds, this phantom freight factor with respect to deliveries to these twelve cities represented from 2 to 19% of the Chicago base price. From this it follows, as will presently be seen, that petitioners' net return at their Kansas City factory on sales to these twelve cities, in effect their f. o. b. factory price, varied according to the amount of phantom freight included in the delivered price.

Much of petitioners' glucose is sold to candy manufacturers, who are in competition with each other in the sale of their candy. Glucose is the principal ingredient in many varieties of low-priced candies, which are sold on narrow margins of profit. Customers for such candies may be diverted from one manufacturer to another by a difference in price of a small fraction of a cent per pound.

The Commission found that the higher prices paid for glucose purchased from petitioners by candy manufacturers located in cities other than Chicago, result in varying degree in higher costs of producing the candies. The degree in each instance varies with the difference in the delivered price of the glucose, and the proportion of glu-

cose in the particular candy. Manufacturers who pay unearned or phantom freight under petitioners' basing point system necessarily pay relatively higher costs for their raw material than do those manufacturers whose location with relation to the basing point is such that they are able to purchase at the base price plus only the freight actually paid. The Commission found that the payment of these increased prices imposed by the basing point system "may . . . diminish" the manufacturers' ability to compete with those buyers at lower prices.

The Commission concluded from these facts that petitioners' basing point system resulted in discriminations in price among purchasers of glucose, and that the discriminations result in substantial harm to competition among such purchasers. Petitioners challenge each conclusion.

First. Section 2 (a) of the Clayton Act, as amended, makes it unlawful for any person, "either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . ." The statute permits differentials "which make only due allowance for differences in the cost of manufacture, sale, or delivery . . ."

Petitioners' pricing system results inevitably in systematic price discriminations, since the prices they receive upon deliveries from Kansas City bear relation to factors other than actual costs of production or delivery. As in the case of the twelve cities selected by the Commission for illustrative purposes, the freight actually paid by petitioners in making deliveries usually varies from the freight factor from Chicago, used in computing the delivered price. When the actual freight is the lesser of the two, petitioners charge and collect unearned or phantom freight; when it is the greater, petitioners absorb the excess freight, which they pay, but do not include in the computation of their delivered price.

In either event, on shipments from Kansas City, the delivered price to the purchaser depends not only on the base price plus the actual freight from Kansas City, but also upon the difference between the actual freight paid and the freight rate from Chicago which is included in the delivered price. This difference also results in varying net prices to petitioners at their factory at Kansas City, according to the destination of the glucose. The factory net varies according as petitioners collect phantom freight or absorb freight, and in each case in the amount of this freight differential.[1] The price discriminations resulting from this systematic inclusion of the freight differential in computing the delivered price are not specifically permitted by the statute. Hence they are unlawful, unless, as petitioners argue, there is an implicit exception to the statute for such a basing point system.

[1] The illustrative prices found by the Commission show this sharply varying factory net and also the amounts of phantom freight. The figures given are upon deliveries from Kansas City for August 1, 1939, when the Chicago base price was $2.09.

	A	B	C	D	E	F
	Freight from Chicago	Delivered Price (Chicago Base Price, $2.09, plus Column A)	Actual Freight from Kansas City	Net to Petitioners at Factory in Kansas City (Column B minus Column C)	Variance in Petitioners' Net from their Net on Deliveries at Kansas City	Phantom Freight (Column A minus Column C)
Kansas City, Missouri	$0.40	$2.49	$0.00	$2.49	$0.00	$0.40
St. Joseph, Missouri	.40	2.49	.09	2.40	−.09	.31
Springfield, Missouri	.40	2.49	.36	2.13	−.36	.04
Fort Smith, Arkansas	.65	2.74	.45	2.29	−.20	.20
Hutchinson, Kansas	.61	2.70	.36	2.34	−.15	.25
Lincoln, Nebraska	.45	2.54	.13	2.41	−.08	.32
Sioux City, Iowa	.40	2.49	.24	2.25	−.24	.16
Waco, Texas	.85	2.94	.63	2.31	−.18	.22
Sherman, Texas	.77	2.86	.54	2.32	−.17	.23
San Antonio, Texas	.88	2.97	.69	2.28	−.21	.19
Denver, Colorado	.66	2.75	.56	2.19	−.30	.10
Salt Lake City, Utah	.77	2.86	.67	2.19	−.30	.10

Petitioners point out that there is no discrimination under their basing point system between buyers at the same points of delivery, and urge that the prohibition of § 2 (a) is directed only at price discriminations between buyers at the same delivery points. There is nothing in the words of the statute to support such a distinction, since the statute is not couched in terms of locality. And its purpose to prevent injuries to competition through price discriminations would preclude any such distinction, not required by its language. The purchasers of glucose from petitioners are found to be in competition with each other, even though they are in different localities. The injury to the competition of purchasers in different localities is no less harmful than if they were in the same city.

We find nothing in the legislative history of the Clayton or Robinson-Patman Acts to support the suggested distinction. It is true that § 3 of the Robinson-Patman Act, 15 U. S. C. § 13a, incorporating the Borah-Van Nuys Bill, S. 4171, 74th Cong., 2d Sess., imposes criminal penalties for selling goods "in any part of the United States at prices lower than those exacted . . . elsewhere in the United States for the purpose of destroying competition . . ." But this section does not restrict the operation of the prohibitions, with civil sanctions, of the Robinson-Patman amendments to § 2 (a) of the Clayton Act. This was specifically pointed out by the Conference Report on the Robinson-Patman Act.[2] H. Rep. No. 2951, 74th Cong., 2d Sess., p. 8.

Petitioners further contend that basing point systems were well known prior to the enactment of the Robinson-Patman Act and were considered by Congress to be legal. From this petitioners conclude that they remained legal in the absence of a clear command to the contrary. Cf.

[2] The report said: "Section 3 authorizes nothing which that amendment [to § 2 of the Clayton Act] prohibits, and takes nothing from it."

Parker v. *Motor Boat Sales,* 314 U. S. 244; *Helvering* v. *Griffiths,* 318 U. S. 371. But we think that the premise falls, and with it the conclusion, whatever it might be if the premise were valid.

In support of the legality of basing point systems, petitioners rely on *Maple Flooring Assn.* v. *United States,* 268 U. S. 563, 570, and *Cement Manufacturers Assn.* v. *United States,* 268 U. S. 588, 597. But these were suits to restrain violations of the Sherman Act, and did not involve the prohibition of the Clayton Act upon discriminations in price. The only question for decision in those cases was whether there was a concerted price-fixing scheme among competing sellers, accomplished in part by their adoption of a uniform basing point system; in fact, no prohibited concert of action was found.

In any event, the basing point systems involved in those cases were quite unlike that used by petitioners. In the *Maple Flooring* case, *supra,* the single basing point was so close to most of the points of production as to result in but trivial freight variances; and the defendants in that case were willing to sell on a f. o. b. mill basis, whenever the purchaser so requested. In the *Cement* case, *supra,* the defendants used a multiple basing point system, with a basing point at or near each point of production. Under this system, any manufacturer, in order to compete in the territory closer freightwise to another, would absorb freight, by adjusting his mill price to make his delivered price as low as that of his competitors. Under this system the delivered price for any locality was determined by the nearest basing point. We have no occasion to decide whether a basing point system such as that in the *Cement* case is permissible under the Clayton Act, in view of the provisions of § 2 (b), permitting reductions in price in order to meet a competitor's equally low price. Cf. *Federal Trade Commission* v. *A. E. Staley Mfg. Co., post,* p. 746.

When the Robinson-Patman Act was adopted in 1936,

there was no settled construction of the Clayton Act in the federal courts contrary to that now urged by the Commission, as was the case with the measures involved in *Helvering* v. *Griffiths, supra.* Nor was there any settled administrative construction to the contrary. In fact in 1924 in the only decision involving the problem, the Federal Trade Commission, after extensive investigation and hearings, ordered the United States Steel Corporation and its subsidiaries to cease and desist from the sales of their rolled steel products on the "Pittsburgh-Plus" price system. 8 F. T. C. 1. The Commission held that the use of a single basing point at Pittsburgh for steel plants over the country was a violation of § 2 of the Clayton Act, as well as § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45, as they then read. The respondents in that case sought no review of the Commission's order and filed with the Commission a formal statement of intended compliance with it.

Petitioners also rely on the failure of the Commission to make further orders against basing point systems in the period from 1924 to the passage of the Robinson-Patman Act in 1936. The Commission undertook no further proceedings because of difficulties of enforcement which it attributed to the exemption provisions of § 2 and to decisions of the lower federal courts in Clayton Act cases. Instead it pressed for clarifying amendments to the Act. See the Commission's Final Report on the Chain Store Investigation (1936), Sen. Doc. No. 4, 74th Cong., 1st Sess., pp. 89–90, 96–97. The Robinson-Patman Act was adopted in response to the Commission's recommendation that defects in § 2 be remedied and its prohibition of price discrimination strengthened.

Finally, petitioners argue that Congress, by the rejection of a provision of the Robinson-Patman Bill, which would have in effect prohibited all basing point systems, has indicated its intention to sanction all such systems.

This provision, as reported to the House by the Committee on the Judiciary, would have defined "price," as used in § 2 of the Clayton Act, as meaning "the amount received by the vendor after deducting actual freight or cost of other transportation, if any, allowed or defrayed by the vendor."

The practical effect of this provision would have been to require that the price of all commodities sold in interstate commerce be computed on an f. o. b. factory basis, in order to avoid the prohibited discriminations in selling price. It would have prohibited any system of uniform delivered prices, as well as any basing point system of delivered prices. These effects were recognized in the Committee's report, see H. Rep. No. 2287, 74th Cong., 2d Sess., p. 14, and in the debates upon the Robinson-Patman Bill. Cf. 80 Cong. Rec. 8118, 8223–8224. Indeed, the provision would have prohibited such a multiple basing point system as that in *Cement Manufacturers Assn.* v. *United States, supra,* as well as the present system.

Such a drastic change in existing pricing systems as would have been effected by the proposed amendment engendered opposition, which finally led to the withdrawal of the provision by the House Committee on the Judiciary. 80 Cong. Rec. 8102, 8140, 8224. We think this legislative history indicates only that Congress was unwilling to require f. o. b. factory pricing, and thus to make all uniform delivered price systems and all basing point systems illegal per se. On the contrary we think that it left the legality of such systems to be determined accordingly as they might be within the reach of § 2 (a), as enacted, and its more restricted prohibitions of discriminations in delivered prices.

We conclude that the discriminations involved in petitioners' pricing system are within the prohibition of the Act. We pass to the question whether these discriminations had the prescribed effect on competition.

Second. Section 2 (a) of the Clayton Act, as amended, prohibits only discriminations whose "effect . . . may be substantially to lessen competition . . . in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . ." Petitioners insist that the Commission's findings, based upon the facts stipulated, do not support its conclusion that petitioners' discriminations have the prescribed effect.

It is to be observed that § 2 (a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition. The statute is designed to reach such discriminations "in their incipiency," before the harm to competition is effected. It is enough that they "may" have the prescribed effect. Cf. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356–357. But as was held in the *Standard Fashion* case, *supra*, with respect to the like provisions of § 3 of the Clayton Act, prohibiting tying clause agreements, the effect of which "may be to substantially lessen competition," the use of the word "may" was not to prohibit discriminations having "the mere possibility" of those consequences, but to reach those which would probably have the defined effect on competition.

Since petitioners' basing point system results in a Chicago delivered price which is always lower than any other, including that at Kansas City, a natural effect of the system is the creation of a favored price zone for the purchasers of glucose in Chicago and vicinity, which does not extend to other points of manufacture and shipment of glucose. Since the cost of glucose, a principal ingredient of low-priced candy, is less at Chicago, candy manufacturers there are in a better position to compete for business, and manufacturers of candy located near other factories producing glucose, distant from the basing point,

as Kansas City, are in a less favorable position. The consequence is, as found by the Commission, that several manufacturers of candy, who were formerly located in Kansas City or other cities served from petitioners' Kansas City plant, have moved their factories to Chicago.

Further, we have seen that prices in cities to which shipments are made from Kansas City, are frequently discriminatory, since the prices in such cities usually vary according to factors, phantom freight or freight absorption, which are unrelated to any proper element of actual cost. And these systematic differentials are frequently appreciable in amount. The Commission's findings that glucose is a principal ingredient of low priced candy and that differences of small fractions of a cent in the sales price of such candy are enough to divert business from one manufacturer to another, readily admit of the Commission's inference that there is a reasonable probability that the effect of the discriminations may be substantially to lessen competition.

The weight to be attributed to the facts proven or stipulated, and the inferences to be drawn from them, are for the Commission to determine, not the courts. See *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73; cf. *Labor Board* v. *Southern Bell Tel. Co.*, 319 U. S. 50, 60. We cannot say that the Commission's inference here is not supported by the stipulated facts, or that it does not support the Commission's order.

II. *Booking Practices.*

Ordinarily, when petitioners announce an advance in the price of glucose, they allow their customers a period of five days to "book" orders, that is, secure options to purchase, at the old price, and a period of thirty days in which to take delivery upon the options. The Commis-

sion charged that petitioners have further violated § 2 (a) of the Clayton Act, as amended, by permitting certain favored customers to secure options for the purchase of glucose, and to take delivery at the old price, for periods longer than those usually permitted to other customers. The Commission also charged other violations of § 2 (a) in that petitioners favored certain tank wagon customers by permitting them to book orders at the lower prices charged for tank car deliveries, and to take deliveries by tank wagon over extended periods of time. The Commission found, upon ample evidence, that these discriminations were in fact made by petitioners.

Petitioners assert that the practices prohibited by § 2 (a) are discriminations in price, and not in the terms and conditions of sale other than price. They rely on the fact that in the course of the progress of the Robinson-Patman Bill through Congress, the phrase "terms of sale," originally included in the prohibited discriminations, was stricken from the bill. But even if the contention be accepted, we cannot ignore the fact that the present discriminations in the terms of sale operated to permit the favored customers to purchase at a lower price than other customers, so that their only practical effect was to establish discriminations in price, precisely the evil at which the statute was aimed. And the Conference Committee, in reporting on this elimination of the phrase "terms of sale" from the bill, made it clear that § 2 (a) still applied to indirect as well as direct discriminations in price. It said that with the elimination of the phrase "terms of sale," the act is inapplicable to "terms of sale except as they amount in effect to the indirect discriminations in price within the meaning of the remainder of subsection (a)." H. Rep. No. 2951, 74th Cong., 2nd Sess., p. 5.

Petitioners also contend that these sales to favored customers were to meet the competition of other sellers of glucose, and were therefore excepted from the pro-

hibition of § 2 (a), by the proviso of subsection (b) of § 2 of the Clayton Act, as amended. Subsection (b) provides:

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price . . . , the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . ."

The only evidence said to rebut the prima facie case made by proof of the price discriminations was given by witnesses who had no personal knowledge of the transactions, and was limited to statements of each witness's assumption or conclusion that the price discriminations were justified by competition. Examination of the testimony satisfies us, as it did the court below, that it was insufficient to sustain a finding that the lower prices allowed to favored customers were in fact made to meet competition. Hence petitioners failed to sustain the burden of showing that the price discriminations were granted for the purpose of meeting competition. Cf. *Federal Trade Commission* v. *A. E. Staley Mfg. Co., post,* p. 746.

Finally it is contended that there was no evidence to support the Commission's finding, which was referable to these practices as well as petitioners' basing point practices, that the discriminations in price may diminish competition within the meaning of § 2 (a). This finding as to the effect of both types of discrimination was based on the same stipulation of facts which we have already considered in connection with the basing point practices.

Since the customers here are the same manufacturers of low-priced candies as were there involved, and since the price discriminations here are relatively substantial in a field where differences of a fraction of a cent in the price of candy are sufficient to divert business from one manufacturer to another, we think that the stipulation, which we find to be applicable to these as well as the basing point practices, is sufficient to support the finding of the prescribed effect on competition.

III. *Discounts to Purchasers of By-Products.*

Still other price discriminations by petitioners charged and found by the Commission were discounts allowed to certain favored purchasers of gluten feed and meal, by-products of petitioners' refining of corn, and other discounts allowed to certain favored purchasers of starch and starch products. It was not and is not contended that these allowances were due to differences in the cost of manufacture, sale or delivery. But it is asserted that these discriminations did not violate § 2 (a), since there was not the requisite effect on competition.

It was stipulated, and the Commission found, that the allowances in question were "sufficient," if and when reflected in whole or in substantial part in resale prices, to attract business to the favored purchasers away from their competitors, "or to force [their] competitors to resell . . . at a substantially reduced profit, or to refrain from reselling." But it is asserted that there is no evidence that the allowances ever were reflected in the purchasers' resale prices. This argument loses sight of the statutory command. As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they "may" have such an effect. We think that it was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition.

IV. *Advertising Allowances.*

The Commission also charged and found that petitioners violated § 2 (e) of the Clayton Act, which provides:

"(e) . . . it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

The alleged violation consisted of advertising expenditures made by petitioners for the Curtiss Candy Company in order to promote the sale of dextrose or corn sugar for use in candy manufacture. For this purpose petitioners entered into an arrangement with the Curtiss Candy Company, whereby during the years 1936 to 1939 they spent over $750,000 in advertising Curtiss candy as being "rich in dextrose." At the same time, Curtiss advertised its candy as being "rich in dextrose," and made the same statement on its labels. While Curtiss was free to purchase dextrose used in the advertised candies from other manufacturers, it in fact made all such purchases from petitioners, in annually increasing quantities until it purchased a total of seven million pounds in 1939. During the same period it purchased of petitioners large quantities of glucose, the purchases increasing from nothing in 1937 to almost fifteen million pounds in 1939. Although petitioners sold dextrose to others, it did not furnish proportionally equal advertising services to them.

Petitioners say that the advertising arrangement is not forbidden by § 2 (e) because it was not made with the Curtiss Candy Company as a "purchaser." But during the period in question the Curtiss Company was in fact a purchaser of petitioners' commodity. The Commission could

properly infer that the advertising for which petitioners paid, contemplated the sale of that commodity to Curtiss, and that the advertising contemplated the offering for sale of the candy by Curtiss. Petitioners thus furnished a service connected with the sale or offering for sale of a commodity upon terms not accorded to other purchasers. The statute does not require that the discrimination in favor of one purchaser against another shall be provided for in a purchase contract or be required by it. It is enough if the discrimination be made in favor of one who is a purchaser and denied to another purchaser or other purchasers of the commodity.

It is said also that the Curtiss Company was not a purchaser of a commodity "bought for resale, with or without processing" within the meaning of § 2 (e), since the Curtiss Company buys dextrose from petitioners, but uses it with other ingredients to produce candy, an entirely new commodity, which it sells. While the Act does not define the term "processing," the conversion of dextrose into candy would seem to conform to the current understanding that processing is a mode of treatment of materials to be transformed or reduced to a different state or thing. See *Cochrane* v. *Deener,* 94 U. S. 780, 788. In view of the purpose of the statute to prevent the enumerated discriminations attending the sale of a commodity for resale, the precise nature or extent of the processing before resale would seem to be immaterial. The statute is aimed at discrimination by supplying facilities or services to a purchaser not accorded to others, in all cases where the commodity is to be resold, whether in its original form or in a processed product. The evils of the discrimination would seem to be the same whether the processing results in little or much alteration in the character of the commodity purchased and resold.

And finally it is said that the Commission was without jurisdiction because the dextrose sold by petitioners to

Curtiss was not found to have been sold in interstate commerce; that if the section is construed to apply to such transactions, it would be unconstitutional; and that, in any case, there is no showing that the transactions complained of, although not themselves in interstate commerce, have in any way affected such commerce. But the effect upon the commerce is amply shown by the interstate and national character of the Curtiss Company's business; by petitioners' advertising for Curtiss, which was itself frequently in interstate commerce, amounting to $750,000; and by Curtiss's own admission that it competed in the sale of its candy in interstate commerce, with all manufacturers of one cent and five cent bars of candy. Moreover, some of petitioners' sales to other companies, to whom these allowances were not accorded, were made in interstate commerce; thus there was a discrimination against sales in interstate commerce, well within the power of the Commission to remedy.

Petitioners make a number of other arguments or contentions of lesser moment which we have considered but find it unnecessary to discuss. We conclude that the advertising furnished by petitioners was a service or facility "connected with the processing . . . sale, or offering for sale" of the commodity purchased by the Curtiss Company upon terms not accorded to other purchasers, and therefore violated the statute.

The several violations of §§ 2 (a) and 2 (e) of the Clayton Act, found by the Commission, sustained by the court below, and brought here for review, fall within the prohibitions of the Act. The Commission's conclusions are amply supported by its findings and the evidence, and the judgment is

Affirmed.

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

MR. JUSTICE JACKSON concurs in the result.

FEDERAL TRADE COMMISSION *v.* A. E. STALEY MANUFACTURING CO. ET AL.

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

No. 559. Argued February 28, 1945.—Decided April 23, 1945.

1. The price discriminations involved in respondents' basing-point delivered price system and in certain "booking" practices were prohibited by § 2 (a) of the Clayton Act. *Corn Products Refining Co.* v. *Federal Trade Comm'n, ante,* p. 726. P. 750.
2. The evidence in this case supports the finding of the Federal Trade Commission that respondents' price discriminations were not made "in good faith" to meet equally low prices of competitors, within the meaning of the proviso of § 2 (b) of the Clayton Act. P. 758.

   (a) The determination from the evidence whether respondents acted "in good faith" to meet a competitor's equally low prices, within the meaning of § 2 (b) of the Act, is for the Commission. P. 758.

   (b) Respondents' showing that they adopted and followed the basing-point system of their competitors did not under § 2 (b) justify their price discriminations. P. 753.

   (c) That respondents' prices are lower than those they might have charged, but never did charge, does not tend to show the establishment of a lower price to meet an equally low price of a competitor. P. 755.
3. The Commission's finding that respondents failed to meet the burden of rebutting the prima facie case of price discriminations involved in their booking practices, since they had failed to show that their lower prices were "made in good faith to meet an equally low price of a competitor," is supported by the evidence. P. 759.

   (a) The appraisal of the evidence and the inferences to be drawn therefrom are for the Commission, not the courts. P. 760.

   (b) Section 2 (b) requires that the seller, who has knowingly discriminated in price, show at least the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor. P. 759.

144 F. 2d 221, reversed.

CERTIORARI, 323 U. S. 702, to review a judgment which set aside an order of the Federal Trade Commission in a proceeding under § 11 of the Clayton Act.

Mr. Walter B. Wooden, with whom *Solicitor General Fahy, Assistant Attorney General Berge, Messrs. Paul A. Freund, Matthias N. Orfield* and *W. T. Kelley* were on the brief, for petitioner.

Mr. Carl R. Miller, with whom *Messrs. Charles C. LeForgee* and *Paul D. Doolen* were on the brief, and *Mr. William D. Whitney* for respondents.

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

Respondents, a parent company and its sales subsidiary, are engaged in the manufacture and sale of glucose or corn syrup in competition with others, including the Corn Products Refining Company, whose methods of marketing and pricing its products are described in our opinion in *Corn Products Refining Co.* v. *Federal Trade Commission, ante,* p. 726. Respondents, in selling their glucose, have adopted a basing point delivered price system comparable to that of the Corn Products Refining Company. Respondents sell their product, manufactured at Decatur, Illinois, at delivered prices based on Chicago, Illinois, the price in each case being the Chicago price plus freight from Chicago to point of delivery.

In this proceeding, brought under § 11 of the Clayton Act, c. 323, 38 Stat. 730, 15 U. S. C. § 21, the Federal Trade Commission charged that respondents' pricing system resulted in price discriminations between different purchasers of glucose in violation of § 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, c. 592, 49 Stat. 1526, 15 U. S. C. § 13. The case was heard by the

Commission on stipulations of facts and exhibits, upon the basis of which the Commission ultimately made its findings. Applying the same principles as in the *Corn Products Refining Company* case, it concluded that respondents had made discriminations between different purchasers in the price of their product; and that respondents were unable to justify the discriminations, as permitted by § 2 (b) of the Clayton Act, by showing that they were made "in good faith" to meet a competitor's equally low price. The Commission accordingly made its order directing respondents to cease and desist from the price discriminations.

On review of the Commission's order, the Court of Appeals for the Seventh Circuit set the Commission's order aside, one judge dissenting. 144 F. 2d 221. One of the majority judges did not consider whether the price discriminations violated § 2 (a), but held that in any event they were made in good faith to meet their competitors' price within the meaning of § 2 (b). Another concurred in the result on the ground that the Commission had failed to make out a case of unlawful price discrimination, and for that reason he found no occasion to pass upon the merits of respondents' defense. The third judge dissented on the ground that respondents' discriminations were unlawful and not justified by competition. We granted certiorari. 323 U. S. 702.

The principal question for decision is whether respondents, who adopted the discriminatory price system of their competitors, including the Corn Products Refining Company, have sustained the burden of justifying their price system under § 2 (b) of the Clayton Act, as amended, by showing that their prices were made "in good faith" to meet the equally low prices of competitors. A further question is whether there was evidence to support the Federal Trade Commission's findings that respondents, in granting to certain favored buyers discriminatory prices

for their product, did not act "in good faith" to meet a competitor's equally low price within the meaning of § 2 (b) of the Clayton Act.

The Commission found that at all relevant times respondents have sold glucose, shipped to purchasers from their plant at Decatur, Illinois, on a delivered price basis, the lowest price quoted being for delivery to Chicago purchasers. Respondents' Chicago price is not only a delivered price at that place. It is also a basing point price upon which all other delivered prices, including the price at Decatur, are computed by adding to the base price, freight from Chicago to the point of delivery. The Decatur price, as well as the delivered price at all points at which the freight from Decatur is less than the freight from Chicago, includes an item of unearned or "phantom" freight, ranging in amount, in instances mentioned by the Commission, from 1 cent per hundred pounds at St. Joseph, Missouri, to 18 cents at Decatur. The Chicago price, as well as that at points at which the freight from Decatur exceeds freight from Chicago, required respondents to "absorb" freight, varying in instances cited by the Commission from 4 cents per one hundred pounds at St. Louis, Missouri, to 15½ cents per hundred pounds at Chicago.

The Commission found that this inclusion of unearned freight or absorption of freight in calculating the delivered prices operated to discriminate against purchasers at all points where the freight rate from Decatur was less than that from Chicago and in favor of purchasers at points where the freight rate from Decatur was greater than that from Chicago. It also made findings comparable to those made in the *Corn Products Refining Company* case that the effect of these discriminations between purchasers, who are candy and syrup manufacturers competing with each other, was to diminish competition between them.

The Commission also found that respondents, during a period of from five to ten days after they advance the prices of their product, customarily permit purchasers generally to "book" orders or secure options to purchase glucose at the old price, for delivery within thirty days, but that they also have permitted certain favored purchasers to secure additional extensions of time for delivery upon such options. In consequence of these time extensions, the favored buyers were enabled to secure glucose at a lower price than that concurrently being charged to other buyers. In some instances, after a price advance, respondents also made fictitious bookings on which deliveries were later made, at the option of the favored buyers; and in still other cases sales were made to favored purchasers long after the expiration of the booking period. Respondents also book glucose in tank car lots to certain purchasers who lack storage facilities for such quantities; respondents then actually make deliveries in tank wagon lots over a period of many months, during which they are selling to others upon like deliveries at higher prices.

These findings, and the conclusion of the Commission that the price discriminations involved are prohibited by § 2 (a), are challenged here. But, for the reasons we have given in our opinion in the *Corn Products Refining Company* case, the challenge must fail. The sole question we find it necessary to discuss here is whether respondents have succeeded in justifying the discriminations by an adequate showing that the discriminations were made "in good faith" to meet equally low prices of competitors.

I

We consider first, respondents' asserted justification of the discriminations involved in its basing point pricing system. As we hold in the *Corn Products Refining Company* case with respect to a like system, price discriminations are necessarily involved where the price basing point

is distant from the point of production. This is because, as in respondents' case, the delivered prices upon shipments from Decatur usually include an item of unearned or phantom freight or require the absorption of freight with the consequent variations in the seller's net factory prices. Since such freight differentials bear no relation to the actual cost of delivery, they are systematic discriminations prohibited by § 2 (a), whenever they have the defined effect upon competition.

Respondents sought to justify these discriminations before the Commission, by a stipulation detailing the history and use of their present pricing system. From this it appears that in 1920, when respondents began the manufacture of glucose or corn syrup, they found that syrup manufactured by their competitors "was being sold at delivered prices in the various markets of the United States"; that in Chicago two large factories were manufacturing syrup and delivering it in Chicago at prices lower than prices then prevailing in any other market; and that the delivered price in such other markets was generally equal to the Chicago price plus the published freight rate from Chicago to the point of delivery. Respondents thus found in operation a pricing system which, if followed, would produce exact identity in prices of glucose of the several producers when sold in any city of the United States. Respondents, to gain access to the markets thus established, made their sales "by first quoting the same prices as were quoted by competitors and then making whatever reduction in price . . . was necessary to obtain business." When respondents soon found that their product would command the same market price as that of their competitors, they "adopted the practice of selling at the same delivered prices as [their] competitors, whatever they might be." Respondents have followed the same practice since June 19, 1936, the date of enactment of the Robinson-Patman Act.

Section 2 (b) of the Clayton Act provides: "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price . . . , the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . ."

It will be noted that the defense that the price discriminations were made in order to meet competition, is under the statute a matter of "rebutting" the Commission's "prima-facie case." Prior to the Robinson-Patman amendments, § 2 of the Clayton Act provided that nothing contained in it "shall prevent" discriminations in price "made in good faith to meet competition." The change in language of this exception [1] was for the purpose of mak-

[1] As originally introduced, the Robinson-Patman amendment contained no provision similar to that in § 2 of the Clayton Act as originally enacted, which provided "That nothing herein contained shall prevent . . . discrimination in price in the same or different communities made in good faith to meet competition." In the Senate this existing provision was added by amendment to the Robinson-Patman bill. 80 Cong. Rec. 6426, 6435. In the House, the Judiciary Committee reported the bill with the proviso, substantially as enacted in § 2 (b). 80 Cong. Rec. 8139. The Conference Committee rejected the Senate version and approved the House amendment. The Report of the Conference Committee, speaking of the Senate proviso, said: "This language is found in existing law, and in the opinion of the conferees is one of the obstacles to enforcement of the present Clayton Act. . . . A provision relating to the question of meeting competition, intended to operate only as a rule of evidence in a proceeding before the Federal Trade Commission, is included in subsection (b) . . ." H. Rep. No. 2951, 74th Cong., 2d Sess., pp. 6–7.

ing the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination. See the Conference Report, H. Rep. No. 2951, 74th Cong., 2d Sess., pp. 6–7; see also the statement of Representative Utterbach, the Chairman of the House Conference Committee, 80 Cong. Rec. 9418.

But respondents argue that they have sustained their burden of proof, as prescribed by § 2 (b), by showing that they have adopted and followed the basing point system of their competitors. In the *Corn Products Refining Company* case we hold that this price system of respondents' competitor in part involves unlawful price discriminations, to the extent that freight differentials enter into the computation of price, as a result of the selection as a basing point of a place distant from the point of production and shipment. Thus it is the contention that a seller may justify a basing point delivered price system, which is otherwise outlawed by § 2, because other competitors are in part violating the law by maintaining a like system. If respondents' argument is sound, it would seem to follow that even if the competitor's pricing system were wholly in violation of § 2 of the Clayton Act, respondents could adopt and follow it with impunity.

This startling conclusion is admissible only upon the assumption that the statute permits a seller to maintain an otherwise unlawful system of discriminatory prices, merely because he had adopted it in its entirety, as a means of securing the benefits of a like unlawful system maintained by his competitors. But § 2 (b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's "lower" price and of that only to the extent that it is made "in good faith to meet an equally low price of a competitor." The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition. Respondents are here seeking to

justify delivered prices which discriminate in favor of buyers in Chicago and at points nearer, freightwise, to Chicago than to Decatur, by a pricing system involving phantom freight and freight absorption. We think the conclusion is inadmissible, in view of the clear Congressional purpose not to sanction by § 2 (b) the excuse that the person charged with a violation of the law was merely adopting a similarly unlawful practice of another.[2]

The statutory test is whether respondents, by their basing point system, adopted a "lower price . . . in good faith to meet an equally low price of a competitor." This test presupposes that the person charged with violating the Act would, by his normal, non-discriminatory pricing methods, have reached a price so high that he could reduce it in order to meet the competitor's equally low price. On the contrary, respondents have used their pricing system to adopt the delivery prices of their Chicago competitors, by charging their own customers upon shipments from Decatur the Chicago base price plus their competitors' costs of delivery from Chicago. Even though respondents, at many delivery points, enjoyed freight advantages over their competitors, they did not avail of the opportunity to charge lower delivered prices. Instead they maintained their own prices at the level of their competitors' high prices, based upon the competitors' higher costs of delivery, by including phantom freight in their own delivered prices.

Respondents have never attempted to establish their own non-discriminatory price system, and then reduced

---

[2] The Chairman of the House Conferees, in presenting the Conference Report, emphasized with illustrations that "this procedural provision cannot be construed as a carte blanche exemption to violate the bill so long as a competitor can be shown to have violated it first, nor so long as that competition cannot be met without the use of oppressive discriminations in violation of the obvious intent of the bill." See 80 Cong. Rec. 9418.

their price when necessary to meet competition. Instead they have slavishly followed in the first instance a pricing policy which, in their case, resulted in systematic discriminations, by charging their customers upon shipments from Decatur, the Chicago base price plus their competitors' actual costs of delivery from Chicago. Moreover, there is no showing that if respondents had charged nondiscriminatory prices, they would be higher in all cases than those now prevailing under their basing point system. Hence it cannot be said that respondents' price discriminations have resulted in "lower" prices to meet equally low prices of a competitor.

Respondents make an ingenious argument that they could have used their present price for deliveries at Decatur (which is the Chicago base price plus freight from Chicago to Decatur) as their base price; and that with the addition of freight from Decatur to the points of delivery, the delivered prices would in all cases then be higher than the present prices, so that reduction to meet the lower prices of their competitors would be permissible under § 2 (b). But this is no answer to the ruling of the Commission that the competitive situation did not justify respondents' pricing system, since respondents' argument is based upon a hypothesis, which never in fact existed. The fact that respondents' prices are lower than those they might have charged, but never did charge, does not tend to show the establishment of a lower price to meet an equally low price of a competitor.

Further, we cannot say that respondents' discriminations in price were shown to have been made in a "good faith" effort to meet competition, as § 2 (b) requires. As we have pointed out here and in our opinion in the companion case, *Corn Products Refining Co.* v. *Federal Trade Commission, supra,* the basing point system used by respondents discriminates systematically in favor of buyers in Chicago and at points nearer, freightwise, to Chicago

than to Decatur, and against purchasers at Decatur and points nearer to it, by reason of respondents' absorption of freight and collection of phantom freight.

This is illustrated most graphically by respondents' delivered prices at Decatur and Chicago. On August 1, 1939, these were $2.09 at Chicago, and $2.27 at Decatur. Since respondents incurred 18 cents freight in shipping to Chicago, their net price at the Decatur factory on shipments to Chicago was $1.91. The discrimination in favor of Chicago and against Decatur was thus 36 cents, or 17 per cent of the Chicago price, in a field where a difference of a fraction of a cent in the sales price of the candy processed from the glucose could divert buyers from one candy manufacturer to another. Only to a lesser degree are there like discriminations when other points of delivery are compared.

The Commission's conclusion seems inescapable that respondents' discriminations, such as those between purchasers in Chicago and Decatur, were established not to meet equally low Chicago prices of competitors there, but in order to establish elsewhere the artificially high prices whose discriminatory effect permeates respondents' entire pricing system. The systematic adoption of a competitor's prices by including unearned freight in respondents' delivery price or, what amounts to the same thing, the maintenance of a discriminatory and artificially high f. o. b. factory price in order to take advantage of the correspondingly high prices of a competitor, based on its higher costs of delivery, is not sufficient to justify the discrimination, for respondent fails to show, as the statute requires, the establishment of a "lower price" made in good faith to meet the equally low price of a competitor. By adopting the price system of their competitors, respondents have succeeded in many instances in establishing an artificially high price and have thus secured the benefit of the high

price levels of a competitor whose costs of delivery are greater.

A price discrimination is measured by the difference between the high price to one purchaser and the lower price to another. Respondents' price discriminations were not dictated by the lower delivery costs or lower delivery prices of their competitors. In none of the markets in which respondents had a freight advantage over their Chicago competitors did respondents reduce their prices below those of their competitors. Instead they met and followed their competitors' prices by prices rendered artificially high, by the inclusion of unearned freight proportioned to the amount by which their competitors' delivered costs exceeded their own.

We cannot say that a seller acts in good faith when it chooses to adopt such a clearly discriminatory pricing system, at least where it has never attempted to set up a non-discriminatory system, giving to purchasers, who have the natural advantage of proximity to its plant, the price advantages which they are entitled to expect over purchasers at a distance. And for like reasons, we must reject respondents' argument that the Commission's order could be rendered nugatory, by respondents' establishing such a high factory price as always to admit of reductions in order to meet the prices of competitors who are using a Chicago basing point system. For we think it could not be said that this practical continuation of the present discriminatory basing point system would be in good faith. But it does not follow that respondents may never absorb freight when their factory price plus actual freight is higher than their competitors' price, or that sellers, by so doing, may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price.

Congress has left to the Commission the determination of fact in each case whether the person, charged with making discriminatory prices, acted in good faith to meet a competitor's equally low prices. The determination of this fact from the evidence is for the Commission. See *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73. In the present case, the Commission's finding that respondents' price discriminations were not made to meet a "lower" price and consequently were not in good faith, is amply supported by the record, and we think the Court of Appeals erred in setting aside this portion of the Commission's order to cease and desist.

II

The Commission found that respondents had not sustained the burden of rebutting the prima facie case of price discriminations involved in their booking practices, since they had failed to show that their lower prices were "made in good faith to meet an equally low price of a competitor." The facts as stipulated were only that the discriminations were made in response to verbal information received from salesmen, brokers or intending purchasers, without supporting evidence, to the effect that in each case one or more competitors had granted or offered to grant like discriminations. It is stipulated that respondents, "believing such report to be true, has then granted similar" price discriminations. The record contains no statements by the persons making these reports and discloses no efforts by respondents to investigate or verify them, and no evidence of respondents' knowledge of their informants' character and reliability. It is admitted that in some instances respondents made sales upon bookings which they suspected had been made without knowledge of the buyers.

In appraising the evidence, the Commission recognized that the statute does not place an impossible burden upon sellers, but it emphasized the good faith requirement of the statute, which places the burden of proving good faith on the seller, who has made the discriminatory prices. The Commission commented on the tendency of buyers to seek to secure the most advantageous terms of sales possible, and upon the entire lack of a showing of diligence on the part of respondents to verify the reports which they received, or to learn of the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact be meeting the equally low price of a competitor. The Commission thought that respondents' allowance of discretionary prices, in circumstances which strongly suggested that the buyers' claims were without merit, as well as respondents' readiness to grant discriminatory prices without taking any steps to verify the existence of a lower price of competitors, and the entire absence of any showing that respondents had taken any precaution to conduct their business in such manner as to prevent unwarranted discriminations in price, all taken together, required the conclusion that respondents had not sustained the burden of showing that their price discriminations were made in good faith to meet the lower prices of competitors.

Section 2 (b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price. But it does place on the seller the burden of showing that the price was made in good faith to meet a competitor's. The good faith of the discrimination must be shown in the face of the fact that the seller is aware that his discrimination is unlawful, unless good faith is shown, and in circumstances which are peculiarly favorable to price discrimination abuses. We agree with the Commission that the statute at least requires the seller, who has knowingly discriminated in price, to show the ex-

istence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor. Nor was the Commission wrong in holding that respondents failed to meet this burden.

The appraisal of the evidence and the inferences to be drawn from it are for the Commission, not the courts. See *Federal Trade Commission* v. *Pacific States Paper Trade Assn., supra,* 63; *Federal Trade Commission* v. *Algoma Lumber Co., supra,* 73. We cannot say that the Commission's inference is not supported by the stipulated facts or that its inference does not support its order.

The Commission's order will be sustained. The judgment below will be reversed, and the cause remanded with instructions to enforce the Commission's order.

So ordered.

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

MR. JUSTICE JACKSON concurs in the result.

WHITE *v.* RAGEN, WARDEN.

NO. 212. CERTIORARI TO THE SUPREME COURT OF ILLINOIS.*

Argued March 29, April 2, 1945.—Decided April 23, 1945.

1. The petitions for habeas corpus in these cases sufficiently alleged violations of petitioners' rights under the Federal Constitution. P. 764.
2. This Court is unable to say that the refusal of the Supreme Court of Illinois to entertain the petitions for habeas corpus in these cases does not rest on an adequate non-federal ground; and the writs of certiorari herein must be dismissed. P. 766.

---

* Together with No. 259, *Lutz* v. *Ragen, Warden,* also on certiorari to the Supreme Court of Illinois.

3. In view of the practice adopted by the Supreme Court of Illinois, it follows that whenever a petition originally filed in that court for a writ of habeas corpus is denied, without opinion or other indication of the ground of its decision, and when the petition relies on allegations of fact to raise federal questions, it is unnecessary for the petitioner, in order to exhaust his state remedies, to apply to this Court for certiorari to review the judgment of the Supreme Court of Illinois. A denial of certiorari by this Court in such circumstances does not bar an application to a federal district court for the relief, grounded on federal rights, which the Supreme Court of Illinois has denied. But any other state remedies, if available, must be exhausted before any application to the federal district court. P. 767.
4. A petition for certiorari to review a judgment of the Supreme Court of Illinois denying an application for habeas corpus, which must be denied here because the decision of that court appears to rest on an adequate non-federal ground, can not be treated as a petition to review a decision of a lower court of the State which had denied an earlier application for habeas corpus, since the petition in the lower state court is not before this Court and its contents do not otherwise appear of record. P. 767.

Writs dismissed.

CERTIORARI, 323 U. S. 704, to review judgments denying leave to file petitions for habeas corpus.

Mr. Wilber G. Katz for petitioners.

William C. Wines, Assistant Attorney General of Illinois, with whom *George F. Barrett,* Attorney General, was on the brief, for respondent.

PER CURIAM.

In these cases, petitioners moved in the Supreme Court of Illinois for leave to file their petitions for habeas corpus. Both petitioners are in the custody of respondent, under sentences upon state convictions. In each case, the Illinois court, without requiring an answer from respondent, without appointing an attorney to represent petitioners,

and without giving any reasons for its action, denied leave to file the petitions. We granted certiorari, *in forma pauperis*, 323 U. S. 704, because the petitions alleged facts showing prima facie violations of petitioners' rights guaranteed by the federal Constitution, and in order to consider whether the State of Illinois affords corrective process for such violations of constitutional right.[1] On application of the petitioners, counsel was appointed to represent them in this Court.

Petitioner White, in No. 212, alleged in his petition for habeas corpus that two indictments for "obtaining money and goods by means of the confidence game" were returned against him in the state Criminal Court; that the court, in advance of the trial, appointed counsel to represent petitioner, but that the person so appointed did not confer with petitioner until they came to court for the trial; that then counsel refused to do anything for petitioner unless petitioner had some money; that in particular peti-

[1] In the last two terms of this Court, to April 21, 1945, 225 petitions for certiorari have been filed to review the denial by the Illinois Supreme Court of leave to file petitions for habeas corpus. From our examination of these applications, it appears that in no case did the Supreme Court of Illinois depart from the practice of denying leave to file without calling for a response and without opinion. Many of these applications disclosed that the petitioners had previously made application to one or more circuit or criminal courts in Illinois, where in the large majority of cases their petitions were denied without calling for a response or appointing an attorney, and without giving any reason for the denial other than the statement in some cases that the court lacked jurisdiction. In a few of these lower court cases, in which attorneys were appointed to represent the petitioners, the petitions were denied without further proceedings.

It also has come to the attention of this Court that for some years the warden of the Illinois State Penitentiary, contrary to *Ex parte Hull*, 312 U. S. 546, denied the rights of prisoners to access to the courts unless they procured counsel to represent them. See *United States ex rel. Foley* v. *Ragen*, 52 F. Supp. 265, 143 F. 2d 774; *United States ex rel. Bongiorno* v. *Ragen*, 54 F. Supp. 973.

tioner asked counsel to have one witness called in his behalf but counsel replied that "he did not have time, as he had a case in another Court, and for me to plead guilty, as the Judge would not give me a continuance." The petition for habeas corpus further alleged that petitioner asked the trial judge "to continue the proceedings so he could have time to call a witness, and confer with his attorney"; that the judge then told petitioner "to keep still, as his lawyer would do all the talking for him" and "thereupon the attorney pleaded the petitioner guilty to two indictments," on which he was given sentences of from one to ten years, to be served concurrently; and that petitioner was thereby denied the assistance of counsel in a criminal trial in violation of the Fourteenth Amendment.

The petition for habeas corpus of petitioner Lutz, in No. 259, alleged that he was tried and convicted for the crime of murder in the state Circuit Court; that he was sentenced to life imprisonment; and that his trial and conviction were without due process in violation of the Fourteenth Amendment, in that his conviction was obtained by the use of false testimony of two witnesses for the state. It was alleged that the prosecuting attorney induced and procured this testimony by bribery of the witnesses; and that he introduced it at the trial, with knowledge that it was false. Attached to the petition are the affidavits of the two witnesses in question, each stating that his testimony at the trial was false and that he was bribed to give it by the prosecuting attorney. The affidavits of two other persons, also attached to the petition, tend to corroborate the affidavits of the two witnesses.

Since the Supreme Court of Illinois dismissed both petitions without requiring respondent to answer, we must assume that the petitioners' allegations are true. *Williams* v. *Kaiser,* 323 U. S. 471, 473–474; *House* v. *Mayo,* 324 U. S. 42. We have many times repeated that not only does due process require that a defendant, on trial in a

state court upon a serious criminal charge and unable to defend himself, shall have the benefit of counsel, compare *Williams* v. *Kaiser, supra, Tomkins* v. *Missouri,* 323 U. S. 485 and *Rice* v. *Olson, post,* p. 786, with *Betts* v. *Brady,* 316 U. S. 455, but that it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel. *Powell* v. *Alabama,* 287 U. S. 45; *Avery* v. *Alabama,* 308 U. S. 444; *Ex parte Hawk,* 321 U. S. 114, 115–116; *House* v. *Mayo, supra.* And we have often pointed out that a conviction, secured by the use of perjured testimony known to be such by the prosecuting attorney, is a denial of due process. *Mooney* v. *Holohan,* 294 U. S. 103; *Pyle* v. *Kansas,* 317 U. S. 213; cf. *New York ex rel. Whitman* v. *Wilson,* 318 U. S. 688. It follows that the allegations of fact in the petitions are sufficient to make out prima facie cases of violation of these constitutional rights of petitioners, sufficient to invoke corrective process in some court, and in the federal district court if none is afforded by the state.

The availability of such a remedy in the federal district court, turning as it does on the exhaustion of state corrective processes, see *Mooney* v. *Holohan, supra; Ex parte Hawk, supra,* 116–117, may also depend upon an application to this Court to review the decision of the state court, and upon the disposition of such an application here. Where the highest state court in which a decision could be had considers and adjudicates the merits of a petition for habeas corpus, state remedies, including appellate review, are not exhausted so as to permit the filing of a petition for habeas corpus in a federal district court, unless the federal question involved is presented to this Court on certiorari or appeal from the state court decision. *Ex parte Hawk, supra,* 116–117.

If this Court denies certiorari after a state court decision on the merits, or if it reviews the case on the merits, a fed-

eral district court will not usually reexamine on habeas corpus the questions thus adjudicated. *Ex parte Hawk, supra,* 118. But where the decision of the state court is that the remedy of habeas corpus is not available under the state practice, or its decision is based upon some other adequate non-federal ground, it is unnecessary for the petitioner to ask this Court for certiorari in order to exhaust his state remedies, since we would lack jurisdiction to review the decision of the state court; and the denial of certiorari by this Court would not preclude a district court from inquiring into the federal question presented to, but not considered by, the state court. See *House* v. *Mayo, supra,* 48. Hence, when this Court denies or dismisses certiorari in this type of case, without passing on the merits, it may, as in the present case, be of importance to the administration of justice in the federal district courts, that we indicate authoritatively for their guidance the view we take of the availability of the state remedies, and the reasons for our decision.

On the argument of these cases in this Court the Attorney General of Illinois urged that the writs of certiorari be dismissed for want of our jurisdiction to entertain them. It was argued, *inter alia,* that the record in each case, when read in the light of the Illinois law, indicates that the judgment of the state Supreme Court, denying leave to file, did not decide any federal question or at least that the record fails to show that the judgment does not rest on a state ground adequate to support it. But the Supreme Court of Illinois has not stated the grounds for its denial of the petitions for habeas corpus, and examination of the record leaves us in doubt as to whether it decided the federal questions presented by the petitions, or whether decision turned upon state grounds.

In support of respondent's contention that the judgments of the Illinois Supreme Court rest upon a non-federal ground, our attention is directed to the decision of that

court, rendered on March 22, 1945, in the case of *People ex rel. Swolley* v. *Ragen,* 390 Ill. 106. There, as here, the Supreme Court of Illinois denied leave to file a petition for a writ of habeas corpus, without requiring respondent to answer. In denying the relief sought, the court made an "announcement" to be filed with the record in the case, with respect to its practice upon original applications for habeas corpus in that court. In its announcement it declared: "Any petition which raises questions of fact only will not be considered. This court does not try questions of fact."

In that case there was no answer or response to the petition and hence no issue of fact had been raised. Dismissal of the petition might therefore involve a decision on the legal sufficiency of the facts alleged in the petition. Since there were no issues of fact at that stage of the proceeding, and since a question of law, the legal sufficiency of the petition, is always then present, we must take it, as the Attorney General of Illinois states, that the court's announcement means that the Supreme Court of the state will not entertain original applications for habeas corpus, save on a record which excludes on its face the possibility of any trial in that court of an issue of fact.[2] In the face of the announcement, evidently intended to settle the practice upon petitions for habeas corpus in that court, and in the absence of any opinion indicating that decision in the present cases turned on a federal question, we cannot say that the refusal to entertain the petitions for habeas corpus in these cases does not rest on an adequate non-federal ground. For that reason, we

[2] Apparently the practice of the Illinois Supreme Court was not heretofore so restricted. Cf. *People ex rel. Day* v. *Lewis,* 376 Ill. 509, 34 N. E. 2d 712, where the court called for a return to a petition which alleged arbitrary action by state officers in revoking petitioner's "good-time" credit.

must dismiss these writs of certiorari. We do not reach the alternative argument, made by the Attorney General, that petitioners' remedy in the state courts is not habeas corpus, but the statutory substitute for the writ of error coram nobis, Ill. Civil Practice Act, § 72, and that the two remedies are mutually exclusive.

It follows that whenever the Illinois Supreme Court denies a petition for the writ originally filed in that court, without opinion or other indication of the ground of its decision, and when the petition relies on allegations of fact to raise federal questions, it is unnecessary for the petitioner, in order to exhaust his state remedies, to apply to this Court for certiorari to review the judgment of the Supreme Court of Illinois. A denial of certiorari by this Court in such circumstances does not bar an application to a federal district court for the relief, grounded on federal rights, which the Supreme Court of Illinois has denied. But any other state remedies, if available, must be exhausted before any application to the federal district court. *Ex parte Hawk, supra,* 116–117.

Petitioner White had made an earlier application for habeas corpus to the Criminal Court of Cook County. On the argument, counsel for petitioner White asked that in the event it be decided that the Illinois Supreme Court's decision was based upon an adequate non-federal ground, his petition for certiorari be treated as seeking review of the decision of the Criminal Court.[3] We are unable to do

[3] A denial of habeas corpus by the lower state courts in Illinois, which have jurisdiction concurrent with that of the State Supreme Court to issue habeas corpus, see Ill. Ann. Stat. (Smith-Hurd), ch. 65, § 2; *People* v. *Superior Court,* 234 Ill. 186, 197, 84 N. E. 875, appears not to be reviewable by the Illinois Supreme Court. See *People* v. *McAnally,* 221 Ill. 66, 77 N. E. 544; *People* v. *Siman,* 284 Ill. 28, 119 N. E. 940. For purposes of review here under § 237 of the Judicial Code, 28 U. S. C. § 344, the denial of habeas corpus by one of the

so, since we do not have before us the petition in the Criminal Court, and its contents do not otherwise appear of record.

Dismissed.

MR. JUSTICE ROBERTS concurs in the result.

UNITED STATES *v.* BEUTTAS ET AL., TRADING AS B–W CONSTRUCTION CO.

CERTIORARI TO THE COURT OF CLAIMS.

No. 431. Argued March 1, 1945.—Decided April 23, 1945.

In the circumstances of this case, there was no basis for recovery by the contractor of the difference between the higher wages paid and those specified in the Government contract. P. 772.

101 Ct. Cls. 748, reversed.

CERTIORARI, 323 U. S. 702, to review a judgment for the plaintiff in an action against the United States on a contract.

Mr. Ralph F. Fuchs, with whom *Solicitor General Fahy, Assistant Attorney General Shea, Messrs. Paul A. Sweeney* and *Jerome H. Simonds* were on the brief, for the United States.

---

lower courts of Illinois, not reviewable in any other state court, is a decision by the highest court of the state in which a decision could be had. *Betts* v. *Brady,* 316 U. S. 455; cf. *Largent* v. *Texas,* 318 U. S. 418. And it follows from the lack of a remedy in the Illinois Supreme Court in such a case, that an original application to that court for the writ is not prerequisite to review here of the decision of the lower state court. Cf. *Tenner* v. *Dullea,* 314 U. S. 692.

Mr. P. J. J. Nicolaides, with whom *Mr. William F. Kelly* was on the brief, for respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The respondents executed a contract with the petitioner whereby they agreed to construct the foundations for a public housing project. By Article 19 they agreed that workmen of designated classes should be paid specified minimum wages, and if, during the progress of the work, the petitioner should find it desirable that wages higher than those specified should be paid, it might establish different rates, and in such case the contract price should be adjusted accordingly.

The respondents paid wages higher than those named in the contract, and brought this action, *inter alia,* to recover the difference. They introduced evidence to prove that commencement of the work was suspended by delays on the part of petitioner's officers and by other conditions for which the respondents were not responsible; that during the period of suspension the petitioner asked bids for erection of the superstructure, and by its advertisement required bidders to pay higher rates to the same classes of workmen than the minima specified in the respondents' contract; that when respondents' employees learned of this they demanded wages equal to those that were to be paid for work on the superstructure; and that to obtain workers and to settle a strike the respondents had to pay such increased wages.

It appears that respondents submitted a claim for reimbursement for the increase in wages to the contracting officer who disallowed it, and then appealed to the Assistant Administrator of Public Works who filed a written de-

cision sustaining the contracting officer's ruling. The Administrator, in turn, rejected the claim. It is urged that the last-named official was in error as to certain of the facts, but there is no suggestion that he acted arbitrarily or in bad faith.

The petitioner's defense is grounded in certain provisions of the contract and the specifications forming a part of it, and facts found by the court below.

Article 3 provided that the contracting officer might make changes in the drawings and specifications within the general scope thereof; that an equitable adjustment as to any increase or decrease of cost due to such changes by the contracting officer or, in specified cases, his superior, should be made; and that if the contractor was dissatisfied with the decision, the dispute should "be determined as provided in article 15 hereof."

Article 15 is:

"Disputes: All labor issues arising under this contract which cannot be satisfactorily adjusted by the Contracting Officer shall be submitted to the Head of the Department. Except as otherwise specifically provided in this contract, *all other disputes* concerning questions arising under this contract shall be decided by the Contracting Officer or his duly authorized representative, subject to written appeal by the Contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the Contractor shall diligently proceed with the work as directed." (Italics supplied.)

Paragraph 4 of § 12 of Division I of the Specifications stated:

"The Government will not consider any claims for additional compensation made by the Contractor because of payment by the Contractor of any wage rate in excess of the applicable rate contained herein. All disputes in re-

gard to the payment of wages in excess of those specified herein shall be adjusted by the Contractor."

When respondents entered into the contract, their employees were unionized and were working under a wage scale fixed by agreement which was in accord with the rates fixed by the contract. This agreement did not expire by its terms until twelve days after respondents completed their work. These workmen struck because they demanded the same wages as were to be paid to workers under the superstructure contract, according to the advertisement for bids for that work. The petitioner did not participate in the negotiations between respondents and their striking workmen.

The Government's defenses were (1) that the dispute must be decided by the procedure prescribed in Article 15; that it had been so decided on the respondents' invocation of that procedure; that no showing of fraud or arbitrary action had been made, and that accordingly the administrative decision was final and the Court of Claims without jurisdiction; and (2) that, in any event, no breach of the contract on the part of the Government had been shown. These contentions were overruled by a divided court, and judgment was entered for the respondents.[1]

1. The respondents' contention is that if Article 15 be construed to cover such a dispute it is void as an attempt to oust the jurisdiction of the Court of Claims to decide a pure matter of law, namely, whether on the facts found, the petitioner had broken the contract. A majority of the judges so held, and also thought Article 15 was not intended to cover such a dispute but only one as to changes, interpretation of the specifications and similar matters usually remitted to the judgment of an architect.

The parties devoted much of their argument here to the question whether only questions of fact or questions of

[1] 101 Ct. Cls. 748; 60 F. Supp. 771.

mixed law and fact can by contract be made subject to final determination by an administrative officer of the Government, or whether a question of law may also, by contract, be made subject to final determination by such an officer. Our cases have not explicitly drawn any distinction between the two categories.[2] We find it unnecessary to decide the question, for we think it clear that the respondents may not recover for the increased wages in the circumstances of this case.

2. Two of the three judges in the majority below were of the view that the Government had in fact established higher wages for the respondents' work and was accordingly liable to pay the increased cost under Article 19 of the contract. All three judges in the majority held that, in any case, the Government is liable because what it did amounted to a breach of its implied obligation not to render performance more costly to the respondents.

Clearly the petitioner did not expressly avail itself of the option to set higher wage rates for the work covered by the respondents' contract. In the light of the quoted portions of the contract and specifications, it cannot be maintained that a recovery is justified pursuant to the covenants of the contract.

As an alternative ground of decision, some of the judges below resorted to the principle that it is an implied condition of every contract that neither party will hinder the other in his discharge of the obligations imposed upon him, nor increase his cost of performance. They held that, by inviting bids for the superstructure at minimum wages

---

[2] See *Kihlberg* v. *United States,* 97 U. S. 398; *Sweeney* v. *United States,* 109 U. S. 618; *United States* v. *Gleason,* 175 U. S. 588; *Plumley* v. *United States,* 226 U. S. 545; *Merrill-Ruckgaber Co.* v. *United States,* 241 U. S. 387; *United States* v. *Mason & Hanger Co.,* 260 U. S. 323; *Goltra* v. *Weeks,* 271 U. S. 536; *United States* v. *John McShain, Inc.,* 308 U. S. 512; *United States* v. *Callahan Walker Co.,* 317 U. S. 56; *United States* v. *Blair,* 321 U. S. 730.

higher than those fixed in the respondents' contract for the foundations, the petitioner breached this implied condition. But, of course, this can be true only if the Government caused the increase in wages. And the findings, in our judgment, render a conclusion to that effect impossible. The Government did not stipulate that the two groups, those employed on the foundations and those employed on the superstructure, should work at the same time at different wages. On the contrary, it had every reason to suppose that the former would finish their work at the then agreed rate before the latter came on the work. And this is what happened. There is no finding that petitioner's officers or agents had reason to expect that the fixing of a wage rate under another contract for a separate portion of the work, which was to be commenced after completion of respondents' contract, would cause a breach of their existing wage agreement by respondents' employees. Moreover, it is found that the petitioner took no part in the wage controversy between the respondents and their employees. It follows that there is no basis for a holding that the Government knowingly hindered respondents in the performance of the contract or culpably increased their costs.

There are other items going to make up the amount of the judgment entered by the Court of Claims which are not attacked. As to the item of $3,751.83 increased wage costs, the judgment must be reversed; in other respects it is affirmed. The cause will be remanded for further proceedings in conformity to this opinion.

MR. JUSTICE DOUGLAS concurs in the result.

637582°—46——53

UNITED STATES ET AL. *v.* HANCOCK TRUCK LINES, INC.

NO. 448. APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA.*

Argued March 27, 1945.—Decided April 23, 1945.

1. The period for taking an appeal to this Court from a final decree of a District Court of three judges in a suit to set aside an order of the Interstate Commerce Commission is sixty days. P. 776.
2. An appeal to this Court from a final decree of a District Court of three judges may be allowed by a single judge. P. 777.
3. It was improper for the District Court to reverse an order of the Interstate Commerce Commission in respect of a provision therein as to which the suitor had advised the Commission that it no longer objected but acquiesced. P. 779.

Reversed.

APPEAL from a decree of a district court of three judges which set aside in part an order of the Interstate Commerce Commission, 42 M. C. C. 547.

Mr. Edward Dumbauld, with whom *Solicitor General Fahy, Assistant Attorney General Berge, Messrs. Robert L. Pierce, Walter J. Cummings, Jr., Daniel W. Knowlton* and *Nelson Thomas* were on the brief, for appellants in No. 448. *Mr. B. W. La Tourette,* with whom *Messrs. G. M. Rebman* and *Howell Ellis* were on the brief, for appellant in No. 449.

---

*Together with No. 449, *Regular Common Carriers Conference of American Trucking Associations, Inc.* v. *Hancock Truck Lines, Inc.,* also on appeal from the District Court of the United States for the Southern District of Indiana.

Messrs. Albert Ward and *Ferdinand Born,* with whom *Mr. Jacob Weiss* was on the brief, for appellee.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The appellee is a motor carrier. With the approval of the Interstate Commerce Commission it acquired the operating rights of Globe Cartage Company, another such carrier, which then had pending before the Commission an application for a certificate of convenience and necessity under §§ 206 (a) and 209 (a) of the Interstate Commerce Act.[1] The appellee prosecuted the application as Globe's successor to obtain a certificate authorizing the exercise of Globe's so-called "grandfather" rights, that is, to continue Globe's operations as they were conducted July 1, 1935.

The Commission made an order awarding a certificate to appellee as a common carrier, but for less than all the routes embraced in the application and restricting appellee's operations to traffic moving on the bills of lading of freight forwarders.[2] The record discloses that the appellee filed a petition for reconsideration, in which it pressed for amendment of the order as respects the routes permitted, but waived objection to the restriction of its traffic to service of freight forwarders. It stated: "We do not challenge, nor do we complain against, the restriction to serve only freight forwarders." There is more to the same effect. The Commission denied the petition.

The appellee brought suit[3] to set aside and enjoin only so much of the Commission's order as restricted its operations to traffic moving on bills of lading of freight forward-

[1] 49 U. S. C. §§ 306 (a), 309 (a).

[2] 41 M. C. C. 313; 42 M. C. C. 547.

[3] Pursuant to 28 U. S. C. §§ 41 (28), 43–48.

ers. A district court of three judges heard the case, and issued a permanent injunction as prayed. One of these judges allowed an appeal to this court on a petition filed by the appellants more than thirty but less than sixty days after entry of the decree. The appellant in No. 449 intervened before the Commission in opposition to the appellee's application, and was permitted to intervene as a defendant in the court below. No circumstance differentiates its status from that of the appellants in No. 448, and what is said concerning that case may be taken as applicable to No. 449.

The appellee moved to dismiss on the ground that the appeal was not timely taken and was improperly allowed by a single judge. We postponed the question of our jurisdiction to the hearing on the merits. After argument and upon consideration we find ourselves in the anomalous position that whereas we hold we have jurisdiction, we cannot pass upon the substantive question of the statutory power of the Commission which is the ground of appeal.

First. Since the appeal is from the final decree of a statutory court of three judges, and not from the entry of a preliminary injunction the period for taking an appeal is sixty days,—not thirty days as appellee contends.

When by the Act of October 22, 1913 [4] the Commerce Court was abolished and its jurisdiction transferred to district courts, definite provision was made for direct appeal to this court, within thirty days, from an order granting or denying an interlocutory injunction in a suit to set aside an order of the Commission. In a later sentence the Act declares "A final judgment or decree of the district court may be" likewise reviewed "if appeal . . . be taken . . . within sixty days" after entry. The appellee's contention, as we shall see, rests on the assumption that when the Act speaks of a final decree, it is addressed to final decrees in

[4] 38 Stat. 208, 219–220.

cases other than those brought to set aside orders of the Commission. But we think this reading incorrect. The paragraph as a whole deals with the same type of suit.

On this erroneous assumption the appellee insists that when the Act of February 13, 1925 [5] restricted direct review of district court judgments in this field by repealing various earlier legislation, but saving from repeal "so much" of the Act of 1913 "as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders" of the Commission, the sentence of the earlier Act applicable to final judgment was repealed because it did not deal with judgments in suits to set aside Commission orders. The argument is, to some extent, based on the fact that when the United States Code was compiled the sentence of the Act of 1913 dealing with appeals from interlocutory injunctions became § 47 of Title 28 and the sentence dealing with appeals from final judgments was omitted from the Title. The omission was corrected in 1934 by inserting the latter sentence as § 47a.[6]

The face of the statutes, the uniform practice of this court [7] and the legislative history [8] make against the contention that appeals from final decrees in the class of cases in question must be taken within thirty days.

Second. We hold the objection that appeal was allowed by but one of the three judges who composed the district court is untenable. The Act of October 22, 1913 (*supra*) requires that in a case such as this both the hearing in respect of an interlocutory injunction and the final hearing shall be by three judges.[9] It says nothing as to who shall

[5] 43 Stat. 936.

[6] A like correction was made in § 345.

[7] Reference to the records of the court discloses that it has repeatedly entertained appeals taken more than thirty but less than sixty days after entry of final judgment.

[8] Hearings H. R. 8206, 68th Cong., 1st Sess., p. 15; Senate Report on S. 2060, 68th Cong., 1st Sess., p. 16.

[9] See 28 U. S. C. § 47.

allow an appeal. Since appeal is of right, allowance would seem to be but a ministerial act which might be performed by any member of the court. Our past practice has apparently sanctioned such an allowance. But if the proper procedure was formerly a matter of doubt, such doubt has been removed.

Section 3 of the Act of April 6, 1942 [10] provides that in such a case as this a single judge may "enter all orders required or permitted by the Rules of Civil Procedure for the District Courts of the United States in effect at the time," with a proviso not here relevant. There is a further proviso that his action shall be subject to review "at any time prior to final hearing," by the court as constituted at final hearing. This, however, is obviously inapplicable to action taken subsequent to final hearing. Rule 72 states that an appeal to this court from a district court shall be allowed "as prescribed by law and the Rules of the Supreme Court of the United States governing such an appeal." Rule 36 of this court authorizes a single judge of a district court to grant such an appeal.

Third. The court below held that the Commission erred in granting appellee a certificate as a common carrier and limiting its right thereunder to carriage of goods consigned by freight forwarders. This is the holding the appellants challenge. We are of opinion that the record precludes consideration and decision of the question.

As has been stated, the appellee, in its petition for reconsideration by the Commission, expressly waived objection to that portion of the order which limited operations to traffic moving on bills of lading to freight forwarders. The Commission's answer to the complaint in the district court recited the filing of that petition and alleged that in it "the plaintiff limited its objections to said report and order, to the Commission's prescription of the routes over which

[10] 56 Stat. 198, 199; 28 U. S. C. § 792.

operating authority was granted therein, expressly waived objection to, and did not challenge or complain against the restriction of the transportation authorized to commodities consigned by freight forwarders and gave up all claim to the right to transport general commodities not so consigned." To this answer the appellee filed a reply consisting of one paragraph in which it denied the allegation above quoted, without explanation or elaboration.

The Commission and the United States filed in the court below a request for findings of fact which included a requested finding reciting the filing of the petition for reconsideration, and stated the "sole error alleged against the Commission was that it granted authority for operation only as to a portion of the routes and between some of the points and places specified in the application. In said petition the plaintiff further stated that it did not challenge nor complain against the restriction of the service authorized to the transportation of commodities which are moving on bills of lading of freight forwarders." The court made no such finding.

The only assignment of error which may be said to attack the failure so to find is one couched in general terms. It is: "The District Court erred . . . 4. In refusing to adopt the findings of fact and conclusions of law submitted by the defendants."

Putting to one side the question whether such an assignment is too general and broad to support a challenge to the court's failure to find as requested, and despite the fact that, neither on brief nor in oral argument, did the appellants' counsel press for reversal on that ground, we think the district court committed reversible error, of which we must take note, in passing on the merits of the case made by the appellee.

It was manifestly improper to reverse the Commission's order in respect of a provision therein as to which the suitor had advised that body it no longer objected but

acquiesced. The record disclosed this situation, the defensive pleading relied upon it, and the court was asked to dismiss because of it. The complaint should have been dismissed. The judgment is

Reversed.

MR. JUSTICE BLACK concurs in the result.

COPPERWELD STEEL CO. *v.* INDUSTRIAL COMMISSION OF OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 684. Argued April 5, 6, 1945.—Decided April 23, 1945.

The state court decision of which review is here sought was grounded upon the view that the appellant had not pursued the remedy afforded by state law for the vindication of any constitutional right claimed to have been violated; so the appeal must be dismissed and certiorari denied. P. 785.

143 Ohio St. 591, 56 N. E. 2d 154, appeal dismissed; certiorari denied.

APPEAL from a judgment sustaining a demurrer in proceedings challenging the validity of awards made to employees of the appellant by the state commission.

Mr. Robert G. Day, with whom *Messrs. H. H. Hoppe, Frank R. S. Kaplan, Maurice J. Mahoney* and *E. P. McHugh, Jr.* were on the brief, for appellant.

Albertus B. Conn, Assistant Attorney General, and *Mr. E. G. Schuessler,* with whom *Hugh S. Jenkins,* Attorney General, was on the brief, for appellee.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The appellant conducts a manufacturing plant at Warren, Ohio, and is an employer as the term is defined by the workmen's compensation law of the State. In an original

proceeding instituted in the Supreme Court, the State's highest tribunal, it challenged awards made to certain of its employees, alleging that the injuries suffered were not incurred in the course of, and did not arise out of, the employment; that the awards were, therefore, beyond the jurisdiction of the Industrial Commission which entered them, and, unless they were abrogated, the appellant would be deprived of its property without due process of law; further, that unless relief were afforded the appellant would be denied the equal protection of the laws.

From a decision sustaining a demurrer and granting judgment for the defendant [1] this appeal was taken. The appellee moved to dismiss. We postponed consideration of the motion to the hearing on the merits, as we were not satisfied that the appellant had properly presented in the court below any issue as to the infirmity of the state law under the federal Constitution, or that the judgment of the Supreme Court of Ohio did not rest on an application of state law adequate to support it.

The questions posed for our decision, the manner of their presentation to the state court and that court's disposition of them will be understood only in the light of the provisions of the workmen's compensation law, the commission's action under that law, and the character of the relief sought by the appellant.

The compensation law is of the compulsory type.[2] It is administered by an Industrial Commission, which classifies industries in respect of hazards, and fixes premiums to be paid by employers into a state fund for the benefit of injured workmen and the dependents of those killed. It

[1] The petition was held demurrable (142 O. S. 439, 52 N. E. 2d 735), was amended, demurred to, and judgment for defendant was rendered on demurrer (143 O. S. 591, 56 N. E. 2d 154).

[2] The summary of the statutory provisions is drawn from the General Code of Ohio, §§ 871–1–871–12; 871–38; 1465–37; 1465–53; 1465–54; 1465–60,–68,–69,–69a,–70,–72,–73,–74,–75,–90.

may adopt merit ratings which reduce the premiums of employers having a low casualty rate.

Every employer subject to the Act is required either to pay premiums into the fund or to qualify as a self-insurer. Payments of compensation for injury or death are made from the state fund in respect of employees of a contributing employer and are paid directly by a self-insuring employer. Employers of both classes are relieved of common-law liability for an employee's injury or death. Those, however, who fail to comply in one of the permissible ways remain liable at law, are denied certain defenses in an action by the employee or his representative and, with their officers, are liable to criminal penalties for failure to comply with the Act. Their employees may, nevertheless, elect to claim compensation, and if it is awarded, an action to recover the amount may be maintained against the employer. Such an action may also be maintained against a self-insuring employer who fails to pay an award.

Should an employer who is subject to the Act fail to pay premiums, or otherwise omit to comply, means are provided to fix civil liability upon him, even to the extent of the appointment of a receiver of his business.

The Commission has authority to hear and decide all questions within its jurisdiction. If it makes an award to a claimant its action is final. Neither the employer nor the claimant is given any appeal or right of review. If the Commission refuses an award on certain grounds specified in the Act the claimant may appeal to a court.

It is conceded by the appellee that if a self-insuring or a non-complying employer is sued for the amount of an award the defense is open to him that the employee granted the award was not injured in the course of his employment or that the injury did not arise out of the employment. In the case of a complying employer who pays premiums into the state fund no such defense is open,

for the award is paid from the fund and he is not a party to the transaction.

We turn now to the facts alleged in appellant's petition. So far as material they follow. The men who were injured or killed were employees in appellant's plant. At the close of their work they left the plant in an automobile and chose one of several ways of egress—a public road, which at a short distance from the plant crossed the Baltimore & Ohio Railroad's track. While crossing this track the automobile was struck by a train. The Commission, despite appellant's representation that the resulting injuries and deaths were not compensable under the Act, entered awards. By its amended petition the appellant showed that as a result of the inclusion of the awards in its accident experience its premiums had been greatly increased.

On the first hearing the Supreme Court overruled appellant's contention that § 871–38 of the code authorized the institution of proceedings in that court to set aside compensation awards. Treating the petition as one for a writ of prohibition, the court held that remedy unavailable to control the action of the Commission in rendering awards. If considered as an application for mandamus, the court found that the provisions of the workmen's compensation law precluded the issuance of the writ. Construing the prayer as one for injunction, the court held that the law of Ohio invested it with no original jurisdiction in equity, and that general equity jurisdiction is conferred on the Courts of Common Pleas of the State. These are all rulings as to the law of Ohio, and, as such, we are without power to review them.

In its amended petition the appellant insisted that its purpose was to raise questions of constitutionality; and that it was without remedy against the loss of its merit rating and the increase of its premiums unless the court should set aside the awards.

In a second opinion the court noticed these allegations. It held that as appellant was not a party to the compensation proceeding and as the awards were payable, not by the appellant, but by the state fund, in which appellant had no property interest, it could not be said that payment of the awards deprived appellant of any property. It said that appellant's interests could be affected only when it was called on to pay increased premiums as a result of the awards, and adverted to the fact that appellant could refuse to pay premiums, and defend a suit for them brought under § 1465–75 of the Act. As to this the appellant urges that the penalties, civil and criminal, which would be imposed upon it and its officers if it pursued such a course amount to a denial of all remedy. Of this, more hereafter.

In respect to the denial of equal protection, the court below seems not to have dealt with the argument as presented in this court. It quoted decisions which sustained as reasonable classifications of employers for imposition of varying rates of premium adjusted to the risks incident to their enterprises. Except as above noted, it had nothing to say to the appellant's contention that whereas self-insurers and non-compliers may make the defense of excess of the Commission's jurisdiction when sued for the amount of an award, it cannot assert such a defense when sued for premiums. In our view, the answer to both of the constitutional contentions, though not clearly expressed below, is that it does not appear the appellant is without remedy, if entitled to redress. For it is stated, without contradiction, that there are courts in the State having general equity jurisdiction, and if resort to a defense at law involves the perils and penalties the appellant asserts, we are not advised that equity will not consider an application for relief. Certainly we can neither require the Supreme Court to exercise a jurisdiction it finds is not conferred upon it by law, nor express any view as to the relief to which the appellant may be entitled, in advance of

its availing itself of a forum apparently not foreclosed to it for the protection of its asserted constitutional rights.

What has been said assumes that we have jurisdiction of the appeal. The assumption involves the answer to two questions. First, were questions under the Fourteenth Amendment presented and decided below? We think that the appellant disclosed, and the court below understood, that the provisions of the Fourteenth Amendment of the federal Constitution were invoked. Not only does the Ohio Constitution embody no provisions in the words of that Article but it is doubtful that it contains any equivalent provisions. While the appellant's petition did not mention the Amendment, it used the exact phraseology in which it is couched. The pleadings and the expressions found in the opinions lead us to conclude that questions under the federal charter were presented and considered.

Secondly, was the constitutional validity of the state statute drawn in question? If not, we have no jurisdiction on appeal. But, as violation of the federal Constitution by the decision of the state court is, in any case, involved, we have jurisdiction to review the decision on certiorari (28 U. S. C. 344 (c)). The question of the propriety of entertaining the appeal need not be decided, in the view we take of the basis of the state court's judgment. Inasmuch as we conclude that decision was grounded upon the view that the appellant had not pursued the remedy afforded by state law for the vindication of any constitutional right it claimed was violated, we must dismiss the appeal and deny certiorari.

So ordered.

RICE *v.* OLSON, WARDEN.

CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

No. 391. Argued February 1, 1945.—Decided April 23, 1945.

Petitioner, an Indian under a state court sentence of imprisonment for one to seven years upon his plea of guilty to a charge of burglary, petitioned a state court for a writ of habeas corpus, alleging that he had been deprived of due process of law in that the trial court failed to advise him of his constitutional rights to counsel and to call witnesses; that he had not waived those rights by word or action; and that the conviction was void because the alleged crime was committed on an Indian Reservation which was within exclusive federal jurisdiction. *Held:*

1. The allegations of the petition showed a prima facie violation of petitioner's right to counsel, and he was entitled to a hearing upon them. Pp. 788, 791.

2. By his plea of guilty, petitioner had not waived his constitutional right to counsel. P. 788.

3. The state court having placed its judgment of dismissal squarely on the absence of merit in the petition, this Court can not conclude that the petition failed to satisfy procedural requirements. P. 792.

144 Neb. 547, 14 N. W. 2d 850, reversed.

CERTIORARI, 323 U. S. 696, to review a judgment affirming the dismissal of a petition for a writ of habeas corpus.

Mr. Barton H. Kuhns for petitioner.

Robert A. Nelson, Assistant Attorney General of Nebraska, with whom *Walter R. Johnson,* Attorney General, and *H. Emerson Kokjer,* Deputy Attorney General, were on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner, an Indian, without benefit of counsel pleaded guilty to a charge of burglary in the District Court of Thurston County, Nebraska, and was sentenced to from

one to seven years. He petitioned another state District Court for a writ of habeas corpus seeking release from the penitentiary on the grounds, among others,[1] that he had been deprived of his constitutional right of counsel, and that the state court lacked jurisdiction. He alleged that he was ignorant of the law, and that in preparing his petition he had no one to help him except a fellow inmate. Petitioner did not challenge the facts stated in the judgment entry, i. e., that, in the burglary proceedings, he was arraigned and pleaded guilty, that the burglary statute was read to him, and that he then reiterated his plea. He challenged the validity of the judgment, however, on the ground that, in violation of the Fourteenth Amendment, he had been deprived of due process of law in that the trial court failed to advise him of his constitutional rights to counsel and to call witnesses. Petitioner further alleged that he had not waived those rights by word or action. Finally, the petition alleged that the conviction was void because the alleged crime was committed on an Indian Reservation which was exclusively within federal jurisdiction.

The petition was dismissed by the state District Court, for lack of merit, without an answer, and without a hearing. Petitioner then moved to set aside the dismissal, repeating his allegations, and requesting the appointment of counsel to assist him. The motion was denied, and petitioner, again acting in his own behalf, appealed to the Supreme Court of Nebraska. That court, without requiring an answer, affirmed the District Court. 144 Neb. 547, 14 N. W. 2d 850. Because important constitutional

[1] Allegations of the petition charging that the petitioner's imprisonment was illegal under state laws need not be set out, since those questions have been finally adjudicated by the state Supreme Court and are not subject to review here. *Smith* v. *O'Grady*, 312 U. S. 329, 330.

rights are involved, we granted certiorari and appointed counsel to represent petitioner. 323 U. S. 696.

In affirming, the Nebraska Supreme Court stated that " 'It is not necessary that there be a formal waiver; and a waiver will ordinarily be implied where accused appears without counsel and fails to request that counsel be assigned to him, particularly where accused voluntarily pleads guilty.' " It is apparent that the court's affirmance did not rest on its statement that a plea of guilty "ordinarily implied" a waiver of the right to counsel, but upon a holding that such a plea "absolutely" and finally waives that right.[2] This is inconsistent with our interpretation of the scope of the Fourteenth Amendment.

Whatever inference of waiver could be drawn from the petitioner's plea of guilty is adequately answered by the uncontroverted statement in his petition that he did not waive the right either by word or action. This denial of waiver squarely raised a question of fact. The state Supreme Court resolved this disputed fact by drawing a conclusive implication from the petitioner's plea of guilty. This is the equivalent of a holding that one who voluntarily pleads guilty without the benefit of counsel has thereby competently waived his constitutional right to counsel, even though he may have sorely needed and been unable to obtain legal aid. A defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary. It is enough that a defendant

[2] In discussing allegations of the petition other than the one relating to appointment of counsel, the state Supreme Court also quoted with approval a statement that "A plea of guilty admits all facts sufficiently pleaded, . . . operates as a waiver of any defense, and . . . with it, of course, the constitutional guarantees with respect to the conduct of criminal prosecutions." The court therefore said that since the record affirmatively showed "that the defendant had pleaded guilty, this absolutely waived this and all other preliminary steps in connection therewith . . . "

charged with an offense of this character is incapable adequately of making his defense, that he is unable to get counsel, and that he does not intelligently and understandingly waive counsel.[3] Whether all these conditions exist is a matter which must be determined by evidence where the facts are in dispute.

The petitioner's need for legal counsel in this case is strikingly emphasized by the allegation in his habeas corpus petition that the offense for which the state court convicted him was committed on a government Indian Reservation "without and beyond the jurisdiction of the Court." This raises an involved question of federal jurisdiction, posing a problem that is obviously beyond the capacity of even an intelligent and educated layman, and which clearly demands the counsel of experience and skill.

The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history. See *Worcester* v. *Georgia,* 6 Pet. 515; 1 Stat. 469; 4 Stat. 729. In the light of this historical background Congress in 1885 passed a comprehensive Act, 23 Stat. 362, 385, in order to fulfill "treaty stipulations with various Indian Tribes," specifically including the Winnebagoes, of which tribe the petitioner alleges he is a member. The last section of that Act subjects Indians who commit certain crimes, including burglary, to trial and punishment. The language there used to accomplish this purpose is that "all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties

[3] *Williams* v. *Kaiser,* 323 U. S. 471; *Tomkins* v. *Missouri,* 323 U. S. 485; *House* v. *Mayo,* 324 U. S. 42.

as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." 23 Stat. 385. This section now appears as § 548 in Title 18 of the United States Code, and the state Supreme Court has ruled that it gives Nebraska authority to try the petitioner. This construction of the section is not in accord with that heretofore given it by the Courts of Nebraska and other courts.[4] In argument before us, Nebraska does not rely on the state Supreme Court's construction of 18 U. S. C. 548. Instead it argues that petitioner's allegation that the crime was committed on an Indian Reservation is false, and that the state Supreme Court was required to take judicial knowledge of its falsity. It admits, however, that Thurston County, where the burglary was allegedly committed, is included within the original statutory boundaries of a federally created Indian Reservation, 14 Stat. 667, 14 Stat. 671, and that the village of Winnebago, where the alleged offense was committed, is located within the boundaries of the Winnebago Reservation. The village of Winnebago, it insists, has ceased to be a part of the Reservation because all the Indians have been given the full benefits of citizenship by Nebraska and because Winnebago is incorporated under the laws of Nebraska and is located entirely upon land which has been patented in fee. The facts upon which this contention rests are said to be those of which Nebraska courts can take judicial knowledge. With these facts thus established, it is said that jurisdiction of Nebraska over this offense is conferred by § 6 of the General Allotment Act passed in 1887, 24 Stat. 390, as amended, 34 Stat. 182. Assuming that all the facts urged by the State are correct, and that these Indian

---

[4] *Ex parte Cross*, 20 Neb. 417, 30 N. W. 428, cf. *Kitto* v. *State*, 98 Neb. 164, 152 N. W. 380; *State* v. *Campbell*, 53 Minn. 354, 55 N. W. 553; *People* v. *Daly*, 212 N. Y. 183, 105 N. E. 1048; *United States* v. *Kagama*, 118 U. S. 375.

lands have been disposed of under this latter statute, the State finds support for its contention in this Court's interpretation of that Act in *Matter of Heff,* 197 U. S. 488. But later cases have cast considerable doubt on what was said in the *Heff* decision. *United States* v. *Celestine,* 215 U. S. 278, 290–291; *Hallowell* v. *United States,* 221 U. S. 317, 323; *Tiger* v. *Western Investment Co.,* 221 U. S. 286, 314; *Donnelly* v. *United States,* 228 U. S. 243, 269–272; *United States* v. *Chavez,* 290 U. S. 357; *United States* v. *McGowan,* 302 U. S. 535, 539.

All of these questions concerning the power of the state courts to try this Indian petitioner for burglary indicate the complexities of the problem he would have found had he attempted to defend himself on this ground. And a decision by the state court that it had jurisdiction might or might not have finally determined the issue. Cf. *Toy Toy* v. *Hopkins,* 212 U. S. 542, 549, and *Bowen* v. *Johnston,* 306 U. S. 19.

We conclude that the petitioner is entitled to a hearing on his allegations that he did not, in the burglary proceedings, waive his constitutional right to have the benefit of counsel.

It has been suggested that even if the court below erred in holding that a plea of guilty is a conclusive waiver of the right to counsel, its judgment might be sustained on the ground that habeas corpus was not the proper remedy, or because the allegations of the petition lack sufficient definiteness. The very fact that the court considered the petition on its merits gives rise to a strong, if not conclusive, inference that the petition satisfied the state's procedural requirements in all respects. By treating this clumsily drawn petition with liberality, instead of dismissing it because of a failure to comply with the precise niceties of technical procedure, the state Supreme Court acted in accordance with its traditional solicitude for the

writ.[5] And this treatment is in line with federal practice. "A petition for *habeas corpus* ought not to be scrutinized with technical nicety. Even if it is insufficient in substance it may be amended in the interest of justice." *Holiday* v. *Johnston,* 313 U. S. 342, 350, 351.[6]

Since the state court placed its judgment precisely on the absence of merit in the petition, we could not, except by speculation, conclude that the petition failed to measure up to its procedural requirements.[7] For the reasons given, we hold that the allegations of the petition showed a prima facie violation of the petitioner's right to counsel.

Reversed.

MR. JUSTICE FRANKFURTER, dissenting.

In view of the circumstances revealed by the record in this case and in the light of Nebraska's experience with

---

[5] "It must be conceded that the petition is not a skillfully drawn pleading, but as it was not attacked in the district court it must receive a liberal construction here . . . Crocker made no appearance in the case, and the warrant was not set out in any of the pleadings. When attacked after judgment, the petition, though informal, must be held sufficient." *Urban* v. *Brailey,* 85 Neb. 796, 798–99, 124 N. W. 467. "It has been held that the proper method of attacking the petition is by motion to quash the writ, and that insufficiency in the petition is waived unless that remedy be resorted to. (*McGlennan* v. *Margowski,* 90 Ind. 150.)" *Nebraska Children's Home Society* v. *State,* 57 Neb. 765, 769, 78 N. W. 267. See also *Chase* v. *State,* 93 Fla. 963, 113 So. 103; *State ex rel. Chase* v. *Calvird,* 324 Mo. 429, 24 S. W. 2d 111; *Stuart* v. *State,* 36 Ariz. 28, 282 P. 276; *State ex rel. Davis* v. *Hardie,* 108 Fla. 133, 146 So. 97; *Ex parte Tipton,* 83 Cal. App. 742, 257 P. 445; *Deaver* v. *State,* 24 Ala. App. 377, 135 So. 604; *McDowell* v. *Gould,* 166 Ga. 670, 144 S. E. 206; *Ex parte Tollison,* 73 Okl. Cr. 38, 117 P. 2d 549; *People* v. *Superior Court,* 234 Ill. 186, 84 N. E. 875; *Willis* v. *Bayles,* 105 Ind. 363, 5 N. E. 8.

[6] See also *Cochran* v. *Kansas,* 316 U. S. 255; *Bowen* v. *Johnston,* 306 U. S. 19.

[7] See *Smith* v. *O'Grady, supra;* cf. *United States* v. *Ju Toy,* 198 U. S. 253, 261.

petitions for *habeas corpus,* as laid before this Court by the Attorney General of Nebraska, the meager allegations of this petition for *habeas corpus* should preclude our attributing to the Supreme Court of Nebraska a disregard, in affirming a denial of the petition, of rights under the Constitution of the United States rather than a denial on allowable state grounds. Accordingly, I believe the judgment should be affirmed.

MR. JUSTICE ROBERTS and MR. JUSTICE JACKSON join in this view.

REPUBLIC AVIATION CORP. *v.* NATIONAL LABOR RELATIONS BOARD.

NO. 226. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued January 10, 1945.—Decided April 23, 1945.

1. The National Labor Relations Board was warranted in these cases in finding unfair labor practices, violative of § 8 of the National Labor Relations Act, in the employer's (1) enforcement of a "no-solicitation" rule against the solicitation of union membership by employees on company property during lunch hour; (2) discharge of employees for wearing union "shop steward" buttons in the plant though at a time when a majority of the employees had not designated any collective bargaining representative; and (3) enforcement of a general "no-distribution" rule against distribution of union literature or circulars by employees on their own time though on parking lots owned by the company and adjacent to the plant. Pp. 795, 803.
2. As an administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred, the Labor Board, within the limits of its inquiry, may infer from proven facts such conclusions as reasonably may be based on the facts proven. P. 800.

---

*Together with No. 452, *National Labor Relations Board* v. *Le Tourneau Company of Georgia,* on certiorari to the Circuit Court of Appeals for the Fifth Circuit.

3. It was reasonable for the Labor Board to adopt a presumption of invalidity of a company rule forbidding union solicitation by employees on company property outside of working hours, in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline. P. 803.
4. The discharge of an employee for violation of a company rule against solicitation, which rule was invalid as applied to the union solicitation in which the employee engaged on his own time, was discriminatory within the meaning of § 8 (3) of the Act in that it discouraged membership in a labor union, notwithstanding that the rule was enforced impartially against all solicitors. P. 805.

142 F. 2d 193, affirmed.

143 F. 2d 67, reversed.

CERTIORARI, 323 U. S. 688, 698, to review, in No. 226, a decree granting enforcement of an order of the National Labor Relations Board; and, in No. 452, a judgment setting aside an order of the Board.

Mr. J. Edward Lumbard, Jr., with whom *Messrs. John J. Ryan, Frederick M. Davenport, Jr., Ralstone R. Irvine* and *Theodore S. Hope* were on the brief, for petitioner in No. 226.

Miss Ruth Weyand, with whom *Solicitor General Fahy, Messrs. Alvin J. Rockwell* and *Mozart G. Ratner* were on the briefs, for the National Labor Relations Board. *Mr. Robert L. Stern* also was on the brief for the Board in No. 226.

Mr. A. C. Wheeler, with whom *Mr. Clifton W. Brannon* was on the brief, for respondent in No. 452.

MR. JUSTICE REED delivered the opinion of the Court.

In the *Republic Aviation Corporation* case, the employer, a large and rapidly growing military aircraft manufacturer, adopted, well before any union activity at the plant, a general rule against soliciting which read as follows:

"Soliciting of any type cannot be permitted in the factory or offices."

The Republic plant was located in a built-up section of Suffolk County, New York. An employee persisted after being warned of the rule in soliciting union membership in the plant by passing out application cards to employees on his own time during lunch periods. The employee was discharged for infraction of the rule and, as the National Labor Relations Board found, without discrimination on the part of the employer toward union activity.

Three other employees were discharged for wearing UAW-CIO union steward buttons in the plant after being requested to remove the insignia. The union was at that time active in seeking to organize the plant. The reason which the employer gave for the request was that, as the union was not then the duly designated representative of the employees, the wearing of the steward buttons in the plant indicated an acknowledgment by the management of the authority of the stewards to represent the employees in dealing with the management and might impinge upon the employer's policy of strict neutrality in union matters and might interfere with the existing grievance system of the corporation.

The Board was of the view that wearing union steward buttons by employees did not carry any implication of recognition of that union by the employer where, as here, there was no competing labor organization in the plant. The discharges of the stewards, however, were found not to be motivated by opposition to the particular union or, we deduce, to unionism.

The Board determined that the promulgation and enforcement of the "no solicitation" rule violated § 8 (1) of the National Labor Relations Act as it interfered with, restrained and coerced employees in their rights under § 7 and discriminated against the discharged employee

under § 8 (3).[1] It determined also that the discharge of the stewards violated § 8 (1) and 8 (3). As a consequence of its conclusions as to the solicitation and the wearing of the insignia, the Board entered the usual cease and desist order and directed the reinstatement of the discharged employees with back pay and also the rescission of "the rule against solicitation in so far as it prohibits union activity and solicitation on company property during the employees' own time." 51 N. L. R. B. 1186, 1189. The Circuit Court of Appeals for the Second Circuit affirmed, 142 F. 2d 193, and we granted certiorari, 323 U. S. 688, because of conflict with the decisions of other circuits.[2]

In the case of *Le Tourneau Company of Georgia,* two employees were suspended two days each for distributing union literature or circulars on the employees' own time on company owned and policed parking lots, adjacent to the company's fenced-in plant, in violation of a long standing and strictly enforced rule, adopted prior to union organization activity about the premises, which read as follows: "In the future no Merchants, Concern, Company, or In-

---

[1] 49 Stat. 449, 452:

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

"SEC. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

. . . . . .

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . ."

[2] *Midland Steel Products Co.* v. *Labor Board,* 113 F. 2d 800; *Labor Board* v. *Williamson-Dickie Mfg. Co.,* 130 F. 2d 260, 267; *Boeing Airplane Co.* v. *Labor Board,* 140 F. 2d 423; *Le Tourneau Co.* v. *Labor Board,* 143 F. 2d 67.

dividual or Individuals will be permitted to distribute, post, or otherwise circulate handbills or posters, or any literature of any description, on Company property without first securing permission from the Personnel Department."

The rule was adopted to control littering and petty pilfering from parked autos by distributors. The Board determined that there was no union bias or discrimination by the company in enforcing the rule.

The company's plant for the manufacture of earth-moving machinery and other products for the war is in the country on a six thousand acre tract. The plant is bisected by one public road and built along another. There is one hundred feet of company-owned land for parking or other use between the highways and the employee entrances to the fenced enclosures where the work is done, so that contact on public ways or on non-company property with employees at or about the establishment is limited to those employees, less than 800 out of 2100, who are likely to walk across the public highway near the plant on their way to work, or to those employees who will stop their private automobiles, buses or other conveyances on the public roads for communications. The employees' dwellings are widely scattered.

The Board found that the application of the rule to the distribution of union literature by the employees on company property which resulted in the lay-offs was an unfair labor practice under § 8 (1) and 8 (3). Cease and desist, and rule rescission orders, with directions to pay the employees for their lost time, followed. 54 N. L. R. B. 1253. The Circuit Court of Appeals for the Fifth Circuit reversed the Board, 143 F. 2d 67, and we granted certiorari because of conflict with the *Republic* case. 323 U. S. 698.

These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization

assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.

The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary, that Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms. Thus a "rigid scheme of remedies" is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation. *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194. So far as we are here concerned, that purpose is the right of employees to organize for mutual aid without employer interference. This is the principle of labor relations which the Board is to foster.

The gravamen of the objection of both *Republic* and *Le Tourneau* to the Board's orders is that they rest on a policy formulated without due administrative procedure. To be more specific it is that the Board cannot substitute its knowledge of industrial relations for substantive evidence. The contention is that there must be evidence before the Board to show that the rules and orders of the employers interfered with and discouraged union organization in the circumstances and situation of each company. Neither in the *Republic* nor the *Le Tourneau* cases can it properly be said that there was evidence or a finding that the plant's physical location made solicitation away from company property ineffective to reach prospective union

members. Neither of these is like a mining or lumber camp where the employees pass their rest as well as their work time on the employer's premises, so that union organization must proceed upon the employer's premises or be seriously handicapped.[3]

The National Labor Relations Act creates a system for the organization of labor with emphasis on collective bargaining by employees with employers in regard to labor relations which affect commerce. An essential part of that system is the provision for the prevention of unfair labor practices by the employer which might interfere with the guaranteed rights. The method for prevention of unfair labor practices is for the Board to hold a hearing on a complaint which has been duly served upon the employer who is charged with an unfair labor practice. At that hearing the employer has the right to file an answer and to give testimony. This testimony, together with that given in support of the complaint, must be reduced to writing and filed with the Board. The Board upon that testimony is directed to make findings of fact and dismiss the complaint or enter appropriate orders to prevent in whole or in part the unfair practices which have been charged. Upon the record so made as to testimony and issues, courts are empowered to enforce, modify or set aside the Board's orders,[4] subject to the limitation that the findings of the Board as to facts, if supported by evidence, are conclusive.

Plainly this statutory plan for an adversary proceeding requires that the Board's orders on complaints of unfair

---

[3] See Sixth Annual Report, National Labor Relations Board, pp. 43, 44; *Re Harlan Fuel Co.*, 8 N. L. R. B. 25, 28, 63; *Re West Kentucky Coal Co.*, 10 N. L. R. B., 88, 105–6, 133; *Re Weyerhaeuser Timber Co.*, 31 N. L. R. B. 258, 262, 267, 270; cf. *Labor Board* v. *Waterman S. S. Co.*, 309 U. S. 206, 224.

[4] *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1; 49 Stat. 449, 452–455, §§ 7 to 10 inclusive.

labor practices be based upon evidence which is placed before the Board by witnesses who are subject to cross-examination by opposing parties.[5] Such procedure strengthens assurance of fairness by requiring findings on known evidence. *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n,* 301 U. S. 292, 302; *United States* v. *Abilene & Southern R. Co.,* 265 U. S. 274, 288. Such a requirement does not go beyond the necessity for the production of evidential facts, however, and compel evidence as to the results which may flow from such facts. *Market Street R. Co.* v. *Railroad Comm'n,* 324 U. S. 548, 559. An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration. *Labor Board* v. *Virginia Power Co.,* 314 U. S. 469, 479; *Labor Board* v. *Hearst Publications,* 322 U. S. 111, 130.

In the *Republic Aviation Corporation* case the evidence showed that the petitioner was in early 1943 a non-urban manufacturing establishment for military production which employed thousands. It was growing rapidly. Trains and automobiles gathered daily many employees for the plant from an area on Long Island, certainly larger than walking distance. The rule against solicitation was introduced in evidence and the circumstances of its violation by the dismissed employee after warning was detailed.

---

[5] This is not a statutory administrative hearing to reach a basis for action akin to legislation. See *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 304–319.

As to the employees who were discharged for wearing the buttons of a union steward, the evidence showed in addition the discussion in regard to their right to wear the insignia when the union had not been recognized by the petitioner as the representative of the employees. Petitioner looked upon a steward as a union representative for the adjustment of grievances with the management after employer recognition of the stewards' union. Until such recognition petitioner felt that it would violate its neutrality in labor organization if it permitted the display of a steward button by an employee. From its point of view, such display represented to other employees that the union already was recognized.

No evidence was offered that any unusual conditions existed in labor relations, the plant location or otherwise to support any contention that conditions at this plant differed from those occurring normally at any other large establishment.

The *Le Tourneau Company of Georgia* case also is barren of special circumstances. The evidence which was introduced tends to prove the simple facts heretofore set out as to the circumstances surrounding the discharge of the two employees for distributing union circulars.

These were the facts upon which the Board reached its conclusions as to unfair labor practices. The Intermediate Report in the *Republic Aviation* case, 51 N. L. R. B. at 1195, set out the reason why the rule against solicitation was considered inimical to the right of organization.[6]

[6] 51 N. L. R. B. 1195:

"Thus, under the conditions obtaining in January 1943, the respondent's employees, working long hours in a plant engaged entirely in war production and expanding with extreme rapidity, were entirely deprived of their normal right to 'full freedom of association' in the plant on their own time, the very time and place uniquely appropriate and almost solely available to them therefor. The respondent's rule is therefore in clear derogation of the rights of its employees guaranteed by the Act."

This was approved by the Board. *Id.*, 1186. The Board's reasons for concluding that the petitioner's insistence that its employees refrain from wearing steward buttons appear at page 1187 of the report.[7] In the *Le Tourneau Company* case the discussion of the reasons underlying the findings was much more extended. 54 N. L. R. B. 1253, 1258, *et seq.* We insert in the note below a quotation which shows the character of the Board's opinion.[8] Furthermore, in both opinions of the Board full citation of

---

[7] We quote an illustrative portion. 51 N. L. R. B. 1187–88: "We do not believe that the wearing of a steward button is a representation that the employer either approves or recognizes the union in question as the representative of the employees, especially when, as here, there is no competing labor organization in the plant. Furthermore, there is no evidence in the record herein that the respondent's employees so understood the steward buttons or that the appearance of union stewards in the plant affected the normal operation of the respondent's grievance procedure. On the other hand, the right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity, and the respondent's curtailment of that right is clearly violative of the Act."

[8] 54 N. L. R. B. at 1259–60: "As the Circuit Court of Appeals for the Second Circuit has held, 'It is not every interference with property rights that is within the Fifth Amendment . . . Inconvenience, or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining.' The Board has frequently applied this principle in decisions involving varying sets of circumstances, where it has held that the employer's right to control his property does not permit him to deny access to his property to persons whose presence is necessary there to enable the employees effectively to exercise their right to self-organization and collective bargaining, and in those decisions which have reached the courts, the Board's position has been sustained. Similarly, the Board has held that, while it was 'within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours,' it was 'not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property,' the latter restriction being deemed an unreasonable impediment to the exercise of the right to self-organization."

authorities was given, including *Matter of Peyton Packing Co.*, 49 N. L. R. B. 828, 50 N. L. R. B. 355, hereinafter referred to.[9]

The Board has fairly, we think, explicated in these cases the theory which moved it to its conclusions in these cases. The excerpts from its opinions just quoted show this. The reasons why it has decided as it has are sufficiently set forth. We cannot agree, as Republic urges, that in these present cases reviewing courts are left to "sheer acceptance" of the Board's conclusions or that its formulation of policy is "cryptic." See *Eastern-Central Assn.* v. *United States,* 321 U. S. 194, 209.

Not only has the Board in these cases sufficiently expressed the theory upon which it concludes that rules against solicitation or prohibitions against the wearing of insignia must fall as interferences with union organization, but, in so far as rules against solicitation are concerned, it had theretofore succinctly expressed the requirements of proof which it considered appropriate to outweigh or overcome the presumption as to rules against solicitation. In the *Peyton Packing Company* case, 49 N. L. R. B. 828, at 843, hereinbefore referred to, the presumption adopted by the Board is set forth.[10]

---

[9] 51 N. L. R. B. 1186, 1187, at note 1 and 54 N. L. R. B. 1253, 1260, at notes 6 and 7.

[10] 49 N. L. R. B. at 843–44: "The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation

Although this definite ruling appeared in the Board's decisions, no motion was made in the court by Republic or Le Tourneau after the Board's decisions for leave to introduce additional evidence to show unusual circumstances involving their plants or for other purposes.[11] Such a motion might have been granted by the Board or court in view of the fact that the Intermediate Report in the *Republic Aviation* case was dated May 21, 1943, and that in *Le Tourneau* November 11, 1943, while the opinion in the *Peyton Packing Company* case was given as late as May 18, 1943. We perceive no error in the Board's adoption of this presumption.[12] The Board had previously considered similar rules in industrial establishments and the definitive form which the *Peyton Packing Company* decision gave to the presumption was the product of the Board's appraisal of normal conditions about industrial establishments.[13] Like a statutory presumption or one established

---

by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline."

[11] 49 Stat. 454–55, § 10 (e):

". . . If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. . . ."

[12] Compare *Labor Board* v. *Regal Knitwear Co.*, 140 F. 2d 746, affirmed on another ground, *Regal Knitwear Co.* v. *Labor Board*, 324 U. S. 9; *Crichton* v. *United States*, 56 F. Supp. 876, 880.

[13] *Re Denver Tent & Awning Co.*, 47 N. L. R. B. 586, 588; *Re United States Cartridge Co.*, 47 N. L. R. B. 896, 897; *Re Carter Carburetor Corp.*, 48 N. L. R. B. 354, 356; *Re Scullin Steel Co.*, 49 N. L. R. B. 405, 411. See also for comparison the later cases of *Re Dallas Tank & Welding Co.*, 51 N. L. R. B. 1315; *Re Johnson-Stephens & Shinkle Shoe Co.*, 54 N. L. R. B. 189, 192.

by regulation, the validity, perhaps in a varying degree, depends upon the rationality between what is proved and what is inferred.[14]

In the *Republic Aviation* case, petitioner urges that irrespective of the validity of the rule against solicitation, its application in this instance did not violate § 8 (3), note 1, *supra,* because the rule was not discriminatorily applied against union solicitation but was impartially enforced against all solicitors. It seems clear, however, that if a rule against solicitation is invalid as to union solicitation on the employer's premises during the employee's own time, a discharge because of violation of that rule discriminates within the meaning of § 8 (3) in that it discourages membership in a labor organization.

Republic Aviation Corporation v. *National Labor Relations Board* is affirmed.

National Labor Relations Board v. *Le Tourneau Company of Georgia* is reversed.

No. 226 affirmed.
No. 452 reversed.

MR. JUSTICE ROBERTS dissents in each case.

---

[14] *Mobile, J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35, 43; *Western & Atlantic R. Co.* v. *Henderson,* 279 U. S. 639, 642; *Helvering* v. *Rankin,* 295 U. S. 123, 129. Compare *Tot* v. *United States,* 319 U. S. 463.

637582°—46——55

PRECISION INSTRUMENT MANUFACTURING CO. ET AL. *v.* AUTOMOTIVE MAINTENANCE MACHINERY CO.

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

No. 377. Argued January 31, February 1, 1945.—Decided April 23, 1945.

1. In this suit for infringement of patents and breach of contracts related thereto, the District Court's findings of fact and conclusions of law sustained its judgment of dismissal on the ground of the complainant's "unclean hands," and the Circuit Court of Appeals' reversal of the judgment was erroneous. Pp. 807, 820.
2. The maxim "he who comes into equity must come with clean hands" closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. P. 814.
3. The clean-hands doctrine is rooted in the historical concept of a court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. P. 814.
4. While equity does not require that its suitors shall have led blameless lives as to other matters, it does require that they shall have acted without fraud or deceit as to the matter in issue. P. 814.
5. One's misconduct need not have been of such a nature as to be punishable as a crime or as to justify legal proceedings, in order to warrant invocation of the maxim. P. 815.
6. Where a suit in equity concerns the public interest as well as the private interests of the litigants, the clean-hands doctrine assumes greater significance; for if the equity court in such case properly applies the maxim to withhold its assistance, it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public. P. 815.
7. A suit to enforce patents and related contracts involves the public interest as well as interests of the adverse parties. P. 815.
8. The far-reaching social and economic consequences of a patent give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope. P. 816.

9. Those who have applications pending in the Patent Office or who are parties to Patent Office proceedings have an uncompromising duty to report to it all facts concerning possible fraud or inequitableness underlying the applications in issue. Failure in this duty is not excused by reasonable doubts as to the sufficiency of the proof of the inequitable conduct nor by resort to independent legal advice. P. 818.
10. A settlement of interference proceedings which is grounded upon knowledge or reasonable belief of perjury, not revealed to the Patent Office or to any other public representative, lacks that equitable nature which entitles it to be enforced and protected in a court of equity. P. 819.

143 F. 2d 332, reversed.

CERTIORARI, 323 U. S. 695, to review the reversal of a judgment dismissing the complaints and counterclaims in two suits for infringement of patents and breach of contracts.

Mr. Casper W. Ooms, with whom *Mr. Will Freeman* was on the brief, for petitioners.

Mr. Frank Parker Davis, with whom *Mr. Albert J. Smith* was on the brief, for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

The respondent, Automotive Maintenance Machinery Company, charged in two suits that the various petitioners had infringed three patents owned by it relating to torque wrenches.[1] It was further asserted that the allegedly infringing acts also breached several contracts related to the patents. In defense, the petitioners claimed inter alia that Automotive possessed such "unclean hands"

[1] The three patents involved are No. 2,279,792, issued on April 14, 1942, to Kenneth R. Larson; No. 2,283,888, issued on May 19, 1942, to H. W. Zimmerman; and reissue No. 22,219, issued on November 3, 1942, to H. W. Zimmerman, based on original No. 2,269,503.

as to foreclose its right to enforce the patents and the contracts.

The District Court, at the close of a consolidated trial on the sole issue of Automotive's alleged inequitable conduct, delivered an oral opinion holding that Automotive's hands were soiled to such an extent that all relief which it requested should be denied. This opinion was subsequently withdrawn at the request of one of the witnesses and is not a part of the record. At the same time, however, the court entered written findings of fact and conclusions of law, forming the basis for a judgment dismissing the various complaints and counterclaims "for want of equity." On appeal, the Circuit Court of Appeals reviewed the facts at length and concluded that the District Court's findings of fact were not supported by substantial evidence and that its conclusions of law were not supported by its findings. The judgment was accordingly reversed. 143 F. 2d 332. We brought the case here because of the public importance of the issues involved.

The basic facts necessary to a determination of the vital issues are clear and without material dispute. In chronological order they may be summarized as follows:

In 1937 and prior thereto Automotive manufactured and sold torque wrenches developed by one of its employees, Herman W. Zimmerman. During this period Snap-On Tools Corporation was one of its customers for these wrenches. Automotive also had in its employ at this time one George B. Thomasma, who worked with Zimmerman and who was well acquainted with his ideas on torque wrenches. In November, 1937, Thomasma secretly gave information to an outsider, Kenneth R. Larson, concerning torque wrenches. Together they worked out plans for a new wrench, although Thomasma claimed that it was entirely his own idea.

After unsuccessfully trying to interest other distributors, Larson made arrangements to supply Snap-On with

the new torque wrench. On October 1, 1938, Larson filed an application for a patent on the newly-developed wrench, which application had been assigned to Snap-On several days prior thereto.[2] Then in December, 1938, Larson, Thomasma and one Walter A. Carlsen organized the Precision Instrument Manufacturing Company to make the wrenches to supply Snap-On's requirements. All three received stock and were elected officers and directors of the new company. Manufacture of the wrenches began in January, 1939, and Precision succeeded in taking away from Automotive all of Snap-On's business. Thomasma continued to work for Automotive until the latter discovered his connection with Precision and discharged him in June, 1939. Thomasma's connection with Precision was also concealed from Snap-On during most of this period.

Subsequently on October 11, 1939, the Patent Office declared an interference between certain claims in Larson's pending patent application and those in one filed by Zimmerman. Automotive was the owner of Zimmerman's application. Shortly after the interference was declared, R. E. Fidler, Automotive's attorney, wrote to the president of the company that the "whole situation confronting your opponents in this interference is quite messy, and I will be somewhat surprised if they fight the matter." He further wrote that if there was a contest "they surely will have a lot of explaining to do."

In August, 1940, Larson filed his preliminary statement in the Patent Office proceedings. In it he gave false dates as to the conception, disclosure, drawing, description and reduction to practice of his claimed invention. These dates were designed to antedate those in Zimmerman's

[2] Snap-On agreed to file the patent application for Larson, who was without funds, and took an assignment of the Larson application as security for performance of the agreement to supply wrenches.

application by one to three years. Larson also claimed that he was the sole inventor of his wrench. When Fidler learned of this preliminary statement he immediately suspected that "there must be something wrong with this picture" and suggested to Automotive's president that a "very careful and thorough investigation" be made of the situation. The president agreed. Fidler then employed several investigators who made oral reports to him from time to time. According to Fidler's memoranda of these reports, Fidler learned in great detail in August and September, 1940, the part that Thomasma played in the development of the Larson wrench and in the organization of Precision. He discovered that Thomasma claimed to have invented the wrench and that Larson "was now trying to freeze him out."

From October 24 to November 4, 1940, Larson and eight witnesses testified in the interference proceedings in support of his claims, corroborating his statements as to dates despite cross-examination. The day before this testimony ended Thomasma met with Fidler and Automotive's president and stated that he had developed Larson's wrench and that Larson's patent application was a "frame-up." Fidler then procured from Thomasma an eighty-three page statement concerning these matters, which Thomasma swore to on November 15. As the District Court found, this statement or affidavit "related in extensive detail the statements of Thomasma with respect to Larson's early work and disclosed such intimate knowledge thereof as to leave little doubt of the author's knowledge of the facts."

With these facts before him, Fidler admitted that he "personally was inclined to take the position that I should do something drastic" in the form of taking the matter up with the Patent Office or the District Attorney. He resolved his problem, however, by submitting it to an out-

side attorney. The latter advised him that his evidence was insufficient to establish Larson's perjury, that the Patent Office would not consider the matter until all proofs in the interference proceedings were in and that the District Attorney probably would not touch the situation while the interference proceedings were pending. Fidler followed his advice.

A few days later Fidler informed Larson's patent attorney, Harry C. Alberts, of the information disclosed in the Thomasma affidavit. Alberts admitted that "it looked very much like Larson had given false testimony" and asked that further examination of Thomasma be made in his presence. Accordingly, on November 28, Thomasma was examined orally before Alberts, Fidler and officials of Automotive and Snap-On. Thomasma repeated substantially the same story as in his affidavit. Snap-On's president said that if the story were true "the whole thing smells to the high heavens." And Alberts remarked that under the circumstances he felt he would have to withdraw as Larson's attorney.

On the same day, Alberts and Snap-On's president confronted Larson and Carlsen with the Thomasma story and demanded an explanation. Larson refused to commit himself on the truth of Thomasma's account but finally admitted that "my testimony is false and the whole case is false." Alberts then withdrew as their attorney,[3] giving them the names of three other lawyers, including M. K. Hobbs. The fact that Alberts withdrew was communicated by him to Fidler.

Larson and Carlsen called on Hobbs the next day, November 29. They told him they were willing to concede

[3] Alberts apparently never withdrew formally as Larson's attorney in the interference proceedings by filing a document to that effect in the Patent Office.

priority in Zimmerman and wanted Hobbs to settle the interference proceedings.[4] Hobbs took the case on that basis, making no effort to inquire into the reasons for the concession since he considered that matter immaterial. Even when Fidler tried to tell him later about the perjury, Hobbs stopped him for he "didn't want to hear the conflict in testimony."

Hobbs immediately undertook to settle the interference proceedings. On December 2 he proposed a settlement which included a concession of priority by Larson, but this proposal was apparently not satisfactory to all those concerned. Meanwhile Fidler presented the facts to another disinterested lawyer and asked him whether he thought there was enough evidence to bring a conspiracy suit for damages or a criminal action. The lawyer, after admitting that he did not have the slightest doubt but that Thomasma was telling the truth, replied in the negative.

On December 13, Fidler submitted a draft agreement that he had prepared. This draft contained a recital that "it has been determined by the parties hereto and their respective counsel that the party Zimmerman is the prior inventor of the subject matter involved in said Interference No. 77,565, as well as all other subject matter commonly disclosed in said Zimmerman and Larson applications." But this draft was likewise unacceptable.

---

[4] Both Larson and Carlsen testified that they told Hobbs of the perjury and of the predicament they were in, stating to him that they did not want to be turned over to the District Attorney. Hobbs, however, denied that they informed him of these matters. It was at the request of Hobbs that the District Court's oral opinion was withdrawn in order that, in the words of the District Court, it would not be "construed as implying that Mr. Hobbs had willfully given false testimony or had been guilty of professional misconduct." The court further said that the record demonstrated "that the witness Hobbs did not testify falsely." Assuming that Hobbs gave no false testimony, however, we do not consider that fact to be of controlling significance in this case.

For a time, negotiations were broken off and resumption of the interference proceedings seemed imminent. One of the other attorneys for Automotive wrote a letter on December 19 to Alberts, who was still acting as attorney for Snap-On, stating that "you must recognize that a large part of the testimony taken on behalf of Snap-On and Larson is, to put it mildly, not the whole truth" and that "you are holding up the issuance of the Zimmerman patent without the slightest justification." Fidler, who had approved this letter, justified these remarks on the ground that "they had told us Zimmerman was the prior inventor and we hadn't yet received a concession of priority." In reply to this letter, Alberts charged that Automotive's attorneys were using "threatening accusations" and "duress" and that they were threatening to "unloose the dogs" unless they got everything they requested in the settlement.

Suddenly on the next day, December 20, negotiations were resumed and the parties quickly entered into three contracts, the first two of which are involved in this suit. These contracts, in their relevant parts, provided as follows:

(1) Under the Automotive and Precision-Larson agreement, Larson conceded priority in Zimmerman and Larson's application was to be assigned to Automotive. Automotive agreed to license Larson and Precision to complete their unfilled orders from Snap-On to the extent of about 6,000 wrenches, with a royalty to be paid on the excess. Automotive released Precision, Larson and their customers from liability for any past infringement and gave Precision and Larson a general release as to all civil damages. Finally, Precision and Larson acknowledged the validity of the claims of the patents to issue on the Larson and Zimmerman applications.

(2) Under the Automotive and Snap-On agreement, Snap-On agreed to reassign the Larson application to Pre-

cision and acknowledged the validity of the claims of the patents to issue on the Larson and Zimmerman applications. Automotive also gave Snap-On the right to sell the 6,000 wrenches then on order from Precision and released Snap-On from any past liability or damages.

(3) Under the Snap-On and Precision-Larson agreement, Snap-On reassigned to Larson and Precision whatever title Snap-On had to the Larson application. Precision agreed to manufacture and deliver to Snap-On the 6,000 wrenches then on order. Snap-On also assented to the Automotive and Precision-Larson agreement.

The Larson application was accordingly assigned to Automotive on December 20, 1940. Automotive subsequently received patents on both the Larson and Zimmerman applications after making certain changes. Then Precision began to manufacture and Snap-On began to sell a new wrench. Automotive claimed that this was an infringement of its patents and a breach of the contracts of December 20, 1940. Thus the suit arose which is now before us.

The guiding doctrine in this case is the equitable maxim that "he who comes into equity must come with clean hands." This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be "the abettor of iniquity." *Bein* v. *Heath,* 6 How. 228, 247. Thus while "equity does not demand that its suitors shall have led blameless lives," *Loughran* v. *Loughran,* 292 U. S. 216, 229, as to other matters, it does require that they shall have acted fairly and

without fraud or deceit as to the controversy in issue. *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240, 245; *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, 387; 2 Pomeroy, Equity Jurisprudence (5th Ed.) §§ 379–399.

This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is "not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion." *Keystone Driller Co.* v. *General Excavator Co., supra,* 245, 246. Accordingly one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor.

Moreover, where a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public. The determination of when the maxim should be applied to bar this type of suit thus becomes of vital significance. See *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488, 492–494.

In the instant case Automotive has sought to enforce several patents and related contracts. Clearly these are matters concerning far more than the interests of the adverse parties. The possession and assertion of patent rights are "issues of great moment to the public." *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, 246. See also *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 665; *Morton Salt Co.* v. *Suppiger Co., supra; United States* v. *Masonite Corp.*, 316 U. S.

265, 278. A patent by its very nature is affected with a public interest. As recognized by the Constitution, it is a special privilege designed to serve the public purpose of promoting the "Progress of Science and useful Arts." At the same time, a patent is an exception to the general rule against monopolies and to the right to access to a free and open market. The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope. The facts of this case must accordingly be measured by both public and private standards of equity. And when such measurements are made, it becomes clear that the District Court's action in dismissing the complaints and counterclaims "for want of equity" was more than justified.

The history of the patents and contracts in issue is steeped in perjury and undisclosed knowledge of perjury. Larson's application was admittedly based upon false data which destroyed whatever just claim it might otherwise have had to the status of a patent. Yet Automotive, with at least moral and actual certainty if not absolute proof of the facts concerning the perjury, chose to act in disregard of the public interest. Instead of doing all within its power to reveal and expose the fraud, it procured an outside settlement of the interference proceedings, acquired the Larson application itself, turned it into a patent and barred the other parties from ever questioning its validity. Such conduct does not conform to minimum ethical standards and does not justify Automotive's present attempt to assert and enforce these perjury-tainted patents and contracts.

Automotive contends that it did not have positive and conclusive knowledge of the perjury until the pleadings

in the instant proceedings were filed and until Larson admitted his perjury on pre-trial examination. It claims that prior thereto it only had Thomasma's affidavit and statements, which were uncorroborated and likely to carry little weight as against Larson and his eight witnesses. It is further pointed out that Fidler submitted what he knew of the facts to at least two independent attorneys, both of whom advised him that the evidence of perjury that he possessed was insufficient. From this it is argued, as the Circuit Court of Appeals held, that while Automotive was "morally certain that Thomasma's story was true" there was no duty to report this uncorroborated information to either the District Attorney or the Patent Office.

But Automotive's hands are not automatically cleansed by its alleged failure to possess sufficiently trustworthy evidence of perjury to warrant submission of the case to the District Attorney or to the Patent Office during the pendency of the interference proceedings. The important fact is that Automotive had every reason to believe and did believe that Larson's application was fraudulent and his statements perjured. Yet it acted in complete disregard of that belief. Never for a moment did Automotive or its representatives doubt the existence of this fraud. Fidler suspected it soon after he knew of Larson's claims. His suspicions were confirmed by his hired investigators. Then Thomasma revealed such intimate and detailed facts concerning the perjury as to convince all who heard him, despite certain reservations entertained by some persons concerning his trustworthiness. Moreover, Fidler was well aware that Alberts threatened to withdraw as Larson's counsel if he discovered from Larson that Thomasma's story was true and that Alberts in fact did so withdraw. The suspected perjury was further confirmed by Larson's sudden willingness to concede priority after he learned of

Thomasma's story and by the admissions by Alberts and Snap-On that Zimmerman "was the prior inventor." And the very fact that Fidler saw fit to submit his proof to outside attorneys for advice is an indication of the substantiality of his belief as to Larson's perjury. With all this evidence before it, however, Automotive pursued the following course of action:

1. It chose to keep secret its belief and allegedly unsubstantial proof of the facts concerning Larson's perjury. We need not speculate as to whether there was sufficient proof to present the matter to the District Attorney. But it is clear that Automotive knew and suppressed facts that, at the very least, should have been brought in some way to the attention of the Patent Office, especially when it became evident that the interference proceedings would continue no longer. Those who have applications pending with the Patent Office or who are parties to Patent Office proceedings have an uncompromising duty to report to it all facts concerning possible fraud or inequitableness underlying the applications in issue. Cf. *Crites, Inc.* v. *Prudential Co.*, 322 U. S. 408, 415. This duty is not excused by reasonable doubts as to the sufficiency of the proof of the inequitable conduct nor by resort to independent legal advice. Public interest demands that all facts relevant to such matters be submitted formally or informally to the Patent Office, which can then pass upon the sufficiency of the evidence. Only in this way can that agency act to safeguard the public in the first instance against fraudulent patent monopolies. Only in that way can the Patent Office and the public escape from being classed among the "mute and helpless victims of deception and fraud." *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, *supra*, 246.

2. Instead of pursuing the interference proceedings and proving the fact that Zimmerman's claims had priority

over those asserted by Larson, Automotive chose to enter into an outside settlement with Larson, Precision and Snap-On, whereby Larson conceded priority. Outside settlements of interference proceedings are not ordinarily illegal. But where, as here, the settlement is grounded upon knowledge or reasonable belief of perjury which is not revealed to the Patent Office or to any other public representative, the settlement lacks that equitable nature which entitles it to be enforced and protected in a court of equity.

3. By the terms of the settlement, Automotive secured the perjured Larson application and exacted promises from the other parties never to question the validity of any patent that might be issued on that application. Automotive then made numerous changes and expansions as to the claims in the application and eventually secured a patent on it without ever attempting to reveal to the Patent Office or to anyone else the facts it possessed concerning the application's fraudulent ancestry. Automotive thus acted to compound and accentuate the effects of Larson's perjury.

These facts all add up to the inescapable conclusion that Automotive has not displayed that standard of conduct requisite to the maintenance of this suit in equity. That the actions of Larson and Precision may have been more reprehensible is immaterial. The public policy against the assertion and enforcement of patent claims infected with fraud and perjury is too great to be overridden by such a consideration. Automotive knew of and suspected the perjury and failed to act so as to uproot it and destroy its effects. Instead, Automotive acted affirmatively to magnify and increase those effects. Such inequitable conduct impregnated Automotive's entire cause of action and justified dismissal by resort to the unclean hands doctrine. *Keystone Driller Co.* v. *General Excavator Co., supra.*

We conclude, therefore, that the evidence clearly supported the District Court's findings of fact and that these findings justified its conclusions of law. The court below erred in reversing its judgment.

Reversed.

MR. JUSTICE ROBERTS.

I think the writ should be dismissed or the judgment of the Circuit Court of Appeals affirmed. The case ought not to have been taken by this Court. It involves merely the application of acknowledged principles of law to the facts disclosed by the record. Decision here settles nothing save the merits or demerits of the conduct of the respective parties. In my view it is not the function of this Court to weigh the facts for the third time in order to choose between litigants, where appraisal of the conduct of each must affect the result.

MR. JUSTICE JACKSON is of the opinion that the judgment should be affirmed, as he takes the view of the facts set forth in the opinion of the court below. 143 F. 2d 332.

DECISIONS PER CURIAM, ETC., FROM JANUARY 30, 1945, THROUGH APRIL 23, 1945.*

No. 830. CANTRELL ET AL. *v.* ADAMS ET AL. Appeal from the Court of Appeals of Kentucky. February 5, 1945. *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. Cleon K. Calvert* for appellants. Reported below: 298 Ky. 845, 183 S. W. 2d 492.

No. 865. SIMMONS *v.* MISSISSIPPI. Appeal from the Supreme Court of Mississippi. February 5, 1945. *Per Curiam:* The motion for leave to proceed *in forma pauperis* is granted. 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. Reported below: 20 So. 2d 64.

No. 856. RYAN *v.* THOMPSON ET AL. Appeal from the District Court of the United States for the Northern District of Illinois. February 5, 1945. *Per Curiam:* The judgment is affirmed. (1) *Douglas* v. *Jeannette,* 319 U. S.

---

*Decisions on applications for certiorari, *post,* pp. 832, 840; rehearing, *post,* p. 885; cases disposed of without consideration by the Court, *post,* p. 884.

637582°—46——56

157, and cases cited; (2) *Hayman* v. *Galveston*, 273 U. S. 414; *Semler* v. *Dental Examiners*, 294 U. S. 608. *Mr. Ray E. Lane* for appellant.

No. —. Ex parte Kenneth Sutton. February 5, 1945. The motion for leave to file petition for writ of habeas corpus is denied.

No. —. Wilson *v.* Hinman et al. February 5, 1945. Application denied.

No. 832. Johnson *v.* Mississippi State Board of Health. Appeal from the Supreme Court of Mississippi. February 12, 1945. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Hurwitz* v. *North*, 271 U. S. 40, 42. *Mr. Forrest Butler Jackson* for appellant. Reported below: 19 So. 2d 827.

No. 850. Jack Cole Co., Inc. *v.* United States et al. Appeal from the District Court of the United States for the Northern District of Alabama. February 12, 1945. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. (1) *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 480–82; *Howard Hall Co.* v. *United States*, 315 U. S. 495, 498–99; (2) *United States* v. *Pan American Corp.*, 304 U. S. 156, 158. *Mr. Francis H. Hare* for appellant. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for appellees. Reported below: 59 F. Supp. 10.

No. —. Ex parte James Martine;

No. —. Ex parte LeRoy Baker; and

No. —. Ex parte Tom Stephenson. February 12, 1945. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. EX PARTE WILLIAM BURGESS. February 12, 1945. The motion for leave to file petition for writ of habeas corpus is denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. —. EX PARTE F. GERALD THOMAS. February 12, 1945. The motion for leave to file petition for writs of mandamus or certiorari is denied.

No. —. EX PARTE BEN FRAZIER. February 12, 1945. The motion for leave to file petition for writ of mandamus is denied.

No. —. STEINBERG *v.* GRAHAM ET AL. February 12, 1945. The motion for a stay is denied.

No. 858. ILLINOIS COMMERCE COMMISSION ET AL. *v.* ILLINOIS CENTRAL RAILROAD CO. Appeal from the Supreme Court of Illinois. February 26, 1945. *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. *George F. Barrett,* Attorney General, and *William C. Wines,* Assistant Attorney General, for appellants. *Messrs. Vernon W. Foster, Charles A. Helsell* and *Elmer A. Smith* for appellee. Reported below: 387 Ill. 256, 56 N. E. 2d 432.

No. 859. ILLINOIS COMMERCE COMMISSION *v.* FLEMING ET AL., TRUSTEES;

No. 860. ILLINOIS COMMERCE COMMISSION *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD CO.;

No. 861. ILLINOIS COMMERCE COMMISSION *v.* SCANDRETT ET AL., TRUSTEES; and

No. 862. ILLINOIS COMMERCE COMMISSION *v.* SPRAGUE ET AL., RECEIVERS. Appeals from the Supreme Court of Illinois. February 26, 1945. *Per Curiam:* The appeals are dismissed for the reason that the judgment of the court below in each case is based upon a non-federal ground adequate to support it. *George F. Barrett,* Attorney General, and *William C. Wines,* Assistant Attorney General, for appellant. *Messrs. M. L. Bell, W. F. Peter, Harry E. Boe* and *Martin L. Cassell, Jr.* for appellees in No. 859. *Mr. Eldon Martin* for appellee in No. 860. *Mr. Carson L. Taylor* for appellees in No. 861. *Mr. Ralph R. Bradley* for appellees in No. 862. Reported below: 388 Ill. 138, 57 N. E. 2d 384.

No. 913. ADIRONDACK TRANSIT LINES, INC. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Southern District of New York. February 26, 1945. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *Mr. Martin J. Kelly, Jr.* for appellant. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for the United States et al.; *Messrs. John E. Buck* and *John F. Finerty* for the Hudson & Manhattan R. Co.; and *Mr. Henry P. Goldstein* for the Manhattan Coach Line, Inc. et al., appellees. Reported below: 59 F. Supp. 503.

No. 727. ORIOLO *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit. February 26, 1945. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Mortensen* v. *United States,* 322 U. S. 369. The

CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE JACKSON think that the judgment should be affirmed, the Mortensen case being inapplicable for the reasons stated in the opinion of the court below. *Mr. Thomas D. McBride* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 146 F. 2d 152.

No. —. EX PARTE HOWARD O. BUTLER. February 26, 1945. The motion for leave to file petition for writ of mandamus is denied.

No. —. EX PARTE ARTHUR LEWIS. February 26, 1945. Application denied.

No. —. EX PARTE GEORGE S. MILLER;

No. —. EX PARTE GEORGE ALBERT BROWN;

No. —. EX PARTE BRYAN SCHWAB; and

No. —. ILLINOIS EX REL. RENSING *v.* NIERSTHEIMER, WARDEN. February 26, 1945. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. BROTHERHOOD & UNION OF TRANSIT EMPLOYEES OF BALTIMORE *v.* MADDEN, REGIONAL DIRECTOR. February 26, 1945. The motion for a stay is denied.

No. 410. PRICE, TRUSTEE, ET AL. *v.* GURNEY ET AL. February 26, 1945. Order entered amending opinion. The petition for rehearing is denied.

Opinion reported as amended, *ante*, p. 100.

No. —. WATKINS *v.* UNITED STATES. March 5, 1945. Petition denied.

No. —. EX PARTE GUSS BROWN. March 5, 1945. The motion for leave to file petition for writ of mandamus is denied.

No. —. EX PARTE ROBERT LEE WILHOIT. March 5, 1945. The motion for leave to file petition for writ of habeas corpus is denied.

No. —. PUTNAM *v.* FEDERAL LAND BANK OF BALTIMORE. March 5, 1945. The application for reconsideration of the denial of petition for appeal is denied.

No. —. EX PARTE UNIVERSAL OIL PRODUCTS CO. March 5, 1945. The motion for leave to file petition for writ of prohibition and mandamus is denied without prejudice to the filing of an application for writ of certiorari. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application.

No. 2, October Term, 1941. BERNARDS ET AL. *v.* JOHNSON ET AL. March 5, 1945. The motion to recall the mandate is denied.

No. 55. PACIFIC GAS & ELECTRIC CO. *v.* SECURITIES & EXCHANGE COMMISSION. Certiorari, 322 U. S. 720, to the Circuit Court of Appeals for the Ninth Circuit. Argued December 4, 1944. Decided March 12, 1945. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE DOUGLAS took no part in

the consideration or decision of this case. *Mr. Herman Phleger,* with whom *Messrs. Wm. B. Bosley, Robert H. Gerdes* and *James S. Moore, Jr.* were on the brief, for petitioner. *Mr. Chester T. Lane,* with whom *Solicitor General Fahy, Messrs. Roger S. Foster, Milton V. Freeman, David K. Kadane* and *Arnold R. Ginsburg* were on the brief, for respondent. Reported below: 139 F. 2d 298.

No. 872. FORD MOTOR CO. *v.* PENNSYLVANIA. Appeal from the Supreme Court of Pennsylvania. March 12, 1945. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. (1) *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 165; *Educational Films Corp.* v. *Ward,* 282 U. S. 379; *Ford Motor Co.* v. *Beauchamp,* 308 U. S. 331; *Butler Bros.* v. *McColgan,* 315 U. S. 501; (2) *Kansas City, M. & B. R. Co.* v. *Stiles,* 242 U. S. 111; *Northwestern Mutual Life Ins. Co.* v. *Wisconsin,* 247 U. S. 132; (3) *Phelps* v. *Board of Education,* 300 U. S. 319, 322–323. *Messrs. W. A. Seifert, Geo. Ross Hull* and *Roy J. Keefer* for appellant. *James H. Duff,* Attorney General, and *Mr. H. F. Stambaugh* for appellee. Reported below: 350 Pa. 236, 38 A. 2d 329.

No. 873. QUAKER OATS CO. *v.* PENNSYLVANIA. Appeal from the Supreme Court of Pennsylvania. March 12, 1945. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. (1) *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 165; *Educational Films Corp.* v. *Ward,* 282 U. S. 379; *Ford Motor Co.* v. *Beauchamp,* 308 U. S. 331; *Butler Bros.* v. *McColgan,* 315 U. S. 501; (2) *Kansas City, M. & B. R. Co.* v. *Stiles,* 242 U. S. 111; *Northwestern Mutual Life Ins. Co.* v. *Wisconsin,* 247 U. S. 132; (3) *Phelps* v. *Board of Education,* 300 U. S. 319, 322–323; (4) *Western Live*

Stock v. *Bureau,* 303 U. S. 250, 256, and cases cited. *Messrs. W. A. Seifert, Geo. Ross Hull* and *Roy J. Keefer* for appellant. *James H. Duff,* Attorney General, and *Mr. H. F. Stambaugh* for appellee. Reported below: 350 Pa. 253, 38 A. 2d 325.

No. —. Ex parte Chesteen McConnell. March 12, 1945. Application denied.

No. —. Catovolo *v.* Hibbs, Commanding General. March 12, 1945. The motion for a stay of proceedings pending application for and consideration of a petition for writ of certiorari is granted.

No. 982. Wisconsin ex rel. Bartelt, Administrator, *v.* Thompson et al. Appeal from the Supreme Court of Wisconsin. March 26, 1945. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Phelps* v. *Board of Education,* 300 U. S. 319, 322–323; *Dodge* v. *Board of Education,* 302 U. S. 74, 79. *Mr. Herbert C. Hirschboeck* for appellant. Reported below: 246 Wis. 11, 16 N. W. 2d 420.

No. —. Ex parte Joseph Richetsky;

No. —. Ex parte Howard Van Orden; and

No. —. Davis *v.* Johnston, Warden. March 26, 1945. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. Ex parte Dorsey W. McMahan. March 26, 1945. The motion for leave to file petition for writ of mandamus is denied.

No. —. DUNCOMBE *v.* MARTINSON ET AL. March 26, 1945. Application denied.

No. 749. HOLLAND *v.* ILLINOIS. March 26, 1945. The motion of petitioner, dated March 10, is denied.

No. 934. DOSS *v.* LINDSLEY, SHERIFF. March 29, 1945. The motion of the petitioner to postpone issuance of order denying petition for certiorari pending filing and action on petition for rehearing is denied.

No. 976. JONES *v.* WHITTLE, SHERIFF. Appeal from the Supreme Court of Georgia. April 2, 1945. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the reason that the judgment of the court below is based upon a non-federal ground adequate to support it. *Mr. Benjamin B. McCowen* for appellant. *Mr. Reuben A. Garland* for appellee. Reported below: 198 Ga. 538, 32 S. E. 2d 94.

No. 1037. BARLOW ET AL. *v.* UTAH. Appeal from the Supreme Court of Utah. April 2, 1945. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Davis* v. *Beason,* 133 U. S. 333; *Reynolds* v. *United States,* 98 U. S. 145. *Messrs. Claude T. Barnes* and *O. A. Tangren* for appellants. *Grover A. Giles,* Attorney General, for appellee. Reported below: 153 P. 2d 647.

No. —. STOCKTON *v.* TEXAS. April 2, 1945. The motion for leave to file petition for writ of habeas corpus is denied.

No. 371. COMMISSIONER OF INTERNAL REVENUE *v.* SMITH. April 9, 1945. Order entered amending opinion. Opinion reported as amended, *ante,* p. 177.

No. —. EX PARTE MARY A. RUTHVEN. April 9, 1945. The motion for leave to file a petition for a writ of habeas corpus is denied.

No. —. EX PARTE STANLEY B. PEPLOWSKI. April 9, 1945. The motion for leave to file petition for writs of habeas corpus and mandamus is denied.

No. —. KELLY *v.* SWYGERT, JUDGE. April 9, 1945. The petition for writ of mandate is denied.

Nos. 561 and 592. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY BOWLES, PRICE ADMINISTRATOR, *v.* UNITED STATES ET AL. April 9, 1945. Davis, present Economic Stabilization Director, substituted for Vinson.

No. 980. WOMBLE *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. April 23, 1945. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is reversed for want of substantial evidence to sustain the conviction. Dissenting: MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS. *Mr. Nathaniel A. Brown* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Leon*

Ulman for the United States. Reported below: 146 F. 2d 263.

No. —. Ex parte Noel Gaines; and

No. —. Ex parte Robert L. McClendon. April 23, 1945. Applications denied.

No. —. Ex parte Robert H. Smith; and

No. —. Ex parte Nathan McBride. April 23, 1945. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. Ex parte Chesteen McConnell. April 23, 1945. The motion for leave to file petition for writ of habeas corpus and for other relief is denied.

No. —. Ex parte Alfred Minntole. April 23, 1945. The motion for leave to file petition for writ of certiorari is denied.

No. 379. Colorado Interstate Gas Co. *v.* Federal Power Commission et al.; and

No. 380. Canadian River Gas Co. *v.* Federal Power Commission et al. April 23, 1945. The motion to dismiss the writs of certiorari is denied. The motions for an order as to distribution of impounded funds are denied without prejudice to applications to the Circuit Court of Appeals.

DECISIONS GRANTING CERTIORARI, FROM JANUARY 30, 1945, THROUGH APRIL 23, 1945.

No. 921. HOUSE *v.* MAYO, STATE PRISON CUSTODIAN. See *ante*, p. 42.

No. 589. COMMISSIONER OF INTERNAL REVENUE *v.* DISSTON. February 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Fahy* for petitioner. *Mr. Harold Evans* for respondent. Reported below: 144 F. 2d 115.

No. 806. ALMA MOTOR CO. *v.* TIMKEN-DETROIT AXLE CO. ET AL. February 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. I. Joseph Farley* for petitioner. *Solicitor General Fahy* for the United States, respondent. Reported below: 144 F. 2d 714.

No. 855. CONGRESS OF INDUSTRIAL ORGANIZATIONS ET AL. *v.* MCADORY, SOLICITOR OF JEFFERSON COUNTY, ET AL. February 5, 1945. Petition for writ of certiorari to the Supreme Court of Alabama granted. *Mr. Lee Pressman* for petitioners. Reported below: 246 Ala. 198, 20 So. 2d 40.

No. 811. HILL ET AL. *v.* FLORIDA EX REL. WATSON, ATTORNEY GENERAL. February 5, 1945. Petition for writ of certiorari to the Supreme Court of Florida granted. *Messrs. Joseph A. Padway* and *Herbert S. Thatcher* for petitioners. *J. Tom Watson*, Attorney General, for respondent. Reported below: 155 Fla. 254, 19 So. 2d 857.

No. 791. DUNCAN *v.* KAHANAMOKU, SHERIFF. February 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. J. Garner Anthony* for petitioner. *Solicitor General Fahy, Assistant Attorney General Wechsler* and *Mr. Edward J. Ennis* for respondent. Reported below: 146 F. 2d 576.

No. 792. WHITE *v.* STEER, COLONEL. February 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Fred Patterson* for petitioner. *Solicitor General Fahy, Assistant Attorney General Wechsler* and *Mr. Edward J. Ennis* for respondent. Reported below: 146 F. 2d 576.

No. 456. UNITED STATES *v.* TWO ACRES OF LAND ET AL. February 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Fahy* for the United States. *Mr. George A. Barr* for respondents. Reported below: 144 F. 2d 207.

No. 699. GOLDSTONE ET AL., EXECUTORS, *v.* UNITED STATES. February 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Eugene L. Bondy* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch, George J. Laikin* and *Walter J. Cummings, Jr.* for the United States. Reported below: 144 F. 2d 373.

No. 820. 10 EAST 40TH STREET BUILDING, INC. *v.* CALLUS ET AL. February 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second

Circuit granted. *Messrs. Joseph M. Proskauer* and *Harold H. Levin* for petitioner. *Messrs. Aaron Benenson* and *Sydney R. Snitkin* for respondents. Reported below: 146 F. 2d 438.

No. 400. CHARLESTON FEDERAL SAVINGS & LOAN ASSOCIATION ET AL. *v.* ALDERSON, STATE TAX COMMISSIONER. See *ante*, pp. 182, 187.

No. 727. ORIOLO *v.* UNITED STATES. See *ante*, p. 824.

No. 953. FINN, TRUSTEE, *v.* MEIGHAN, SUBSTITUTED TRUSTEE. March 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Joseph Lorenz* for petitioner. *Mr. Burton C. Meighan, Jr.* for respondent. Reported below: 146 F. 2d 594.

No. 1016. UNITED STATES ALKALI EXPORT ASSOCIATION, INC. ET AL. *v.* UNITED STATES; and

No. 1017. CALIFORNIA ALKALI EXPORT ASSOCIATION, INC. ET AL. *v.* UNITED STATES. March 5, 1945. The motions for leave to file petitions for writs of certiorari under § 262 of the Judicial Code are granted. The petitions for writs of certiorari to the District Court of the United States for the Southern District of New York are granted. *Messrs. Wm. Dwight Whitney, Leland Hazard, David A. Reed, Robert T. McCracken, Ralph S. Harris, H. G. Hitchcock, H. W. Stull, J. E. F. Wood* and *Bruce Bromley* for petitioners in No. 1016. *Messrs. Fred N. Oliver* and *Edward D. Lyman* for petitioners in No. 1017. *Solicitor General Fahy, Assistant Attorney General Berge* and *Mr. Charles H. Weston* for the United States. Reported below: 58 F. Supp. 785.

Nos. 895, 896 and 897. CLEVELAND *v.* UNITED STATES;
No. 898. DARGER *v.* UNITED STATES;
No. 899. JESSOP *v.* UNITED STATES;
No. 900. DOCKSTADER *v.* UNITED STATES;
No. 901. STUBBS *v.* UNITED STATES;
No. 902. PETTY *v.* UNITED STATES;
No. 903. CHATWIN *v.* UNITED STATES;
No. 904. ZITTING *v.* UNITED STATES; and
No. 905. CHRISTENSEN *v.* UNITED STATES. March 12, 1945. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mr. O. A. Tangren* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. W. Marvin Smith, Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 146 F. 2d 730.

No. 815. SECURITIES & EXCHANGE COMMISSION *v.* OKIN. March 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Fahy* and *Mr. Roger S. Foster* for petitioner. *Mr. Samuel Okin* for respondent. Reported below: 143 F. 2d 945.

No. 914. BOWLES, PRICE ADMINISTRATOR, *v.* SEMINOLE ROCK & SAND CO. March 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Fahy* and *Mr. Thomas I. Emerson* for petitioner. *Messrs. Robert Ruark, Bennett H. Perry, Robert H. Anderson* and *J. M. Hemphill* for respondent. Reported below: 145 F. 2d 482.

No. 932. TRUST UNDER THE WILL OF BINGHAM ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. March 12,

1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. George E. Cleary* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch* and *L. W. Post* for respondent. Reported below: 145 F. 2d 568.

No. 853. AKINS *v.* TEXAS. March 26, 1945. Petition for writ of certiorari to the Court of Criminal Appeals of Texas granted. *Messrs. A. S. Baskett* and *W. J. Durham* for petitioner. *Grover Sellers,* Attorney General, *Benjamin T. Woodall,* Assistant Attorney General, and *Mr. Ernest S. Goens* for respondent. Reported below: 182 S. W. 2d 723.

No. 837. AMERICAN TOBACCO CO. ET AL. *v.* UNITED STATES;

No. 838. LIGGETT & MYERS TOBACCO CO. ET AL. *v.* UNITED STATES; and

No. 840. R. J. REYNOLDS TOBACCO CO. ET AL. *v.* UNITED STATES. March 26, 1945. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted limited to the question whether actual exclusion of competitors is necessary to the crime of monopolization under § 2 of the Sherman Act. The CHIEF JUSTICE, MR. JUSTICE REED, and MR. JUSTICE JACKSON took no part in the consideration or decision of these applications. *Messrs. George W. Whiteside* and *Milton Handler* for petitioners in No. 837. *Messrs. Bethuel M. Webster* and *Francis H. Horan* for petitioners in No. 838. *Messrs. Harold F. McGuire, B. S. Womble, Thomas Turner Cooke* and *Richard C. Stoll* for petitioners in No. 840. *Solicitor General Fahy, Assistant Attorney General Berge* and *Mr. Robert L. Stern* for the United States. Reported below: 147 F. 2d 93.

No. 1059. SECURITIES & EXCHANGE COMMISSION *v.* LONG ISLAND LIGHTING CO. March 26, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. The application for a stay is also granted. *Solicitor General Fahy* and *Mr. Roger S. Foster* for petitioner. *Mr. Harold R. Medina* for respondent. Reported below: 148 F. 2d 252.

No. 996. BOLLENBACH *v.* UNITED STATES. April 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Bernard Hershkopf* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 147 F. 2d 199.

No. 955. WALLING, ADMINISTRATOR, *v.* YOUNGERMAN-REYNOLDS HARDWOOD CO., INC. April 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Fahy* for petitioner. *Mr. Fred S. Ball, Jr.* for respondent. Reported below: 145 F. 2d 349.

No. 956. WALLING, ADMINISTRATOR, *v.* HARNISCHFEGER CORPORATION. April 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Fahy* for petitioner. *Messrs. Louis Quarles* and *Leo Mann* for respondent. Reported below: 145 F. 2d 589.

No. 964. IN THE MATTER OF ROBERT D. MICHAEL. April 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs.*

Robert T. McCracken and *Stanley F. Coar* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl, William Strong* and *Miss Beatrice Rosenberg* for the United States. Reported below: 146 F. 2d 627.

No. 971. MAY DEPARTMENT STORES CO. *v.* NATIONAL LABOR RELATIONS BOARD. April 9, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Lyle M. Allen* and *R. Walston Chubb* for petitioner. *Solicitor General Fahy, Mr. Alvin J. Rockwell* and *Miss Ruth Weyand* for respondent. Reported below: 146 F. 2d 66.

No. 1066. GENERAL ELECTRIC CO. *v.* JEWEL INCANDESCENT LAMP CO. ET AL. April 9, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Alexander C. Neave* for petitioner. Reported below: 146 F. 2d 414.

No. 980. WOMBLE *v.* UNITED STATES. See *ante*, p. 830.

No. 1000. THOMPSON, TRUSTEE, ET AL. *v.* TEXAS MEXICAN RAILWAY CO. April 23, 1945. Petition for writ of certiorari to the Court of Civil Appeals, 4th Supreme Judicial District, of Texas, granted. *Mr. Robert H. Kelley* for petitioners. *Messrs. M. G. Eckhardt* and *B. D. Tarlton* for respondent. Reported below: 181 S. W. 2d 895.

No. 1006. KEETON, ADMINISTRATRIX, *v.* THOMPSON, TRUSTEE IN BANKRUPTCY. April 23, 1945. Petition for

writ of certiorari to the Supreme Court of Arkansas granted. *Messrs. Theron W. Agee* and *David Sidney Partain* for petitioner. *Mr. Thomas B. Pryor* for respondent. Reported below: 207 Ark. 793, 183 S. W. 2d 505.

No. 1189. DE BEERS CONSOLIDATED MINES, LTD. ET AL. *v.* UNITED STATES; and

No. 1190. SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO ET AL. *v.* UNITED STATES. April 23, 1945. Petitions for writs of certiorari to the District Court of the United States for the Southern District of New York granted. *Messrs. Robert T. Swaine* and *Wm. Dwight Whitney* for petitioners in No. 1189. *Mr. John M. Harlan* for petitioners in No. 1190. *Solicitor General Fahy, Assistant Attorney General Berge, Messrs. Charles H. Weston, Herbert A. Berman* and *Edward S. Stimson* for the United States.

Nos. 1080 and 1191. UNIVERSAL OIL PRODUCTS CO. *v.* ROOT REFINING CO. April 23, 1945. Petitions for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. MR. JUSTICE ROBERTS took no part in the consideration or decision of these applications. *Messrs. Robert T. McCracken* and *Ralph S. Harris* for petitioner. *Messrs. J. Bernhard Thiess, Thorley von Holst, Sidney Neuman* and *Robert W. Poore* for respondent. Reported below: 147 F. 2d 259.

No. 825. HAWK *v.* OLSON, WARDEN. April 23, 1945. Petition for writ of certiorari to the Supreme Court of Nebraska granted. *Henry Hawk, pro se. Walter R. Johnson,* Attorney General, and *H. Emerson Kokjer,* Deputy Attorney General, for respondent.

DECISIONS DENYING CERTIORARI, FROM JANUARY 30, 1945, THROUGH APRIL 23, 1945.

No. 830. CANTRELL ET AL. *v.* ADAMS ET AL. See *ante*, p. 821.

No. 865. SIMMONS *v.* MISSISSIPPI. See *ante*, p. 821.

No. 753. MINER, JUDGE, ET AL. *v.* ILLINOIS EX REL. BENEFIT ASSOCIATION OF RAILWAY EMPLOYEES ET AL. February 5, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Messrs. Charles Aaron* and *Charles W. Stiefel, Jr.* for petitioners. *Messrs. Barnabas F. Sears* and *Herbert H. Naujoks* for respondents. Reported below: 387 Ill. 393, 56 N. E. 2d 353.

No. 783. FLEISH *v.* JOHNSTON, WARDEN. February 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Louis S. Beedy* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for respondent. Reported below: 145 F. 2d 16.

No. 787. LOEW *v.* UNITED STATES. February 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Herbert Zelenko* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 145 F. 2d 332.

No. 793. MAGGIO *v.* ZEITZ, TRUSTEE IN BANKRUPTCY. February 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Samuel C. Duberstein* and *Max Schwartz* for petitioner. *Mr. Joseph Glass* for respondent. Reported below: 145 F. 2d 241.

No. 817. CUDMORE, SECRETARY, *v.* BOWLES, PRICE ADMINISTRATOR. February 5, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Paul E. Jamieson* and *Thos. H. Patterson* for petitioner. *Solicitor General Fahy, Messrs. Thomas I. Emerson* and *David London* for respondent. Reported below: 145 F. 2d 697.

No. 433. HOWE, EXECUTRIX, *v.* UNITED STATES. February 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Arnold R. Baar* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch* and *Miss Louise Foster* for the United States. Reported below: 142 F. 2d 310.

No. 556. ROBERTS *v.* COMMISSIONER OF INTERNAL REVENUE. February 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. R. B. Cannon* and *Harry C. Weeks* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, A. F. Prescott* and *Mrs. Muriel S. Paul* for respondent. Reported below: 143 F. 2d 657.

No. 677. FRASER *v.* UNITED STATES. February 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Wils Davis* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark* and *Mr. Robert S. Erdahl* for the United States. Reported below: 145 F. 2d 145.

No. 654. MCMULLEN *v.* SQUIER, WARDEN. February 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Thomas McMullen, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *William Strong* for respondent. Reported below: 144 F. 2d 703.

No. 774. FITZPATRICK *v.* NIERSTHEIMER, WARDEN;
No. 800. HESLEY *v.* RAGEN, WARDEN;
No. 834. HAINES *v.* NIERSTHEIMER, WARDEN; and
No. 871. WESCOTT *v.* RAGEN, WARDEN. February 5, 1945. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 836. BARTELL *v.* ILLINOIS;
No. 839. WHITED *v.* ILLINOIS; and
No. 843. MILLMAN *v.* RAGEN, WARDEN. February 5, 1945. Petitions for writs of certiorari to the Supreme Court of Illinois 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. Reported below: No. 836, 386 Ill. 483, 54 N. E. 2d 700.

No. 879. BURNS *v.* ALABAMA. February 5, 1945. Petition for writ of certiorari to the Supreme Court of Alabama denied. The motion for a stay is also denied. MR. JUSTICE BLACK took no part in the consideration or decision of these applications. *Mr. G. Ernest Jones* for petitioner. Reported below: 246 Ala. 135, 19 So. 2d 450.

No. 673. CALIFORNIA SHIPBUILDING CORP. *v.* INDUSTRIAL ACCIDENT COMMISSION ET AL. February 12, 1945. Petition for writ of certiorari to the District Court of Appeal, 2d Appellate District, of California, denied. *Messrs. Max Thelen* and *Gordon Johnson* for petitioner. *Mr. Everett A. Corten* for respondents. Reported below: 64 Cal. App. 2d 622, 149 P. 2d 432.

No. 784. BENTON, ADMINISTRATOR, *v.* ST. LOUIS-SAN FRANCISCO RAILROAD CO. February 12, 1945. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Joseph A. Padway* and *Clarence C. Chilcott* for petitioner. *Mr. Maurice G. Roberts* for respondent. Reported below: 182 S. W. 2d 61.

No. 812. BOUNDARY COUNTY ET AL. *v.* WOLDSON. February 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Claude D. Randall* for petitioners. *Mr. Ezra R. Whitla* for respondent. Reported below: 144 F. 2d 17.

No. 814. ONAN ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. February 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Cir-

cuit denied. *Mr. R. H. Fryberger* for petitioners. *Solicitor General Fahy, Mr. Alvin J. Rockwell, Misses Ruth Weyand* and *Fannie M. Boyls* for respondent. Reported below: 145 F. 2d 328.

No. 821. UNITED STATES *v.* ANGLIN & STEVENSON ET AL. February 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Solicitor General Fahy* for the United States. *Messrs. Joseph C. Stone, W. T. Anglin, Charles A. Moon, Francis Stewart, Leon C. Phillips, D. A. Richardson, L. O. Lytle, George Jennings, Harry B. Parris* and *Wilbur J. Holleman* for respondents. Reported below: 145 F. 2d 622.

No. 824. PATHFINDER PETROLEUM CO. *v.* GENERAL INSURANCE CO. February 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Earl Glen Whitehead* for petitioner. *Mr. Walter O. Schell* for respondent. Reported below: 145 F. 2d 368.

No. 827. COTTON STATE FERTILIZER CO. ET AL. *v.* HURT. February 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles J. Bloch* for petitioners. *Mr. Carl T. Hoffman* for respondent. Reported below: 145 F. 2d 293.

No. 844. HORTON ET AL., TRADING AS MECHANICAL ICE TRAY CO., ET AL. *v.* GENERAL MOTORS CORP. February 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. William H. Davis, Daniel V. Mahoney, George E. Faithfull* and *C. M. Fisher* for petitioners. *Mr. Drury W. Cooper* for respondent. Reported below: 144 F. 2d 720.

No. 810. TALBOTT *v.* CALIFORNIA. February 12, 1945. Petition for writ of certiorari to the District Court of Appeal, 2d Appellate District, of California, denied. Reported below: 65 Cal. App. 2d 654, 151 P. 2d 317.

No. 752. THOMPSON *v.* HARRIS, WARDEN. February 12, 1945. Petition for writ of certiorari to the Supreme Court of Utah denied. *Mrs. Dorothea Merrill Dryer* for petitioner. Reported below: 152 P. 2d 91.

No. 765. GRAHAM *v.* SQUIER, WARDEN. February 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Allan Lee Graham, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. W. Marvin Smith, Robert S. Erdahl* and *Leon Ulman* for respondent. Reported below: 145 F. 2d 348.

No. 779. JONES *v.* STEWART, JUDGE. February 12, 1945. Petition for writ of certiorari to the Supreme Court of Indiana denied.

No. 785. ARONSON ET AL. *v.* NEW YORK. February 12, 1945. Petition for writ of certiorari to the Supreme Court of New York denied. *Ralph Aronson* and *Hyman Brecker, pro se. Mr. Thomas Cradock Hughes* for respondent. Reported below: 268 App. Div. 791, 50 N. Y. S. 2d 458.

No. 789. MITCHELL *v.* BOARD OF GOVERNORS OF THE WASHINGTON STATE BAR ASSOCIATION. February 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. Reported below: 145 F. 2d 827.

No. 818. KINSEY *v.* FLORIDA. February 12, 1945. Petition for writ of certiorari to the Supreme Court of Florida denied. Reported below: 155 Fla. 159, 19 So. 2d 706.

No. 887. LYERLA *v.* NIERSTHEIMER, WARDEN;
No. 889. CORDTS *v.* RAGEN, WARDEN;
No. 891. KIRSCH *v.* RAGEN, WARDEN;
No. 894. GAPINSKI *v.* NIERSTHEIMER, WARDEN; and
No. 910. VAN DYKE *v.* NIERSTHEIMER, WARDEN. February 12, 1945. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 775. DAVIS, ADMINISTRATRIX, *v.* ALABAMA GREAT SOUTHERN RAILROAD CO. February 12, 1945. Petition for writ of certiorari to the Supreme Court of Alabama denied for the reason that it does not appear from the record or from the papers submitted that the judgment is final. *Mr. Erle Pettus* for petitioner. *Messrs. Sidney S. Alderman, J. T. Stokely, H. G. Hedrick* and *S. R. Prince* for respondent. Reported below: 246 Ala. 64, 18 So. 2d 737.

No. 878. CARNAHAN *v.* NIERSTHEIMER, WARDEN. February 12, 1945. Petition for writ of certiorari to the Supreme Court of Illinois 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.

No. 858. ILLINOIS COMMERCE COMMISSION ET AL. *v.* ILLINOIS CENTRAL RAILROAD CO. See *ante,* p. 823.

No. 704. WALDON *v.* UNITED STATES. February 26, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *John Waldon, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. W. Marvin Smith, Robert S. Erdahl* and *Irving S. Shapiro* for the United States.

No. 798. SAFEWAY STORES, INC. *v.* BOWLES, PRICE ADMINISTRATOR. February 26, 1945. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Messrs. Elisha Hanson* and *Eliot C. Lovett* for petitioner. *Solicitor General Fahy* for respondent. Reported below: 145 F. 2d 836.

No. 799. SAFEWAY STORES, INC. *v.* BOWLES, PRICE ADMINISTRATOR. February 26, 1945. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Messrs. Elisha Hanson* and *Eliot C. Lovett* for petitioner. *Solicitor General Fahy* for respondent. Reported below: 145 F. 2d 836.

No. 819. CENTRAL DISPENSARY & EMERGENCY HOSPITAL *v.* NATIONAL LABOR RELATIONS BOARD. February 26, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Joseph C. McGarraghy* for petitioner. *Solicitor General Fahy, Mr. Alvin J. Rockwell, Misses Ruth Weyand* and *Margaret M. Farmer* for respondent. Reported below: 145 F. 2d 852.

No. 822. FRANKLIN ET AL. *v.* CITY OF NEW YORK ET AL. February 26, 1945. Petition for writ of certiorari to the

Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles Franklin* for petitioners. *Mr. Leo Brown* for respondents. Reported below: 144 F. 2d 571.

No. 826. BERGER ET AL. *v.* UNITED STATES. February 26, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis B. Boudin* for petitioners. *Solicitor General Fahy, Messrs. Douglas B. Maggs* and *Albert A. Spiegel* for the United States. Reported below: 145 F. 2d 888.

No. 831. RAMBO ET AL. *v.* UNITED STATES. February 26, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. George C. Spence* and *Edgar Watkins* for petitioners. *Solicitor General Fahy, Messrs. J. Edward Williams, Vernon L. Wilkinson* and *Miss Wilma C. Martin* for the United States. Reported below: 145 F. 2d 670.

No. 842. GREENAN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. February 26, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Geo. B. Thatcher* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Robert N. Anderson* and *Miss Melva M. Graney* for respondent. Reported below: 145 F. 2d 134.

No. 851. THATCHER *v.* BLACKER ET AL. February 26, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Lester H. Loble* and *M. S. Gunn* for petitioner. *Mr. Taylor B. Weir* for respondents. Reported below: 145 F. 2d 255.

No. 805. FRASER ET UX. *v.* BARTON ET AL. February 26, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Wils Davis* for petitioners. *Mr. L. E. Gwinn* for Barton et al.; *Solicitor General Fahy, Assistant Attorney General Berge, Messrs. Charles H. Weston, J. Stephen Doyle, Jr., W. Carroll Hunter* and *Mrs. Mary Connor Myers* for the United States, respondents. Reported below: 145 F. 2d 139.

No. 847. ALLISON *v.* PENNSYLVANIA. February 26, 1945. Petition for writ of certiorari to the Superior Court of Pennsylvania denied. *Mr. J. Harry Pershing* for petitioner. Reported below: 155 Pa. Super. 290, 38 A. 2d 535.

No. 849. MARTINO *v.* MICHIGAN WINDOW CLEANING CO. February 26, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Daniel D. Carmell* for petitioner. *Mr. Larry S. Davidow* for respondent. Reported below: 145 F. 2d 163.

No. 863. MOORE *v.* MOORE. February 26, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Earl B. Dickerson* for petitioner. *Mr. Melvin L. Griffith* for respondent. Reported below: 145 F. 2d 580.

No. 918. WEINSTEIN *v.* NORTH CAROLINA. February 26, 1945. Petition for writ of certiorari to the Supreme Court of North Carolina denied. *Mr. Thomas W. Ruffin* for petitioner. *Harry McMullan,* Attorney General, *Hughes J. Rhodes* and *Ralph Moody,* Assistant Attorneys General, for respondent. Reported below: 224 N. C. 645, 31 S. E. 2d 920.

No. 854. ROBINSON ET AL. *v.* DEAL ET AL. February 26, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Messrs. Geo. E. H. Goodner* and *Scott P. Crampton* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *J. Louis Monarch* for respondents. Reported below: 145 F. 2d 382.

No. 803. UNITED STATES *v.* BRAND INVESTMENT CO. February 26, 1945. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Fahy* for the United States. Reported below: 102 Ct. Cls. 40.

No. 869. CHASE NATIONAL BANK *v.* DIXON, IRMAOS & CIA. LTDA. February 26, 1945. 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. Paul D. Miller* for petitioner. *Messrs. James Joseph Noble, Oscar R. Houston* and *Arthur W. Clement* for respondent. Reported below: 144 F. 2d 759.

No. 882. W. F. & JOHN BARNES CO. ET AL. *v.* INTERNATIONAL HARVESTER CO. ET AL. February 26, 1945. 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. George I. Haight, John A. Marzall* and *M. K. Hobbs* for petitioners. *Mr. Alwin F. Pitzner* for respondents. Reported below: 145 F. 2d 915.

No. 689. PEARCE *v.* FLORIDA. February 26, 1945. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. J. B. Hodges* for petitioner. Reported below: 154 Fla. 657, 18 So. 2d 754.

No. 813. ELDRIDGE *v.* KEITH. February 26, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Grover C. Eldridge, pro se. Mr. John C. Goins* for respondent. Reported below: 145 F. 2d 234.

No. 883. FOXALL *v.* RAGEN, WARDEN;
No. 890. PHILLIPS *v.* RAGEN, WARDEN;
No. 892. WRIGHT *v.* RAGEN, WARDEN;
No. 893. FIFE *v.* RAGEN, WARDEN;
No. 915. CRIST *v.* RAGEN, WARDEN;
No. 924. GORDON *v.* ILLINOIS;
No. 925. HANLEY *v.* RAGEN, WARDEN;
No. 926. EULER *v.* ILLINOIS; and
No. 931. PULLETT *v.* BENNETT, WARDEN. February 26, 1945. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 916. ROONEY *v.* RAGEN, WARDEN. February 26, 1945. Petition for writ of certiorari to the Supreme Court of Illinois 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.

No. 149. CALDWELL SUGARS, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. March 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth

Circuit denied. *Mr. C. J. Batter* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Joseph M. Jones* and *Miss Helen R. Carloss* for respondent. Reported below: 140 F. 2d 772.

No. 150. SLACK BROS., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. March 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. C. J. Batter* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Joseph M. Jones* and *Miss Helen R. Carloss* for respondent. Reported below: 141 F. 2d 261.

No. 795. GLOBE INDEMNITY CO. *v.* UNITED STATES. March 5, 1945. Petition for writ of certiorari to the Court of Claims denied. *Messrs. William F. Kelly* and *P. J. J. Nicolaides* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea, Mr. Abraham J. Harris* and *Miss Cecelia Goetz* for the United States. Reported below: 102 Ct. Cls. 21.

No. 802. ESTATE OF JOHNSON *v.* UNITED STATES. March 5, 1945. Petition for writ of certiorari to the Court of Claims denied. *Mr. John Jay McKelvey* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Robert N. Anderson* and *Mrs. Elizabeth B. Davis* for the United States. Reported below: 102 Ct. Cls. 213, 57 F. Supp. 159.

No. 808. TREE ET UX. *v.* UNITED STATES. March 5, 1945. Petition for writ of certiorari to the Court of

Claims denied. *Mr. Allen H. Gardner* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Robert N. Anderson* and *Mrs. Elizabeth B. Davis* for the United States. Reported below: 102 Ct. Cls. 128, 55 F. Supp. 438.

No. 864. DOLLERT ET AL. *v.* PRATT-HEWIT OIL CORP. ET AL. March 5, 1945. Petition for writ of certiorari to the Court of Civil Appeals, 4th Judicial District, of Texas, denied. *Messrs. Daniel W. Hoan* and *Luther M. Bickett* for petitioners. *Mr. William Hamlet Blades* for respondents. Reported below: 179 S. W. 2d 346.

No. 880. WOODSON *v.* MICHIGAN. March 5, 1945. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. George Stone* for petitioner. *John R. Dethmers,* Attorney General, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent. Reported below: 309 Mich. 391, 15 N. W. 2d 679.

No. 886. DRISCOLL ET AL., TRUSTEES, *v.* HOWARD-VAUGHAN CO., INC. ET AL. March 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. W. Cameron Burton* for petitioners. *Mr. William Dean Embree* for John D. Rockefeller, Jr. and *Mr. Herbert C. Smyth, Jr.* for Socony-Vacuum Oil Co., respondents.

No. 678. MAHONEY ET AL. *v.* JOHNSTON, WARDEN. March 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied.

Harry Mahoney and *Truman Mahoney, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *William Strong* for respondent. Reported below: 144 F. 2d 663.

No. 690. KING *v.* UNITED STATES. March 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Emory King, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 144 F. 2d 729.

No. 749. HOLLAND *v.* ILLINOIS. March 5, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 782. RICCIA *v.* WELCH, SUPERINTENDENT. March 5, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *William H. Riccia, pro se. Solicitor General Fahy* for respondent.

No. 794. WROBEL *v.* OVERHOLSER, SUPERINTENDENT. March 5, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Rudolph Joseph Wrobel, Jr., pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for respondent. Reported below: 145 F. 2d 859.

No. 801. POVICH *v.* SANFORD, WARDEN. March 5, 1945. Petition for writ of certiorari to the Circuit Court

of Appeals for the Fifth Circuit denied. *Stephen T. Povich, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for respondent. Reported below: 144 F. 2d 868.

No. 829. MACKRETH *v.* WILLIAMS, WARDEN. March 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Reported below: 145 F. 2d 272.

No. 960. BAKER *v.* RAGEN, WARDEN. March 5, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 334. PADDY *v.* UNITED STATES. March 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. MR. JUSTICE MURPHY is of opinion that the writ should be granted. *William James Paddy, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. W. Marvin Smith, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 143 F. 2d 847.

No. 662. PERRY *v.* UNITED STATES. March 5, 1945. The petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit and motion for other relief are denied. *H. E. Perry, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States.

No. 816. KELLY *v.* UNITED STATES. March 5, 1945. The petition for writ of certiorari to the Circuit Court of

Appeals for the Ninth Circuit is denied for the reason that application therefor was not made within the time provided by law. *Harry C. Kelly, pro se. Solicitor General Fahy* for the United States. Reported below: 138 F. 2d 489.

No. 936. MORRIS *v.* RAGEN, WARDEN; and

No. 937. MANCUSO *v.* RAGEN, WARDEN. March 5, 1945. The petitions for writs of certiorari to the Supreme Court of Illinois 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.

No. 797. CHAPMAN *v.* HUNTER, WARDEN. March 5, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Abe Chapman, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Leon Ulman* for respondent.

No. —. SCOTT *v.* RAGEN, WARDEN. March 12, 1945. Petition for writ of certiorari denied.

No. 857. UNITED STATES GYPSUM CO. *v.* NATIONAL WAR LABOR BOARD ET AL. March 12, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Joseph H. Batt, John E. MacLeish, Leland K. Neeves* and *Charles M. Price* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea* and *Mr. Paul A. Sweeney* for respondents. Reported below: 145 F. 2d 97.

No. 874. WALL *v.* BRIM. March 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Grover Middlebrooks* and *Clifford E. Hay* for petitioner. *Mr. Julian Webb* for respondent. Reported below: 145 F. 2d 492.

No. 875. DES ROSIERS *v.* FORD MOTOR CO. March 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Herbert J. Jacobi* and *Thomas A. Jenckes* for petitioner. *Mr. I. Joseph Farley* for respondent. Reported below: 143 F. 2d 907.

No. 907. PARK, CHAIRMAN, *v.* GROUP OF INSTITUTIONAL INVESTORS ET AL. March 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Frank C. Nicodemus, Jr.*, for petitioner. *Messrs. Kenneth F. Burgess, Douglas F. Smith, George Ragland, Jr., Fred N. Oliver* and *Willard P. Scott* for Group of Institutional Investors et al., and *Mr. Meyer Abrams* for Abrams et al., respondents. Reported below: 145 F. 2d 299.

No. 912. BULLDOG ELECTRIC PRODUCTS CO. *v.* WESTINGHOUSE ELECTRIC & MANUFACTURING CO. March 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Abraham J. Levin* for petitioner. *Messrs. Drury W. Cooper, Victor S. Beam* and *Thomas J. Byrne* for respondent. Reported below: 148 F. 2d 792.

No. 917. OHIO PUBLIC SERVICE CO. *v.* NATIONAL LABOR RELATIONS BOARD. March 12, 1945. 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, Mr. Alvin J. Rockwell* and *Miss Ruth Weyand* for respondent. Reported below: 144 F. 2d 252.

No. 928. HINES, ADMINISTRATRIX, ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD CO. March 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Fred B. Greear* and *George P. Cridlin* for petitioners. *Mr. Ernest Woodward* for respondent.

No. 933. NATIONAL MEMORIAL PARK, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. March 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Llewellyn A. Luce* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch* and *Ernest R. Mortenson* for respondent. Reported below: 145 F. 2d 1008.

No. 949. UNITED STATES *v.* MONTGOMERY WARD & CO., INC. ET AL. March 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied for the reason that application has been made prior to judgment of the Circuit Court of Appeals. *Solicitor General Fahy* for the United States. *Messrs. Stuart S. Ball, John A. Barr, Harold A. Smith, Guy A. Gladson* and *Arthur D. Welton* for respondents.

No. 848. HOLT ET AL. *v.* BARNESVILLE FARMERS ELEVATOR CO. March 12, 1945. Petition for writ of certiorari

to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Leonard Eriksson* for petitioners. *Mr. W. E. Rumble* for respondent. Reported below: 145 F. 2d 250.

No. 881. HARRIS ET AL. *v.* HAMMOND. March 12, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Paul Treasevant Chance* for petitioners. *Mr. W. Inman Curry* for respondent. Reported below: 145 F. 2d 333.

No. 938. JOHNSON *v.* RAGEN, WARDEN. March 12, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 939. EVANS *v.* NIERSTHEIMER, WARDEN. March 12, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 351. CARLOTA BENITEZ SAMPAYO *v.* UNITED STATES ET AL.;

No. 352. CARLOTA BENITEZ SAMPAYO *v.* BANK OF NOVA SCOTIA; and

No. 353. CARLOTA BENITEZ SAMPAYO *v.* BANK OF NOVA SCOTIA ET AL. March 12, 1945. The petitions for writs of certiorari to the Circuit Court of Appeals for the First Circuit are denied. The CHIEF JUSTICE took no part in the consideration or decision of these applications. *Carlota Benitez Sampayo, pro se. Solicitor General Fahy, Assistant Attorney General Littell, Mr. Vernon L. Wilkinson* and *Miss Wilma C. Martin* for the United States, and *Mr. Henri Brown* for the Bank of Nova Scotia, respondents. Reported below: 141 F. 2d 939, 942, 943.

No. 614. MEURER STEEL BARREL CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. March 26, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Emanuel A. Stern* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Robert N. Anderson* and *Miss Louise Foster* for respondent. Reported below: 144 F. 2d 282.

No. 828. HASTINGS, SPECIAL TRUSTEE, *v.* HAYSTONE SECURITIES CORP. ET AL. March 26, 1945. Petition for writ of certiorari to the Court of Appeals of New York denied. *Messrs. Francis J. Quillinan, William H. Foulk* and *Frederick Baum* for petitioner. *Mr. Horace G. Hitchcock* for respondents. Reported below: 293 N. Y. 404, 57 N. E. 2d 733.

No. 870. ACME POULTRY CORP. *v.* UNITED STATES. March 26, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Milton E. Sahn* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Mrs. Mayte B. Greene* for the United States. Reported below: 146 F. 2d 738.

No. 940. CITY OF ORANGEBURG *v.* SOUTHERN RAILWAY CO. March 26, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Julian S. Wolfe* for petitioner. *Messrs. Frank G. Tompkins* and *Adam H. Moss* for respondent. Reported below: 145 F. 2d 725.

No. 947. ROODENKO *v.* UNITED STATES. March 26, 1945. Petition for writ of certiorari to the Circuit Court

of Appeals for the Tenth Circuit denied. *Mr. Carle Whitehead* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 147 F. 2d 752.

No. 970. CONDENSER CORPORATION OF AMERICA *v.* MICAMOLD RADIO CORP. March 26, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Loyd H. Sutton* for petitioner. *Mr. Kenneth S. Neal* for respondent. Reported below: 145 F. 2d 878.

No. 885. ANDERSON, RECEIVER, *v.* TWAY. March 26, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Robert S. Marx, Frank E. Wood* and *Harry Kasfir* for petitioner. *Mr. Chas. I. Dawson* for respondent. Reported below: 143 F. 2d 95.

No. 930. FREDERICK *v.* UNITED STATES. March 26, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Bernard A. Golding* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. W. Marvin Smith, Robert S. Erdahl* and *William Strong* for the United States. Reported below: 146 F. 2d 488.

No. 943. THOMPSON ET AL. *v.* UNITED STATES. March 26, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Eustis Myres* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl*

and *William Strong* for the United States. Reported below: 145 F. 2d 826.

No. 944. DRAKE ET AL. *v.* UNITED STATES. March 26, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Eustis Myres* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl, Leon Ulman* and *Mrs. Mayte B. Greene* for the United States. Reported below: 145 F. 2d 825.

No. 945. NEGRO *v.* BOSTON & MAINE RAILROAD. March 26, 1945. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Irving I. Goldsmith* for petitioner. *Mr. Charles E. Nichols* for respondent. Reported below: 293 N. Y. 791, 59 N. E. 2d 31.

No. 957. PROCTOR ET AL. *v.* UNITED STATES. March 26, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Bernard A. Golding* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 146 F. 2d 724.

No. 965. MOSHER *v.* WAYLAND ET AL. March 26, 1945. Petition for writ of certiorari to the Supreme Court of Arizona denied. *Mr. Thomas O. Marlar* for petitioner. *Mr. Chas. L. Strouss* for respondents. Reported below: 158 P. 2d 654.

No. 968. HAY *v.* COMMISSIONER OF INTERNAL REVENUE. March 26, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Joseph D. Brady* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Robert N. Anderson* and *Miss Melva M. Graney* for respondent. Reported below: 145 F. 2d 1001.

No. 934. DOSS *v.* LINDSLEY, SHERIFF. March 26, 1945. The motion to defer consideration is denied. The petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit is also denied. *Mr. Richard E. Westbrooks* for petitioner. *George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent. Reported below: 148 F. 2d 22.

No. 906. COYLE *v.* CALIFORNIA ET AL. March 26, 1945. Petition for writ of certiorari to the Supreme Court of California denied.

No. 962. WESTRUP *v.* RAGEN, WARDEN;

No. 1015. BAKER *v.* RAGEN, WARDEN; and

No. 1018. BLOOMENTHAL *v.* RAGEN, WARDEN. March 26, 1945. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 961. WATKINS *v.* RAGEN, WARDEN. March 26, 1945. The petition for writ of certiorari to the Supreme Court of Illinois is 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.

No. 845. WHITE *v.* GEORGIA. April 2, 1945. Petition for writ of certiorari to the Court of Appeals of Georgia denied. *Mr. Houston White, pro se.* Reported below: 71 Ga. App. 512, 31 S. E. 2d 78.

No. 876. RICHARDSON *v.* RICHARDSON ET AL. April 2, 1945. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Edward A. Simmons* for petitioner. *Mr. Albert J. Rapp* for respondents. Reported below: 309 Mich. 336, 15 N. W. 2d 660.

No. 941. NATIONAL ALUMINATE CORP. *v.* PERMUTIT COMPANY ET AL. April 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. George I. Haight* and *Dewey F. Fagerburg* for petitioner. *Messrs. Clarence D. Kerr* and *Joseph J. Gravely* for the Permutit Company, and *Solicitor General Fahy* for the Alien Property Custodian, respondents. Reported below: 145 F. 2d 175.

No. 950. SUPERIOR COAL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. April 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Nelson Trottman, William T. Faricy* and *Nye F. Morehouse* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Robert N. Anderson* and *Harold C. Wilkenfeld* for respondent. Reported below: 145 F. 2d 597.

No. 954. GENECOV ET AL. *v.* FEDERAL PETROLEUM BOARD. April 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. Edward Lee* for petitioners. *Solicitor General Fahy, Assistant Attorney General Berge, Messrs. Charles H. Weston* and *Matthias N. Orfield* for respondent. Reported below: 146 F. 2d 596.

No. 959. FRANKLIN LIFE INSURANCE CO. *v.* HEITCHEW. April 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Edmund Burke* for petitioner. Reported below: 146 F. 2d 71.

No. 972. PFEIFFER BREWING CO. *v.* BOWLES, PRICE ADMINISTRATOR. April 2, 1945. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Messrs. Merlin Wiley* and *E. C. Shields* for petitioner. *Solicitor General Fahy* and *Mr. Richard H. Field* for respondent. Reported below: 146 F. 2d 1006.

No. 973. FRIEDMANN *v.* COMMISSIONER OF INTERNAL REVENUE. April 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Leon E. Kaumheimer* and *Frederic Sammond* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *A. F. Prescott* for respondent. Reported below: 145 F. 2d 594.

No. 974. ADAMS *v.* CITY BANK FARMERS TRUST CO. ET AL., EXECUTORS, ET AL. April 2, 1945. Petition for writ of certiorari to the Surrogate's Court of New York

County, New York, denied. *Messrs. Austin Sherman, Howard E. Reinheimer* and *A. P. G. Steffes* for petitioner. *Mr. Arthur M. Boal* for respondents. Reported below: 267 App. Div. 985, 48 N. Y. S. 2d 801.

No. 975. CALLOWAY, TRUSTEE, *v.* HART. April 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William H. Sadler* for petitioner. *Mr. Crampton Harris* for respondent. Reported below: 146 F. 2d 103.

No. 995. METRIK *v.* FORT TRYON GARDENS, INC. April 2, 1945. Petition for writ of certiorari to the Supreme Court, Appellate Term, First Department, of New York, denied. *Mr. Jacob W. Friedman* for petitioner. *Mr. Alfred C. Bennett* for respondent.

No. 998. ESTATE OF KROGER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. April 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Ike Lanier, C. Chester Guy, J. E. Marshall* and *Edward J. Quinn* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Carlton Fox* and *Miss Helen R. Carloss* for respondent. Reported below: 145 F. 2d 901.

Nos. 1001 and 1002. PRESIDENT & DIRECTORS OF MANHATTAN COMPANY *v.* KELBY ET AL., TRUSTEES, ET AL. April 2, 1945. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John Lord O'Brian, J. M. Richardson Lyeth, Mark W. Maclay* and *Charles A. Horsky* for petitioner. *Messrs.*

Geo. C. Wildermuth, Charles M. McCarty and *Joseph Nemerov* for Kelsey et al., and *Mr. Samuel Silbiger* for Eddy, respondents. Reported below: 147 F. 2d 465.

No. 1004. FRANKLIN PEANUT CO. *v.* COMMISSIONER OF INTERNAL REVENUE. April 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. E. F. Colladay* and *Wilton H. Wallace* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Mr. Sewall Key, Miss Helen R. Carloss* and *Mrs. Maryhelen Wigle* for respondent. Reported below: 144 F. 2d 979.

No. 1008. DOLAN ET AL. *v.* MEYER ET AL. April 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. George R. Fearon* and *Laurence Sovik* for petitioners. *Mr. Robert H. O'Brien* for respondents. Reported below: 145 F. 2d 880.

No. 929. BARRY, ADMINISTRATRIX, *v.* READING COMPANY. April 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Milford J. Meyer* for petitioner. *Messrs. Robert N. Miller* and *John C. Ristine* for respondent. Reported below: 147 F. 2d 129.

No. 935. COMPAGNA ET AL. *v.* UNITED STATES;

No. 942. MARITOTE *v.* UNITED STATES; and

No. 946. KAUFMAN *v.* UNITED STATES. April 2, 1945. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Wm. Scott Stewart* for petitioners in No. 935. *Francis Maritote, pro se. Messrs. J. Bertram Wegman* and *Harold Simandl* for

petitioner in No. 946. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 146 F. 2d 524.

No. 841. SPURLOCK *v.* STEER. April 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied on the ground that the cause is moot. *Mr. F. M. Brooks* for petitioner. *Solicitor General Fahy, Assistant Attorney General Wechsler* and *Mr. John L. Burling* for respondent. Reported below: 146 F. 2d 652.

No. 719. POTTS *v.* POTTS. April 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Joseph Arthur Edge* for petitioner. Reported below: 142 F. 2d 883.

No. 761. GALLAGHER *v.* RAGEN, WARDEN. April 2, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Charles Liebman* for petitioner. *George F. Barrett,* Attorney General, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 809. MCCOY *v.* PESCOR, WARDEN. April 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Jack A. McCoy, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Miss Beatrice Rosenberg* and *Mrs. Mayte B. Greene* for respondent. Reported below: 145 F. 2d 260.

No. 951. ANDERSON *v.* LOUISIANA. April 2, 1945. Petition for writ of certiorari to the Supreme Court of Lou-

isiana denied. Reported below: 206 La. 986, 20 So. 2d 288.

No. 978. ST. JOHN *v.* STUBBLEFIELD, WARDEN. April 2, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1010. TOMPSETT *v.* OHIO ET AL. April 2, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. Reported below: 146 F. 2d 95.

No. 1019. MEYERS *v.* RAGEN, WARDEN. April 2, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 766. FITZGERALD *v.* SANFORD, WARDEN. April 2, 1945. The petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit and the motion for other relief are denied. *Thomas Fitzgerald, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for respondent. Reported below: 145 F. 2d 228.

No. 966. DICKEY *v.* RAISIN PRORATION ZONE No. 1, RAISIN PRORATION ASSOCIATION, ET AL. April 9, 1945. Petition for writ of certiorari to the Supreme Court of California denied. *Messrs. Walter M. Gleason, Max Radin* and *Morgan J. Doyle* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea, Messrs. Paul A. Sweeney* and *Walter J. Cummings, Jr.* for the Commodity Credit Corporation, respondent. Reported below: 24 Cal. 2d 796, 151 P. 2d 505.

637582°—46——59

No. 967. UNITED STATES EX REL. POTTS *v.* RABB, U. S. MARSHAL. April 9, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Walter Biddle Saul* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Irving S. Shapiro* and *Mrs. Mayte B. Greene* for respondent. Reported below: 147 F. 2d 225.

No. 983. TILGHMAN *v.* UNITED STATES. April 9, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. S. Baskett* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 146 F. 2d 644.

No. 984. WESTERN ELECTRIC CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 988. POINT BREEZE EMPLOYEES ASSOCIATION, INC. *v.* NATIONAL LABOR RELATIONS BOARD. April 9, 1945. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Wilkie Bushby* and *William J. Butler* for petitioner in No. 984. *Mr. Charles H. Dorn* for petitioner in No. 988. *Solicitor General Fahy, Messrs. Alvin J. Rockwell* and *David Findling* for respondent. Reported below: 147 F. 2d 519.

No. 985. MCLEAN *v.* TEXAS. April 9, 1945. Petition for writ of certiorari to the Court of Civil Appeals, First Supreme Judicial District, of Texas, denied. *Messrs. William D. Gordon* and *E. E. Easterling* for petitioner. *Mr. E. L. Reid* for respondent. Reported below: 181 S. W. 2d 725.

No. 1003. TAYLOR *v.* COMMISSIONER OF INTERNAL REVENUE. April 9, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Walter R. Kuhn* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *J. Louis Monarch* for respondent.

No. 1012. HALL, JUDGE, *v.* UNITED STATES. April 9, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. William C. Mathes* and *Lasher B. Gallagher* for petitioner. *Solicitor General Fahy, Messrs. J. Edward Williams* and *Vernon L. Wilkinson* for the United States. Reported below: 145 F. 2d 781.

No. 1020. JEFFERSON COUNTY *v.* TENNESSEE VALLEY AUTHORITY. April 9, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. M. W. Egerton* for petitioner. *Solicitor General Fahy* and *Mr. Charles J. McCarthy* for respondent. Reported below: 146 F. 2d 564.

No. 1024. MORRILL *v.* WAERN BUILDING CORP. April 9, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Theodore E. Rein* for petitioner. *Messrs. Walter E. Wiles* and *George E. Billett* for respondent. Reported below: 145 F. 2d 584.

No. 1027. MALLINCKRODT *v.* COMMISSIONER OF INTERNAL REVENUE. April 9, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth

Circuit denied. *Messrs. Daniel N. Kirby, Charles P. Williams, Homer Cummings, Max O'Rell Truitt* and *Mac Asbill* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Robert N. Anderson* and *Bernard Chertcoff* for respondent. Reported below: 146 F. 2d 1.

No. 1041. KENNEDY *v.* EMERALD COAL & COKE CO. April 9, 1945. Petition for writ of certiorari to the Supreme Court of Delaware denied. *Messrs. Walter H. Maloney* and *Leonard K. Guiler* for petitioner. *Messrs. Earl F. Reed* and *Charles M. Thorp, Jr.* for respondent. Reported below: 42 A. 2d 398.

No. 1065. OIL WORKERS INTERNATIONAL UNION, LOCAL 463, ET AL. *v.* TEXOMA NATURAL GAS CO. April 9, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Lindsay P. Walden* for petitioners. *Messrs. J. J. Hedrick, W. T. Spies* and *D. H. Culton* for respondent. Reported below: 146 F. 2d 62.

No. 1079. GREAT LAKES TRANSIT CORP. *v.* MARCEAU. April 9, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Ulysses S. Thomas* for petitioner. *Mr. Thomas C. Burke* for respondent. Reported below: 146 F. 2d 416.

No. 969. WRAGG *v.* FEDERAL LAND BANK OF NEW ORLEANS ET AL. April 9, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. MR. JUSTICE BLACK took no part in the consid-

eration or decision of this application. *Messrs. Walter J. Knabe* and *Jack Crenshaw* for petitioner. Reported below: 145 F. 2d 816.

No. 1069. E. I. DU PONT DE NEMOURS & CO. *v.* WRIGHT, ADMINISTRATRIX. April 9, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. *Messrs. Charles W. Milner, Robert T. McCracken* and *Abel Klaw* for petitioner. *Mr. J. Verser Conner* for respondent. Reported below: 146 F. 2d 765.

No. 1005. O'KEITH *v.* JOHNSTON, WARDEN. April 9, 1945. The petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit is denied. *Charles O'Keith, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for respondent. Reported below: 146 F. 2d 231.

No. 804. PIERCE *v.* UNITED STATES. April 9, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Joel Thomas Pierce, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 146 F. 2d 84.

No. 846. UNITED STATES EX REL. ROGALSKI *v.* JACKSON, WARDEN. April 9, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. Reported below: 146 F. 2d 251.

No. 867. MICHENER *v.* JOHNSTON, WARDEN. April 9, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Edward F. Treadwell* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for respondent. Reported below: 146 F. 2d 129.

No. 888. CARTER *v.* JOHNSTON, WARDEN. April 9, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *James A. Carter, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Mrs. Mayte B. Greene* for respondent. Reported below: 145 F. 2d 882.

No. 919. GOLDEN *v.* MISSOURI. April 9, 1945. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. Casper Yost* for petitioner. *J. E. Taylor,* Attorney General, *W. Brady Duncan,* Assistant Attorney General, and *Mr. Frank W. Hayes* for respondent. Reported below: 353 Mo. 585, 183 S. W. 2d 109.

No. 920. BATSON *v.* SQUIER, WARDEN. April 9, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Clarence L. Batson, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Leon Ulman* for respondent. Reported below: 146 F. 2d 264.

No. 958. ANDREWS *v.* ROBERTSON, JAILER, ET AL. April 9, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John J.*

McCreary for petitioner. *T. Grady Head,* Attorney General of Georgia, *Victor Davidson, R. A. McGraw,* Assistant Attorneys General, and *Mr. Charles H. Garrett* for respondent. Reported below: 145 F. 2d 101.

No. 963. BISSELL *v.* AMRINE, WARDEN. April 9, 1945. Petition for writ of certiorari to the Supreme Court of Kansas denied. Reported below: 159 Kan. 358, 155 P. 2d 413.

No. 981. HAMMERSMITH *v.* NEW YORK. April 9, 1945. Petition for writ of certiorari to the Supreme Court of New York denied.

No. 989. MORTON *v.* UNITED STATES. April 9, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Charles W. Arth* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 147 F. 2d 28.

No. 990. LESSER *v.* NEW YORK. April 9, 1945. Petition for writ of certiorari to the Supreme Court of New York denied.

No. 991. LOCKE *v.* ILLINOIS. April 9, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 992. BRANER *v.* ILLINOIS. April 9, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied. Reported below: 389 Ill. 190, 58 N. E. 2d 869.

No. 993. BROOKS *v.* RAGEN, WARDEN. April 9, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 994. PETERSEN *v.* NEW YORK. April 9, 1945. Petition for writ of certiorari to the Court of Appeals of New York denied. [See 267 App. Div. 882, 47 N. Y. S. 2d 316.]

No. 997. WILLIAMS *v.* UNITED STATES. April 9, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Gustave A. Gerber* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 146 F. 2d 651.

No. 868. BOWEN *v.* JOHNSTON, WARDEN. April 9, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Hugh A. Bowen, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for respondent. Reported below: 146 F. 2d 268.

No. 909. STUMPF *v.* SANFORD, WARDEN. April 9, 1945. 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. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C., § 350. The motion for other relief is also denied. *Henry John Stumpf, Jr., pro se. Solicitor General Fahy* for respondent. Reported below: 145 F. 2d 270.

No. 684. COPPERWELD STEEL CO. *v.* INDUSTRIAL COMMISSION. See *ante*, p. 780.

No. 999. SPETEN *v.* BOWLES, PRICE ADMINISTRATOR. April 23, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. George F. Shafer* for petitioner. *Solicitor General Fahy, Messrs. Robert L. Stern* and *Thomas I. Emerson* for respondent. Reported below: 146 F. 2d 602.

No. 1011. CARTER *v.* KUBLER. April 23, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Elmer McClain* for petitioner. *Mr. T. W. Kimber* for respondent. Reported below: 145 F. 2d 471.

No. 1013. DR. WILLIAM HOWARD HAY FOUNDATION *v.* SAFETY HARBOR SANATORIUM. April 23, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Reported below: 145 F. 2d 661.

No. 1021. WALT DISNEY PRODUCTIONS *v.* NATIONAL LABOR RELATIONS BOARD. April 23, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Pierce Works* for petitioner. *Solicitor General Fahy, Messrs. Robert L. Stern, Alvin J. Rockwell, David Findling* and *Miss Ruth Weyand* for respondent. Reported below: 146 F. 2d 44.

No. 1031. LACK *v.* WESTERN LOAN & BUILDING CO. ET AL. April 23, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied.

Mr. Henry S. Dottenheim for petitioner. *Mr. George A. Critchlow* for respondents. Reported below: 146 F. 2d 852.

No. 1034. KRAMER ET AL. *v.* UNITED STATES. April 23, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John A. Chamberlain* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 147 F. 2d 756.

No. 1035. BARTHEL *v.* STAMM, EXECUTRIX. April 23, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Grover Middlebrooks* for petitioner. Reported below: 145 F. 2d 487.

No. 1036. OHIO EX REL. FOSTER *v.* EVATT, TAX COMMISSIONER. April 23, 1945. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mr. Matthew L. Bigger* for petitioner. *Hugh S. Jenkins,* Attorney General, and *Aubrey A. Wendt,* Assistant Attorney General, for respondent. Reported below: 144 Ohio St. 65, 56 N. E. 2d 265.

No. 1040. EX PARTE GEORGE S. HAWKE. April 23, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George S. Hawke, pro se.*

No. 1044. BROOKS *v.* UNITED STATES. April 23, 1945. Petition for writ of certiorari to the Circuit Court of Ap-

peals for the Second Circuit denied. *Mr. Ernest Angell* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Irving S. Shapiro* and *Robert S. Erdahl* for the United States. Reported below: 147 F. 2d 134.

No. 1048. KLEIN, TRUSTEE IN BANKRUPTCY, *v.* MOSER. April 23, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. David Jetzinger* for petitioner. *Messrs. Samuel M. Rinaker* and *Earl B. Wilkinson* for respondent. Reported below: 145 F. 2d 523.

No. 1051. MORRIS PLAN INDUSTRIAL BANK OF NEW YORK *v.* RAPHIEL. April 23, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry W. Parker* for petitioner. *Mr. John L. Grant* for respondent. Reported below: 146 F. 2d 340.

No. 1052. SANTA INEZ CO. *v.* UNITED STATES. April 23, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George Naus* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch* and *Bernard Chertcoff* for the United States. Reported below: 145 F. 2d 667.

No. 1055. HOWARD *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD CO. April 23, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *G. F. Howard, pro se. Mr. Eldon Martin* for respondent. Reported below: 146 F. 2d 316.

No. 977. KING COUNTY ET AL. *v.* WASHINGTON CHOCOLATE CO. April 23, 1945. Petition for writ of certiorari to the Supreme Court of Washington denied. *Smith Troy,* Attorney General, *Edwin C. Ewing,* Assistant Attorney General, and *Mr. Floyd M. Reischling* for petitioners. Reported below: 21 Wash. 2d 630, 152 P. 2d 981.

No. 1014. VIATOR *v.* STONE, CHAIRMAN, STATE TAX COMMISSION, ET AL. April 23, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Albert Sidney Johnston, Jr.* for petitioner. Reported below: 145 F. 2d 824.

No. 1028. GREEN ET AL. *v.* ANCHOR MILLS CO. April 23, 1945. Petition for writ of certiorari to the Supreme Court of North Carolina denied. *Mr. J. F. Flowers* for petitioners. *Mr. Whiteford S. Blakeney* for respondent. Reported below: 224 N. C. 714, 32 S. E. 2d 341.

No. 1032. ROCKTON & RION RAILROAD *v.* WALLING, ADMINISTRATOR. April 23, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John M. Hemphill* for petitioner. *Solicitor General Fahy, Mr. Douglas B. Maggs* and *Miss Bessie Margolin* for respondent. Reported below: 146 F. 2d 111.

No. 1045. COMPANHIA ANTARCTICA PAULISTA *v.* COE, COMMISSIONER OF PATENTS. April 23, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Gilbert P. Ritter*

for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea, Messrs. Paul A. Sweeney, Jerome H. Simonds* and *W. W. Cochran* for respondent. Reported below: 146 F. 2d 669.

No. 1050. DAVENPORT *v.* UNITED STATES. April 23, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John J. Hooker* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Miss Rosalie M. Moynahan* for the United States. Reported below: 147 F. 2d 290.

No. 1053. OKEECHOBEE COUNTY *v.* NUVEEN ET AL. April 23, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Manley P. Caldwell* for petitioner. *Mr. Miller Walton* for respondents. Reported below: 145 F. 2d 684.

No. 1054. STATE NATIONAL BANK *v.* TITTLE. April 23, 1945. Petition for writ of certiorari to the Supreme Court of Texas denied. *Mr. S. P. Jones* for petitioner. *Mr. Sidney L. Herold* for respondent. Reported below: 143 Tex. 235, 183 S. W. 2d 720.

No. 1058. POTOMAC CHEMICAL CO., INC. *v.* CHAPMAN. April 23, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Alvin L. Newmyer* for petitioner. Reported below: 146 F. 2d 664.

No. 1064. WENDLINGER *v.* HARDWARE MUTUAL CASUALTY CO. April 23, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Peter Q. Nyce, Thomas A. Williams, L. C. O'Connor* and *John W. Fussell* for petitioner. *Messrs. Thomas B. Gay* and *Archibald G. Robertson* for respondent. Reported below: 146 F. 2d 984.

No. 1067. HORNI SIGNAL MANUFACTURING CORP. *v.* KATZ. April 23, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Daniel V. Mahoney* for petitioner. *Messrs. A. D. Caesar* and *Charles W. Rivise* for respondent. Reported below: 145 F. 2d 961.

No. 1068. WYMAN ET AL., EXECUTORS, *v.* PAN AMERICAN AIRWAYS, INC. April 23, 1945. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Robert E. Coulson* for petitioners. *Messrs. Donald Havens* and *Edgar R. Kraetzer* for respondent. Reported below: 267 App. Div. 983, 49 N. Y. S. 2d 271.

No. 1091. BADENHAUSEN ET AL. *v.* BAETJER ET AL. April 23, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Abraham Mitnovetz* and *Harry O. Levin* for petitioners. *Messrs. Harry N. Baetjer* and *Joseph France* for respondents. Reported below: 146 F. 2d 762.

No. 1039. PUTNAM ET AL. *v.* FEDERAL LAND BANK OF BALTIMORE. April 23, 1945. Petition for writ of certi-

orari to the Supreme Court of Pennsylvania denied. *Mr. Elmer McClain* for petitioners. *Mr. John L. Bitner* for respondent. Reported below: 350 Pa. 533, 39 A. 2d 586.

No. 922. ATLANTIC COMPANY *v.* BROUGHTON ET AL.;

No. 923. ATLANTIC COMPANY *v.* CARTHAN ET AL.;

No. 986. BROUGHTON ET AL. *v.* ATLANTIC COMPANY; and

No. 987. CARTHAN ET AL. *v.* ATLANTIC COMPANY. April 23, 1945. The petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit are denied. *Messrs. Hughes Spalding, John A. Sibley* and *Sumter M. Kelley* for the Atlantic Company. *Mr. Richard E. Cotton* for respondents in Nos. 922 and 923, and petitioners in Nos. 986 and 987. Reported below: 146 F. 2d 480.

No. 1007. SIRES *v.* NIERSTHEIMER, WARDEN. April 23, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1009. ROBERTSON *v.* CHRONISTER ET AL. April 23, 1945. Petition for writ of certiorari to the Supreme Court of Arkansas denied.

No. 1023. MARSH *v.* NIERSTHEIMER, WARDEN;

No. 1030. BARLAND *v.* ILLINOIS;

No. 1119. PISKORZ *v.* ILLINOIS STATE SUPREME COURT; and

No. 1120. RESCO *v.* RAGEN, WARDEN. April 23, 1945. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 1022. BYRA *v.* NEW JERSEY. On petition for writ of certiorari to the Court of Errors & Appeals of New Jersey;

No. 1046. DAULLEY *v.* RAGEN, WARDEN; and

No. 1060. ADKISON *v.* RAGEN, WARDEN. On petitions for writs of certiorari to the Supreme Court of Illinois. April 23, 1945. The petitions for writs of certiorari 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. Reported below: No. 1022, 129 N. J. L. 384, 30 A. 2d 49.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM JANUARY 30, 1945, THROUGH APRIL 23, 1945.

No. 835. INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL No. 283 (C. I. O.) *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD ET AL. On petition for writ of certiorari to the Supreme Court of Wisconsin. February 26, 1945. Dismissed on motion of counsel for the petitioner. *Mr. Max Raskin* for petitioner. *Mr. James Ward Rector* for respondents. Reported below: 245 Wis. 417, 14 N. W. 2d 872.

No. 456. UNITED STATES *v.* TWO ACRES OF LAND ET AL. Certiorari, *ante*, p. 833, to the Circuit Court of Appeals for the Seventh Circuit. March 5, 1945. Dismissed on motion of counsel for the petitioner. *Solicitor General Fahy* for the United States. *Mr. George A. Barr* for respondents.

DECISIONS DENYING REHEARING, FROM JANUARY 30, 1945, THROUGH APRIL 23, 1945.*

No. 657. SEGAL LOCK & HARDWARE CO., INC. ET AL. *v.* FEDERAL TRADE COMMISSION. February 5, 1945. 323 U.S. 791.

No. 701. O'NEILL *v.* NIERSTHEIMER, WARDEN. February 5, 1945. 323 U.S. 794.

No. 723. COHEN ET AL. *v.* UNITED STATES. February 5, 1945. 323 U.S. 797.

No. 192. GIESE *v.* UNITED STATES. February 5, 1945. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. 323 U.S. 682.

No. 22. KOREMATSU *v.* UNITED STATES. February 12, 1945. 323 U.S. 214.

No. 731. HAYS ET AL. *v.* FARRINGTON ET AL. February 12, 1945. 323 U.S. 797.

No. 66. WALLACE CORPORATION *v.* NATIONAL LABOR RELATIONS BOARD. February 26, 1945. 323 U.S. 248.

---

*See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

637582°—46——60

No. 433. HOWE, EXECUTRIX, *v.* UNITED STATES. February 26, 1945.

No. 753. MINER, JUDGE, ET AL. *v.* ILLINOIS EX REL. BENEFIT ASSOCIATION OF RAILWAY EMPLOYEES ET AL. February 26, 1945.

No. 921. HOUSE *v.* MAYO, STATE PRISON CUSTODIAN. February 26, 1945.

No. —. EX PARTE LOUIS MOSKOVITZ. February 26, 1945. The second petition for rehearing is denied. 323 U. S. 817.

No. 177. LEDBETTER, ADMINISTRATOR, ET AL. *v.* FARMERS BANK & TRUST CO. ET AL.; and

No. 567. CRAPO *v.* JOHNSTON, WARDEN. February 26, 1945. The second petitions for rehearing are denied. 323 U. S. 813, 818.

No. 410. PRICE, TRUSTEE, ET AL. *v.* GURNEY ET AL. See *ante*, p. 825.

No. —. WILSON *v.* HINMAN ET AL. March 5, 1945.

No. —. WILSON *v.* UNITED STATES DISTRICT COURT, NORTHERN TEXAS. March 5, 1945. 323 U. S. 678.

No. 730. THOMAS J. MOLLOY & CO., INC. *v.* BERKSHIRE, DEPUTY COMMISSIONER, ET AL. March 5, 1945. 323 U. S. 802.

No. 81. OTIS & Co. *v.* SECURITIES & EXCHANGE COMMISSION ET AL. March 5, 1945. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. 323 U. S. 624.

No. 115. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. *v.* DUEL, COMMISSIONER OF INSURANCE. March 12, 1945. *Ante*, p. 154.

No. 738. MINNESOTA MINING & MANUFACTURING CO. *v.* COE, COMMISSIONER OF PATENTS. March 12, 1945. 323 U. S. 799.

No. 850. JACK COLE CO., INC. *v.* UNITED STATES ET AL. March 12, 1945.

No. 1112, October Term, 1941. MITCHELL *v.* UNITED STATES. March 12, 1945. The petition for rehearing is denied for the reason that it was not filed within the time provided by the rules. 316 U. S. 702.

No. —. EX PARTE UNIVERSAL OIL PRODUCTS CO. March 12, 1945. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application.

No. 879. BURNS *v.* ALABAMA. March 12, 1945. MR. JUSTICE BLACK took no part in the consideration or decision of this application.

No. —. KUCZYNSKI *v.* O'BRIEN, JUDGE. March 26, 1945. 323 U. S. 812.

No. 126. MERRILL *v.* FAHS, COLLECTOR OF INTERNAL REVENUE. March 26, 1945. *Ante*, p. 308.

No. 400. CHARLESTON FEDERAL SAVINGS & LOAN ASSOCIATION ET AL. *v.* ALDERSON, STATE TAX COMMISSIONER. March 26, 1945. *Ante*, p. 182.

No. 816. KELLY *v.* UNITED STATES. March 26, 1945.

No. 912. BULLDOG ELECTRIC PRODUCTS CO. *v.* WESTINGHOUSE ELECTRIC & MANUFACTURING CO. March 26, 1945.

No. 937. MANCUSO *v.* RAGEN, WARDEN. March 26, 1945.

No. 949. UNITED STATES *v.* MONTGOMERY WARD & CO., INC. ET AL. March 26, 1945.

No. 506. MOSHER *v.* HUNTER, WARDEN. March 26, 1945. The petition for rehearing and the motion for other relief are denied. 323 U. S. 800.

Nos. 2–7. HARTFORD-EMPIRE CO. ET AL. *v.* UNITED STATES. See *ante*, p. 570.

No. 149. CALDWELL SUGARS, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. April 2, 1945.

No. 150. SLACK BROS., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. April 2, 1945.

No. 514. ROBINSON *v.* UNITED STATES. April 2, 1945. *Ante*, p. 282.

No. 704. WALDON *v.* UNITED STATES. April 2, 1945.

No. 829. MACKRETH *v.* WILLIAMS, WARDEN. April 2, 1945.

No. 864. DOLLERT ET AL. *v.* PRATT-HEWIT OIL CORP. ET AL. April 2, 1945.

No. 939. EVANS *v.* NIERSTHEIMER, WARDEN. April 2, 1945.

No. —. WILSON *v.* HINMAN ET AL. April 2, 1945. The second petition for rehearing is denied.

No. 238. GLENN, COLLECTOR OF INTERNAL REVENUE, *v.* BEARD. April 2, 1945. 323 U. S. 724.

No. 738. MINNESOTA MINING & MANUFACTURING CO. *v.* COE, COMMISSIONER OF PATENTS. April 2, 1945. The second petition for rehearing is denied.

No. 371. COMMISSIONER OF INTERNAL REVENUE *v.* SMITH. See *ante*, p. 695.

No. 713, October Term, 1942. VELAZQUEZ *v.* UNITED STATES. April 9, 1945. 319 U. S. 770.

No. 63. NORTHWESTERN BANDS OF SHOSHONE INDIANS *v.* UNITED STATES. April 9, 1945. *Ante*, p. 335.

No. 836. BARTELL *v.* ILLINOIS. April 9, 1945.

No. 857. UNITED STATES GYPSUM CO. *v.* NATIONAL WAR LABOR BOARD ET AL. April 9, 1945.

No. 872. FORD MOTOR CO. *v.* PENNSYLVANIA. April 9, 1945.

No. 873. QUAKER OATS CO. *v.* PENNSYLVANIA. April 9, 1945.

No. 55. PACIFIC GAS & ELECTRIC CO. *v.* SECURITIES & EXCHANGE COMMISSION. April 9, 1945. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. —. EX PARTE STANLEY PEPLOWSKI. April 23, 1945.

No. 11, original. GEORGIA *v.* PENNSYLVANIA RAILROAD CO. ET AL. April 23, 1945.

No. 463. GOLDWASSER *v.* COMMISSIONER OF INTERNAL REVENUE. April 23, 1945. 323 U. S. 765.

Nos. 510 and 511. MARKET STREET RAILWAY CO. *v.* RAILROAD COMMISSION OF CALIFORNIA ET AL. April 23, 1945.

No. 797. CHAPMAN *v.* HUNTER, WARDEN. April 23, 1945.

No. 929. BARRY, ADMINISTRATRIX, *v.* READING COMPANY. April 23, 1945.

No. 947. ROODENKO *v.* UNITED STATES. April 23, 1945.

No. 968. HAY *v.* COMMISSIONER OF INTERNAL REVENUE. April 23, 1945.

No. 994. PETERSEN *v.* NEW YORK. April 23, 1945.

No. 1020. JEFFERSON COUNTY *v.* TENNESSEE VALLEY AUTHORITY. April 23, 1945.

No. 1037. BARLOW ET AL. *v.* UTAH. April 23, 1945.

No. —. EX PARTE BRYAN SCHWAB. April 23, 1945.

No. 351. CARLOTA BENITEZ SAMPAYO *v.* UNITED STATES ET AL.;

No. 352. CARLOTA BENITEZ SAMPAYO *v.* BANK OF NOVA SCOTIA; and

No. 353. CARLOTA BENITEZ SAMPAYO *v.* BANK OF NOVA SCOTIA ET AL. April 23, 1945. The CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 840. R. J. REYNOLDS TOBACCO CO. *v.* UNITED STATES. April 23, 1945. The CHIEF JUSTICE, MR. JUSTICE REED, and MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

INDEX

ABDUCTION. See **Criminal Law**, 2.

ACCOUNTING. See **Bankruptcy**, 3; **Public Utilities**, 1.

ACCRUAL. See **Taxation**, I, 2.

ADMINISTRATIVE ACTION. See **Jurisdiction**, I, 8–13; **Labor**, 6, 8.

ADMIRALTY.

1. *Foreign Vessels. Immunity.* Merchant vessel owned but not possessed by foreign government not immune. *Mexico* v. *Hoffman*, 30.

2. *Id.* Duty of courts not to enlarge immunity to extent which government has not recognized. *Id.*

3. *Public Vessels Act. Cause of Action.* Liability of United States for negligence of personnel in operation of public vessel. *Canadian Aviator* v. *U. S.*, 215.

ADVERTISING. See **Antitrust Acts**, 2.

AGENTS. See **Contracts**, 1.

AGRICULTURAL ADJUSTMENT ACT. See **Taxation**, I, 11.

ALCOHOLIC BEVERAGES. See **Antitrust Acts**, 1.

ALLOCATION OF COSTS. See **Public Utilities**, 4.

ALLOTMENT. See **Indians**, 2–3.

ALL-WRITS ACT. See **Jurisdiction**, II, 3.

ANTITRUST ACTS. See **Jurisdiction**, II, 1.

1. *Violations. Price Fixing.* Conspiracy of producers, wholesalers and retailers to fix retail prices of alcoholic beverages shipped into State; "fair trade" contracts; effect of Twenty-First Amendment. *U. S.* v. *Frankfort Distilleries*, 293.

2. *Violations. Price Discriminations.* Basing-point system of pricing; booking practices; allowance of discounts; allowances for advertising; prices of competitors; evidence and findings of Trade Commission. *Corn Products Co.* v. *Trade Comm'n*, 726; *Trade Comm'n* v. *Staley Mfg. Co.*, 746.

3. *Violations. Rate-Fixing Combinations* not immune from operation of antitrust laws. *Georgia* v. *Pennsylvania R. Co.*, 439.

ANTITRUST ACTS—Continued.

4. *Remedies.* State as "person" entitled to sue for injunctive relief under § 16 of Clayton Act. *Georgia* v. *Pennsylvania R. Co.*, 439.

5. *Id.* Power of this Court to modify decree of district court. *Hartford-Empire Co.* v. *U. S.*, 570.

6. *Id.* Previous opinion of this Court amended. *Id.*

APPEAL. See **Bankruptcy**, 3; **Jurisdiction**, I, 1–2; III, 1.

ASSESSMENT. See **Constitutional Law**, IV, (B), 1–2.

ASSIGNS. See **Labor**, 8; **Injunction.**

ATTORNEYS. See **Indians**, 4.

BANKRUPTCY.

1. *Petition. Corporations.* Filing of Ch. X petition on behalf of corporation by stockholders unauthorized. *Price* v. *Gurney*, 100.

2. *Preference. Suit to Set Aside. Limitations.* Action by trustee to set aside preference barred by § 11 (e) after two years from date of adjudication in bankruptcy; state law can not extend period. *Herget* v. *Central Bank Co.*, 4.

3. *Reorganization Proceedings. Chapter X.* Appeal from decree confirming plan; duty of appellants to other stockholders of same class; accounting for proceeds of appeal; jurisdiction to award relief. *Young* v. *Higbee Co.*, 204.

BANKS.

National Banks. Stockholder's Liability. Enforcement of double liability under § 23 of 1913 Act; bona fide sale within 60 days of closing no defense. *Garber* v. *Crews*, 200.

BASING-POINT PRICE SYSTEM. See **Antitrust Acts**, 2.

BONA FIDE. See **Banks.**

BOOKING PRACTICES. See **Antitrust Acts**, 2.

BRIDGES. See **Labor**, 3.

BURDEN OF PROOF. See **Evidence**, 2, 4.

BURGLARY. See **Constitutional Law**, IV, (A), 4.

CERTIORARI. See **Jurisdiction**, II, 3.

CHAIN STORES. See **Labor**, 2.

CLAYTON ACT. See **Antitrust Acts.**

CLEAN HANDS. See **Equity**; **Patents for Inventions**, 9.

COERCION. See **Constitutional Law**, IV, (A), 3; **Criminal Law**, 3; **Evidence**, 5.

COMBINATION. See **Antitrust Acts**, 1, 3; **Patents for Inventions**, 2.

COMMERCIAL SUCCESS. See **Patents for Inventions**, 8.

COMMISSION. See **Contracts**, 1.

COMPENSATION. See **Constitutional Law**, III, 1–2; **Indians**, 1; **Taxation**, I, 1; **Waters**, 1–3.

COMPETITION. See **Antitrust Acts**, 1–3.

COMPLAINT. See **Procedure**, 1–2.

CONDEMNATION. See **Eminent Domain; Jurisdiction**, I, 2.

CONFESSION. See **Constitutional Law**, IV, (A), 3; **Criminal Law; Evidence**, 4.

CONSIDERATION. See **Taxation**, I, 8–9.

CONSPIRACY. See **Antitrust Acts**, 1, 3; **Jurisdiction**, II, 1.

CONSTITUTIONAL LAW. See **Bankruptcy**, 2; **Evidence**, 4; **Habeas Corpus**, 1.

I. In General, p. 895.
II. Commerce Clause, p. 895.
III. Fifth Amendment, p. 896.
IV. Fourteenth Amendment.
(A) Due Process Clause, p. 896.
(B) Equal Protection Clause, p. 896.
V. Twenty-First Amendment, p. 896.

I. In General.

1. *Foreign Corporations. Insurance Companies. State Regulation.* Requirements as to reserves; inclusion of membership fees as premiums in computing reserve. *State Farm Ins. Co.* v. *Duel*, 154.

2. *Full Faith and Credit.* Requirement of Wisconsin statute as to reserves of insurance companies, valid as applied to foreign corporation. *Id.*

3. *Imports. Immunity from State Taxation.* Determination of who was importer; extent of immunity of imports for manufacture; articles brought from Philippine Islands were imports. *Hooven & Allison Co.* v. *Evatt*, 652.

II. Commerce Clause.

1. *Federal Regulation. Navigation.* Federal government may block navigation at one place in order to aid it at another. *U. S.* v. *Commodore Park*, 386.

2. *State Regulation. Insurance Companies.* Query whether Wisconsin statute relating to reserves of insurance companies violated commerce clause. *State Farm Ins. Co.* v. *Duel*, 154.

CONSTITUTIONAL LAW—Continued.

III. Fifth Amendment.

1. *Taking for Public Use. Just Compensation.* Decrease in value of lands resulting from authorized navigation improvement not compensable. *U. S.* v. *Commodore Park,* 386.

2. *Id.* Diminution of generating capacity of hydroelectric plant, resulting from authorized navigation improvement, not compensable. *U. S.* v. *Willow River Co.,* 499.

IV. Fourteenth Amendment.

(A) Due Process Clause.

1. *Foreign Corporations. Insurance Companies. Regulation.* Requirements as to reserves; inclusion of membership fees as premiums in computing reserve. *State Farm Ins. Co.* v. *Duel,* 154.

2. *Public Utilities. Rate Regulation.* Validity of order of state commission reducing fare of street railway. *Market Street R. Co.* v. *Railroad Comm'n,* 548.

3. *Criminal Cases. Confessions.* Validity of convictions; coerced confession; state procedure. *Malinski* v. *New York,* 401.

4. *Criminal Cases. Fair Trial.* Compelling defendant without counsel to plead to charge of burglary denied constitutional right. *House* v. *Mayo,* 42.

5. *Id.* Conviction on testimony known by prosecutor to be false. *White* v. *Ragen,* 760.

6. *Criminal Cases. Right to Counsel. White* v. *Ragen,* 760; *Rice* v. *Olson,* 786.

7. *Id.* Accused did not waive right to counsel by plea of guilty. *Rice* v. *Olson,* 786.

(B) Equal Protection Clause.

1. *Taxation. Classification.* Validity of differences in mode of valuation of same class of property belonging to different taxpayers. *Charleston Loan Assn.* v. *Alderson,* 182.

2. *Id.* Burden of establishing unconstitutionality of assessments is on protestant. *Id.*

V. Twenty-First Amendment.

Effect of. Amendment did not bar antitrust prosecution of liquor producers, wholesalers and retailers for conspiracy to fix retail prices of liquors shipped into State. *U. S.* v. *Frankfort Distilleries,* 293.

CONSTRUCTION. See **Statutes, 1–4.**

CONSUMERS. See **Public Utilities, 10.**

CONTINGENT FEE. See **Contracts, 1.**

CONTINUANCE. See **Jurisdiction**, I, 4; **Procedure**, 3.

CONTRACTS. See **Labor**, 4–5.

1. *Government Contracts. Validity.* Option contracts for purchase of land; provision for commission to optioning agent; cost-plus-a-percentage-of-cost system of contracting; public policy. *Muschany* v. *U. S.*, 49.

2. *Government Contracts. Interpretation.* No basis in circumstances here for recovery by contractor of difference between higher wages paid and those specified. *U. S.* v. *Beuttas*, 768.

CORPORATIONS. See **Bankruptcy**, 1–3; **Banks**; **Taxation**, I, 5.

COST-PLUS SYSTEM. See **Contracts**, 1.

COUNSEL. See **Constitutional Law**, IV, (A), 4, 6–7.

CRIMES. See **Criminal Law.**

CRIMINAL LAW. See **Constitutional Law**, IV, (A), 3–7; V; **Habeas Corpus**, 1–3.

1. *Offenses.* Mann Act applicable to transportation wholly within District of Columbia. *U. S.* v. *Beach*, 193.

2. *Kidnapping. Penalty.* Death sentence under Federal Kidnapping Act; not precluded though victim's injuries were not permanent or were healed before imposition of sentence; kidnapped person as "liberated unharmed." *Robinson* v. *U. S.*, 282.

3. *Confessions.* Effect of use of coerced confession as evidence. *Malinski* v. *New York*, 401.

CURRENCY. See **Customs Duties.**

CUSTOMS DUTIES.

Value of Imported Goods. Proper rate as between "free" and "official" rates for conversion of currency of invoice of imported goods into dollars. *Barr* v. *U. S.*, 83.

DAMAGES. See **Admiralty**, 1–3; **Labor**, 4–5.

DEATH. See **Criminal Law**, 2; **Taxation**, I, 2, 10.

DEATH SENTENCE. See **Criminal Law**, 2.

DECEDENTS. See **Taxation**, I, 2, 10.

DECEIT. See **Contracts**, 1; **Patents for Inventions**, 9.

DECLARATION OF TAKING ACT. See **Eminent Domain.**

DECREE. See **Antitrust Acts**, 5.

DEDUCTIONS. See **Taxation**, I, 4–8.

DEPARTMENT OF STATE. See **International Law.**

DEPLETION. See **Taxation**, I, 6.

DISCHARGE. See **Labor**, 7.

DISCOUNTS. See **Antitrust Acts**, 2.

DISTRICT OF COLUMBIA. See **Criminal Law**, 1.

DIVIDEND. See **Taxation**, I, 2, 5.

DOLLARS. See **Customs Duties.**

DOUBLE LIABILITY. See **Banks.**

DURESS. See **Contracts**, 1.

EARNINGS. See **Taxation**, I, 5.

EMBROIDERIES INDUSTRY. See **Labor**, 6.

EMINENT DOMAIN. See **Constitutional Law**, III, 1–2; **Waters**, 1–3.

Condemnation Under War Purposes Act. Effect of Declaration of Taking Act; right of landowner to challenge validity of taking; appeal. *Catlin* v. *U. S.*, 229.

EMPLOYER AND EMPLOYEE. See **Interest**; **Labor**, 5; **Taxation**, I, 1.

EMPLOYERS' LIABILITY ACT. See **Jurisdiction**, I, 4.

EQUAL PROTECTION. See **Constitutional Law**, IV, (B), 1–2.

EQUIPMENT. See **Taxation**, I, 4.

EQUITY.

Clean-Hands Maxim. Application in suit for patent infringement. *Precision Co.* v. *Automotive Co.*, 806.

EQUIVALENTS. See **Patents for Inventions**, 7.

ESTATE TAX. See **Taxation**, I, 10.

ESTOPPEL. See **Indians**, 4.

EVIDENCE. See **Antitrust Acts**, 2.

1. *Presumption.* Effect of presumption from margin evidence in proceeding for refund of processing taxes under Revenue Act of 1936. *Webre Steib Co.* v. *Commissioner*, 164.

2. *Sufficiency of Evidence* as to whether taxpayer had borne burden of federal processing tax. *Id.*

3. *Vessels.* Sufficiency of evidence that vessel was not in possession or service of Mexican government. *Mexico* v. *Hoffman*, 30.

4. *Unconstitutionality of Tax.* Burden of proof on protestant. *Charleston Assn.* v. *Alderson*, 182.

5. *Confession.* Effect of use of coerced confession as evidence. *Malinski* v. *New York*, 401.

EXCHANGE. See **Customs Duties.**

EXEMPTION. See **Labor,** 1–2; **Statutes,** 2; **Public Utilities,** 1.

FAIR LABOR STANDARDS ACT. See **Labor,** 1–6.

FAIR TRADE CONTRACTS. See **Antitrust Acts,** 1.

FAIR TRIAL. See **Constitutional Law,** IV, (A), 3–7.

FARES. See **Constitutional Law,** IV, (A), 2; **Public Utilities,** 11.

FEDERAL KIDNAPPING ACT. See **Criminal Law,** 2.

FEDERAL POWER ACT. See **Public Utilities,** 1.

FEDERAL POWER COMMISSION. See **Jurisdiction,** III, 2–3; **Public Utilities,** 1–10.

FEDERAL RESERVE BANK. See **Customs Duties; Jurisdiction,** I, 8.

FEDERAL TRADE COMMISSION. See **Antitrust Acts,** 2.

FEES. See **Indians,** 4.

FINDINGS. See **Antitrust Acts,** 2; **Public Utilities,** 7.

FOREIGN CORPORATIONS. See **Constitutional Law,** I, 1–2; IV, (A), 1.

FOREIGN POLICY. See **International Law.**

FOREIGN VESSELS. See **Admiralty,** 1–2.

FORMULA. See **Public Utilities,** 4.

FRAUD. See **Contracts,** 1; **Patents for Inventions,** 9.

FREE RATE. See **Customs Duties.**

FREIGHT RATES. See **Jurisdiction,** II, 1.

FULL FAITH AND CREDIT. See **Constitutional Law,** 2.

FUTURE INTERESTS. See **Taxation,** I, 7.

GAS. See **Public Utilities,** 2–10.

GIFT. See **Taxation,** I, 7–9.

GIFT TAX. See **Taxation,** I, 7–9.

GOVERNMENT CONTRACTS. See **Contracts,** 1–2.

HABEAS CORPUS.

1. *Petition.* Sufficiency of allegations of denial of constitutional right. *House* v. *Mayo,* 42; *Rice* v. *Olson,* 786.

2. *Procedure* upon denial by Illinois Supreme Court of application filed originally in that court. *White* v. *Ragen,* 760.

3. *Scope of Federal Court Review* of state court adjudication. *House* v. *Mayo,* 42.

HEIR. See **Indians**, 2–3.

HOMEWORK. See **Labor**, 6.

HUSBAND AND WIFE. See **Taxation**, I, 8–9.

IMMUNITY. See **Admiralty**, 1–3.

IMPORTS. See **Constitutional Law**, I, 3; **Customs Duties**; **Philippine Islands**; **Taxation**, II.

IMPOUNDED FUNDS. See **Public Utilities**, 10.

INCOME TAX. See **Taxation**, I, 1–6.

INCOMPETENTS. See **Indians**, 3.

INDIANS.

1. *Treaties. Shoshones.* Treaty of July 30, 1863 with Northwestern Bands of Shoshones was not recognition or acknowledgment by United States of Indian title to lands; claim to compensation not within special jurisdictional Act as one "arising under or growing out of" treaty. *Shoshone Indians* v. *U. S.*, 335.

2. *Restricted Lands.* Mortgage given by Osage heir prior to state court decree of heirship, invalid. *Drummond* v. *U. S.*, 316.

3. *Id.* When lands inherited from incompetent Osage allottee deemed "turned over." *Id.*

4. *Id.* Suit by United States to enforce restrictions not barred by prior judgment in proceedings in which Secretary of Interior had authorized employment and approved fees of counsel for Indian. *Id.*

INDIAN TITLE. See **Indians**, 1.

INFRINGEMENT. See **Equity**; **Patents for Inventions**, 9.

INHERITANCE. See **Indians**, 2–3.

INJUNCTION. See **Antitrust Acts**, 4; **Jurisdiction**, II, 1; **Procedure**, 6.

Scope of Jurisdiction. Successors and assigns. *Regal Knitwear Co.* v. *Labor Board*, 9.

INJURIES. See **Criminal Law**, 2.

IN REM PROCEEDINGS. See **Admiralty**, 1, 3.

INSANITY. See **Indians**, 3.

INSOLVENCY. See **Banks.**

INSURANCE. See **Constitutional Law**, I, 1–2; II, 2; IV, (A), 1.

Reserves. State regulation; validity of Wisconsin statute. *State Farm Ins. Co.* v. *Duel*, 154.

INTEREST. See **Labor**, 5.

When Recoverable. Interest on minimum wages and liquidated damages not recoverable in judgment under § 16 (b) of Fair Labor Standards Act. *Brooklyn Bank* v. *O'Neil*, 697; *Fitzgerald Construction Co.* v. *Pedersen*, 720.

INTERNATIONAL LAW.

Immunity. Merchant vessel owned but not possessed by foreign government not immune from suit. *Mexico* v. *Hoffman*, 30.

INTERSTATE COMMERCE. See **Antitrust Acts**, 1–3; **Jurisdiction**, II, 1; **Labor**, 3; **Public Utilities**, 2.

INTERSTATE COMMERCE ACT.

Review of Commission. Reversal by District Court of order in respect of provision therein to which suitor had acquiesced was improper. *U. S.* v. *Hancock Truck Lines*, 774.

INTERSTATE COMMERCE COMMISSION. See **Interstate Commerce Act.**

INTOXICATING LIQUORS. See **Antitrust Acts**, 1.

Twenty-First Amendment. Effect of. U. S. v. *Frankfort Distilleries*, 293.

INVENTION. See **Patents for Inventions.**

JUDGMENTS. See **Indians**, 4; **Interest**; **Jurisdiction**, I, 2; II, 4–13; **Procedure**, 4.

Res Judicata. See *Young* v. *Higbee Co.*, 204.

JURISDICTION. See **Bankruptcy**, 1–3; **Indians**, 1; **Procedure**; **Public Utilities**, 1, 9–10.

I. In General, p. 902.
II. Jurisdiction of this Court, p. 902.
III. Jurisdiction of Circuit Courts of Appeals, p. 903.

References to particular subjects under title Jurisdiction: Administrative Decisions, I, 8–13; All-Writs Act, II, 3; Appeal, I, 1; II, 7; III, 1; Certificate of Probable Cause, III, 1; Certiorari, II, 3; Concurrent Findings, I, 6–7; Condemnation Proceedings, I, 2; Continuance, I, 4; II, 12; Evidence, I, 9; Fair Labor Standards Act, II, 11; Federal Question, I, 4–5; II, 9–13; Finality of Judgments, I, 2; II, 8; Habeas Corpus, I, 3; Injunction, II, 1; Interstate Commerce Commission, I, 13; Natural Gas Act, III, 2–4; Original Jurisdiction, II, 1–2; Patents, I, 7; Scope of Review, II, 4–6, 9; III, 2–3; Secretary of Treasury, I, 8; States, II, 1–2; Tax Court, I, 10–12; Venue, III, 2.

637582°—46——61

JURISDICTION—Continued.

I. In General.

1. *Appeal.* Timeliness. *U. S.* v. *Hancock Truck Lines,* 774.

2. *Finality of Judgments.* Orders in condemnation proceedings as not appealable "final decisions" under Jud. Code § 128. *Catlin* v. *U. S.,* 229.

3. *Habeas Corpus Proceedings.* Scope of federal court review of state court adjudication. *House* v. *Mayo,* 42; *Rice* v. *Olson,* 786.

4. *Federal Question.* Continuance to enable petitioners to ascertain whether state court decided federal question. *Herb* v. *Pitcairn,* 117.

5. *Id.* Whether at death of taxpayer dividend had "accrued" under § 42 of 1938 Revenue Act was federal question. *Estate of Putnam* v. *Commissioner,* 393.

6. *Concurrent Findings.* Decisions of two courts below that vessel was not in possession or service of Mexican government, supported by evidence. *Mexico* v. *Hoffman,* 30.

7. *Conflict Between Circuits.* Factual issue of validity of patent determined by this Court independently. *Dow Co.* v. *Halliburton Co.,* 320.

8. *Administrative Action.* Action of Secretary of Treasury under § 522 (c) of Tariff Act of 1930 as subject to judicial review. *Barr* v. *U. S.,* 83.

9. *Id.* Reviewing court may determine whether there is evidence legally sufficient for administrative action, but may not weigh it. *Webre Steib Co.* v. *Commissioner,* 164.

10. *Review of Tax Court.* Conclusiveness of Tax Court decision. *Choate* v. *Commissioner,* 1; *Commissioner* v. *Wemyss,* 303; *Commissioner* v. *Court Holding Co.,* 331.

11. *Id.* Decision of Tax Court that transfer lacked "consideration in money or money's worth," under § 503 of 1932 Act, binding on review. *Commissioner* v. *Wemyss,* 303.

12. *Id.* Conclusion of Tax Court as supported by record. *Commissioner* v. *Smith,* 695.

13. *Review of Interstate Commerce Commission.* Reversal of order in respect of provision therein to which suitor had acquiesced was improper. *U. S.* v. *Hancock Truck Lines,* 774.

II. Jurisdiction of this Court.

1. *Original Jurisdiction.* Leave granted Georgia to file complaint seeking injunctive relief against conspiracy of railroads to fix freight rates which discriminate against State. *Georgia* v. *Pennsylvania R. Co.,* 439.

2. *Id.* Jurisdiction of suit in which State is party. *Id.*

JURISDICTION—Continued.

3. *Certiorari. All-Writs Act.* Cause as one reviewable not under § 240 (a) but under § 262 of Judicial Code. *House* v. *Mayo,* 42.

4. *Id.* Scope of review under § 262 of Judicial Code. *Id.*

5. *Review of Federal Courts.* Conflict between Circuits as to validity of patent; factual issue of validity determined here independently. *Dow Chemical Co.* v. *Halliburton Co.,* 320.

6. *Id.* Power of this Court to modify decree of District Court in antitrust case. *Hartford-Empire Co.* v. *U. S.,* 570.

7. *Review of State Courts.* Requisites of appeal under Judicial Code § 237 (a) and certiorari under § 237 (c). *Charleston Loan Assn.* v. *Alderson,* 182.

8. *Id.* Finality of judgment. *Market Street R. Co.* v. *Railroad Comm'n,* 548.

9. *Id.* Scope of review where federal right or immunity involved. *Hooven & Allison Co.* v. *Evatt,* 652.

10. *Id.* Existence of federal question. *Rice* v. *Olson,* 786.

11. *Id.* Question of right to interest on sums recoverable under § 16 (b) of Fair Labor Standards Act was federal question. *Brooklyn Bank* v. *O'Neil,* 697.

12. *Id.* Continuances granted to enable petitioners to ascertain from state court whether it decided federal question. *Herb* v. *Pitcairn,* 117.

13. *Id.* Judgment of state court as based on adequate non-federal ground. *White* v. *Ragen,* 760; *Copperweld Co.* v. *Industrial Commission,* 780.

III. Jurisdiction of Circuit Courts of Appeals.

1. *Appeals. Certificate of Probable Cause.* Failure of C. C. A. to consider propriety and to issue certificate was error. *House* v. *Mayo,* 42.

2. *Natural Gas Act.* Objection in proceeding under § 19 (b) that natural gas company is not located and does not have principal place of business in circuit in which the proceeding was brought goes to venue, not jurisdiction, and is too late when raised for first time after judgment. *Panhandle Co.* v. *Power Comm'n,* 635.

3. *Id.* Scope of review of order of Commission. *Id.*

4. *Id. Distribution of Impounded Funds.* C. C. A. was without jurisdiction to adjudicate rights of consumers in funds impounded on review of rate order or to order payment to municipal officers. *Central States Co.* v. *Muscatine,* 138.

KIDNAPPING. See **Criminal Law**, 2.

LABOR.

1. *Fair Labor Standards Act. Coverage.* Exemptions narrowly construed. *Phillips Co.* v. *Walling*, 490.

2. *Id.* Warehouse and central office employees of interstate retail chain store system not exempt employees of "retail establishment." *Id.*

3. *Id.* Applicable to employees engaged in repairing abutments and substructures of bridges on line of interstate railroad. *Fitzgerald Co.* v. *Pedersen*, 720.

4. *Fair Labor Standards Act. Remedies.* Waiver of rights to minimum wages and liquidated damages. *Brooklyn Bank* v. *O'Neil*, 697.

5. *Id.* Interest on minimum wages and liquidated damages not includible in judgment under § 16 (b). *Brooklyn Bank* v. *O'Neil*, 697; *Fitzgerald Co.* v. *Pedersen*, 720.

6. *Fair Labor Standards Act. Enforcement.* Authority of Administrator, as means of effectuating minimum wage order for embroideries industry, to prohibit homework. *Gemsco* v. *Walling*, 244.

7. *National Labor Relations Act.* Unfair labor practices; no-solicitation and no-distribution rules; discharge for wearing "shop steward" buttons. *Republic Aviation Corp.* v. *Labor Board*, 793.

8. *Id. Orders of Board. Enforcement.* Provision of cease and desist order for enforcement against employer's "successors and assigns"; validity and application. *Regal Knitwear Co.* v. *Labor Board*, 9.

LANDOWNERS. See **Contracts**, 1; **Eminent Domain**; **Indians.**

LANDS. See **Contracts**, 1; **Eminent Domain**; **Indians**, 1–4.

LEASE. See **Taxation**, I, 6.

LEGITIMATE COST. See **Public Utilities**, 5.

LIBEL. See **Admiralty**, 1, 3.

LIMITATIONS. See **Bankruptcy**, 2.

LIQUIDATED DAMAGES. See **Labor**, 4–5.

LIQUIDATING DIVIDEND. See **Taxation**, I, 5.

LOCAL DISTRIBUTION. See **Public Utilities**, 1–2.

MANN ACT. See **Criminal Law**, 1.

MARRIAGE. See **Taxation**, I, 8–9.

MERCHANTMEN. See **Admiralty**, 1.

MILLER-TYDINGS ACT. See **Antitrust Acts**, 1.

MINIMUM WAGE. See **Labor**, 4–6.

MINORS. See **Taxation**, I, 7.

MISREPRESENTATION. See **Contracts**, 1.

MORTGAGE. See **Indians**, 2.

MUNICIPAL CORPORATIONS. See **Public Utilities**, 10.

MURDER.

Prosecution. Effect of use of coerced confession as evidence. *Malinski* v. *New York*, 401.

NATIONAL BANKS. See **Banks.**

NATIONAL LABOR RELATIONS ACT. See **Labor**, 7–8.

NATURAL GAS ACT. See **Jurisdiction**, III, 2–3; **Public Utilities**, 2–10.

NAVIGABLE WATERS. See **Constitutional Law**, II, 1; III, 1–2; **Waters**, 1–3.

NAVIGATION. See **Constitutional Law**, II, 1; III, 1–2; **Waters**, 1–3.

NEGLIGENCE. See **Admiralty**, 3.

OFFENSES. See **Criminal Law.**

OFFICIAL RATE. See **Customs Duties.**

OIL. See **Taxation**, I, 6.

OPINION.

Amendment. Opinion heretofore rendered added to and clarified. *Hartford-Empire Co.* v. *U. S.*, 570.

OPTION. See **Contracts**, 1; **Taxation**, I, 1.

ORIGINAL PACKAGE RULE. See **Constitutional Law**, I, 3.

OSAGE INDIANS. See **Indians**, 2–3.

PATENT OFFICE. See **Patents for Inventions**, 9.

PATENTS FOR INVENTIONS.

1. *Nature.* Right of patentee is to exclude others from use of invention. *Special Equipment Co.* v. *Coe*, 370.

2. *Id.* Use of subcombination patent to prevent appropriation of combination invention. *Id.*

3. *Issuance. Suit to Compel.* Intention of claimant to misuse patent or not to use invention, unsupported by record; refusal to order issuance of patent erroneous. *Id.*

PATENTS FOR INVENTIONS—Continued.

4. *Validity. Want of Invention.* Grebe-Sanford Patent No. 1,877,504, claims 1, 5, 7, 8 and 9, for method of treating deep wells to increase production, invalid for want of invention. *Dow Co.* v. *Halliburton Co.*, 320.

5. *Id.* Application of old process to new and analogous use not invention. *Id.*

6. *Id.* Dilution of chemical solution by adding water not invention, unless definite dilution point or range is discovered corresponding to physical phenomenon. *Id.*

7. *Id.* Mere substitution of equivalents, though better results produced, not invention. *Id.*

8. *Id.* Whether claimed invention filled long-felt want and was commercial success relevant only when invention otherwise doubtful. *Id.*

9. *Infringement. Remedy.* Dismissal of suit on ground of complainant's "unclean hands"; fraud or inequitableness underlying applications for patents; duty of parties in Patent Office proceedings. *Precision Co.* v. *Automotive Co.*, 806.

PENALTY. See **Criminal Law**, 2.

PENDENTE LITE. See **Jurisdiction**, III, 4; **Public Utilities**, 10.

PERJURY. See **Patents for Inventions**, 9.

PERSON. See **Antitrust Acts**, 4.

PERSONAL SERVICES. See **Taxation**, I, 1.

PETITION. See **Bankruptcy**, 1.

PHILIPPINE ISLANDS.

Imports. State Taxation. Articles brought from Philippine Islands immune from state taxation as imports. *Hooven & Allison Co.* v. *Evatt*, 652.

PIPELINES. See **Public Utilities**, 2–10.

PLEA. See **Constitutional Law**, IV, (A), 7.

PLEADING. See **Procedure**, 1–2.

POSSESSION. See **Evidence**, 3.

PREFERENCE. See **Bankruptcy**, 2.

PREFERENTIAL TRANSFER. See **Bankruptcy**, 2.

PRESUMPTION. See **Evidence**, 1.

PRICE DISCRIMINATION. See **Antitrust Acts**, 2–3.

PRICE FIXING. See **Antitrust Acts**, 1–3.

PROBABLE CAUSE. See **Jurisdiction**, III, 1.

PROBATE COURT. See **Indians**, 2–3.

PROCEDURE. See **Bankruptcy**, 1–3; **Constitutional Law**, IV, (A), 2–7; IV, (B), 2; **Habeas Corpus**, 1–3; **Jurisdiction**; **Labor**, 4–6, 8; **Taxation**, I, 11.

1. *Complaint. Sufficiency.* Sufficiency of allegations of denial of constitutional right. *Rice* v. *Olson*, 786; *House* v. *Mayo*, 42.

2. *Id.* Sufficiency of complaint as stating cause of action under Public Vessels Act. *Canadian Aviator* v. *U. S.*, 215.

3. *Continuance* to enable petitioners to ascertain whether state court decided federal question. *Herb* v. *Pitcairn*, 117.

4. *Judgment.* Circuit Court of Appeals without jurisdiction under Natural Gas Act to adjudicate rights of consumers or to order payment of impounded funds to municipal officials. *Central States Co.* v. *Muscatine*, 138.

5. *Vacating Judgment.* When unnecessary to permit appellant to obtain determination of constitutional question. *State Farm Ins. Co.* v. *Duel*, 154.

6. *Injunction.* Enforcement against "successors and assigns." See *Regal Knitwear Co.* v. *Labor Board*, 9.

7. *Appeal.* Timeliness. *U. S.* v. *Hancock Truck Lines*, 774.

8. *Id.* Allowance of appeal from three-judge court by single judge. *Id.*

PROCESSING TAX. See **Evidence**, 1–2; **Taxation**, I, 11.

PRODUCTION. See **Patents for Inventions**, 4.

PROFITS. See **Taxation**, I, 5.

PUBLIC POLICY. See **Contracts**, 1.

PUBLIC UTILITIES. See **Constitutional Law**, IV, (A), 2.

1. *Federal Power Act. Jurisdiction of Commission.* Regulation of accounting practices; exemption of "facilities used in local distribution." *Connecticut Co.* v. *Federal Power Comm'n*, 515.

2. *Natural Gas Act. Coverage.* Wholesales of gas purchased within State, but which moves in continuous stream across state lines to local distributors, are in interstate commerce and subject to regulation. *Colorado-Wyoming Co.* v. *Power Comm'n*, 626.

3. *Natural Gas Act. Rates.* Validity of rate reduction orders. *Colorado Interstate Co.* v. *Power Comm'n*, 581; *Colorado-Wyoming Co.* v. *Power Comm'n*, 626; *Panhandle Co.* v. *Power Comm'n*, 635.

4. *Id.* Separation of regulable and non-regulable properties of integrated system; formula for allocating costs; interstate sales for

PUBLIC UTILITIES—Continued.

resale for industrial use regulable; inclusion of production and gathering facilities in rate base; intercompany transactions. *Colorado Interstate Co.* v. *Power Comm'n,* 581.

5. *Id.* Construction of rate base on actual legitimate cost of property. *Panhandle Co.* v. *Power Comm'n,* 635.

6. *Id.* End result, not method of valuation, is issue on review of rate order. *Id.*

7. *Id.* Adequacy of rate of return allowed by Commission. *Panhandle Co.* v. *Power Comm'n,* 635.

8. *Id.* Inadequacy of findings of Commission. *Colorado-Wyoming Co.* v. *Power Comm'n,* 626.

9. *Id.* Review of orders of Commission; jurisdiction and venue; scope of review. *Panhandle Co.* v. *Power Comm'n,* 635.

10. *Natural Gas Act. Rate Order. Impounded Funds.* Circuit Court of Appeals was without jurisdiction to adjudicate rights of consumers in funds impounded on review of rate order or to order payment to municipal officers. *Central States Co.* v. *Muscatine,* 138.

11. *Street Railways.* Validity of order of state commission reducing fare of street railway. *Market Street R. Co.* v. *Railroad Comm'n,* 548.

PUBLIC VESSELS ACT. See **Admiralty,** 3; **Procedure,** 2.

RAILROADS. See **Antitrust Acts,** 3; **Constitutional Law,** IV, (A), 2; **Jurisdiction,** II, 1; **Labor,** 3.

RAILWAYS. See **Constitutional Law,** IV, (A), 2; **Public Utilities,** 11.

RATE OF RETURN. See **Public Utilities,** 7.

RATES. See **Antitrust Acts,** 3; **Constitutional Law,** IV, (A), 2; **Customs Duties; Jurisdiction,** II, 1; **Public Utilities,** 2–11.

REENACTMENT. See **Statutes,** 1.

REFUND. See **Taxation,** I, 11.

REORGANIZATION. See **Bankruptcy,** 1, 3.

RESERVES. See **Constitutional Law,** I, 1–2; II, 2; IV, (A), 1.

RESTRICTED LANDS. See **Indians,** 2–4.

RETAIL STORES. See **Antitrust Acts,** 1; **Labor,** 2.

RIPARIAN RIGHTS. See **Constitutional Law,** III, 1–2; **Waters,** 1–3.

SALE. See **Banks; Taxation,** I, 3–4.

Elements of Sale. Conclusiveness of Tax Court's determination that transaction was sale. *Choate* v. *Comm'r,* 1.

SECRETARY OF INTERIOR. See **Indians,** 4.

SECRETARY OF TREASURY. See **Customs Duties.**

SENTENCE. See **Criminal Law,** 2.

SHERMAN ACT. See **Antitrust Acts.**

SHOP STEWARD. See **Labor,** 7.

SHOSHONE INDIANS. See **Indians,** 1.

SPECIAL JURISDICTIONAL ACT. See **Indians,** 1.

STATE DEPARTMENT. See **International Law.**

STATES. See **Antitrust Acts,** 4; **Constitutional Law,** I, 1–2; II, 2; V; **Jurisdiction,** II, 1–2.

STATUTES.

1. *Construction.* Effect of reenactment of statute which has had settled construction. *Fondren* v. *Commissioner,* 18.

2. *Id.* Exemptions from Fair Labor Standards Act narrowly construed. *Phillips Co.* v. *Walling,* 490.

3. *Id.* Construction of Public Vessels Act. *Canadian Aviator* v. *U. S.,* 215.

4. *Id. Tax Statutes.* Provisions of federal gift and estate tax statutes to be construed harmoniously. *Merrill* v. *Fahs,* 308.

STOCK. See **Bankruptcy,** 1, 3; **Banks; Taxation,** I, 1–3.

STOCKHOLDERS. See **Bankruptcy,** 1, 3; **Banks; Taxation,** I, 1–3.

STOCKHOLDER'S LIABILITY. See **Banks.**

STREET RAILWAYS. See **Constitutional Law,** IV, (A), 2; **Public Utilities,** 11.

SUBCOMBINATION. See **Patents for Inventions,** 2.

SUCCESSORS. See **Injunction; Labor,** 8.

TAXATION. See **Constitutional Law,** I, 3; IV, (B), 1–2; **Evidence,** 1–2, 4; **Statutes,** 4.

I. Federal Taxation.

1. *Income Tax. Taxable Income.* Compensation for personal service; option to purchase stock; when taxable income received. *Commissioner* v. *Smith,* 177, 695.

2. *Id.* Dividend as "accrued" at date of death of taxpayer. *Estate of Putnam* v. *Commissioner,* 393.

TAXATION—Continued.

3. *Income Tax. Gain from Sale.* Transaction as sale by corporation rather than by stockholders. *Commissioner* v. *Court Holding Co.,* 331.

4. *Income Tax. Computation.* Sale of equipment; allowance for unrecovered cost. *Choate* v. *Commissioner,* 1.

5. *Id.* Basis for computing "earnings and profits" distributed by corporation as liquidating dividends; validity of Art. 115–3 of Treasury Regulations, 101. *Commissioner* v. *Wheeler,* 542.

6. *Id. Deductions. Depletion.* Depletion inapplicable to equipment used in operation of oil lease. *Choate* v. *Commissioner,* 1.

7. *Gift Tax.* Statutory $5,000 exclusion; gifts of "future interests in property"; gifts for benefit of minors. *Fondren* v. *Commissioner,* 18.

8. *Id.* Transfer to prospective wife in consideration of marriage and as compensation for consequential loss of trust income was taxable gift in entirety under 1932 Act. *Commissioner* v. *Wemyss,* 303.

9. *Id.* Relinquishment of marital rights not "adequate and full consideration." *Merrill* v. *Fahs,* 308.

10. *Estate Tax.* Transfer as "intended to take effect in possession or enjoyment after death"; extent to which corpus of trust includible under § 302 (c) of 1926 Act. *Fidelity-Philadelphia Co.* v. *Rothensies,* 108; *Commissioner* v. *Field,* 113.

11. *Processing Tax. Refund.* Procedure under Title VII of Revenue Act of 1936 for refund; evidence as to whether taxpayer had borne burden of tax. *Webre Steib Co.* v. *Commissioner,* 164.

II. State Taxation.

Imports. Immunity from state taxation; articles from Philippines as imports. *Hooven & Allison Co.* v. *Evatt,* 652.

TAX COURT. See **Jurisdiction,** I, 10–12.

THREE-JUDGE COURT. See **Procedure,** 8.

TORTS. See **Admiralty,** 3.

TRADE COMMISSION. See **Antitrust Acts,** 2.

TRANSFER. See **Bankruptcy,** 2; **Taxation,** I, 7–10.

TRANSPORTATION. See **Antitrust Acts,** 3; **Criminal Law,** 1.

TREASURY REGULATIONS. See **Taxation,** I, 5.

TREATIES. See **Indians**, 1.

Treaties With Indians. Construed according to tenor; terms not to be varied to avoid alleged injustices. *Shoshone Indians* v. *U. S.*, 335.

TRIAL. See **Constitutional Law**, IV, (A), 3–7.

TRUSTS. See **Bankruptcy**, 2; **Taxation**, I, 7, 10.

TWENTY-FIRST AMENDMENT. See **Antitrust Acts**, 1; **Constitutional Law**, V; **Intoxicating Liquors.**

UNCLEAN HANDS. See **Equity**; **Patents for Inventions**, 9.

UNFAIR LABOR PRACTICES. See **Labor**, 7.

UNITED STATES. See **Admiralty**, 3.

VACATION OF JUDGMENT. See **Procedure**, 5.

VALUATION. See **Public Utilities**, 3–7, 11.

VENUE. See **Jurisdiction**, III, 2; **Public Utilities**, 9.

VESSELS. See **Admiralty**, 1–3; **Evidence**, 3.

WAGES. See **Contracts**, 2; **Interest**; **Labor**, 4–6.

WAIVER. See **Constitutional Law**, IV, (A), 7; **Labor**, 4.

WAREHOUSES. See **Labor**, 2.

WAR PURPOSES ACT. See **Eminent Domain**; **Jurisdiction**, I, 2.

WATERS.

1. *Riparian Owners. Navigation Improvements.* Owner of land between high and low water mark of navigable stream not entitled to compensation from United States for decrease in value resulting from authorized navigation improvement. *U. S.* v. *Commodore Park*, 386.

2. *Id.* Decrease in such value as lands may have had by reason of proximity to navigable waters not compensable. *Id.*

3. *Id.* Diminution of generating capacity of hydroelectric plant, resulting from authorized navigation improvement, not compensable. *U. S.* v. *Willow River Co.*, 499.

WELLS. See **Patents for Inventions**, 4.

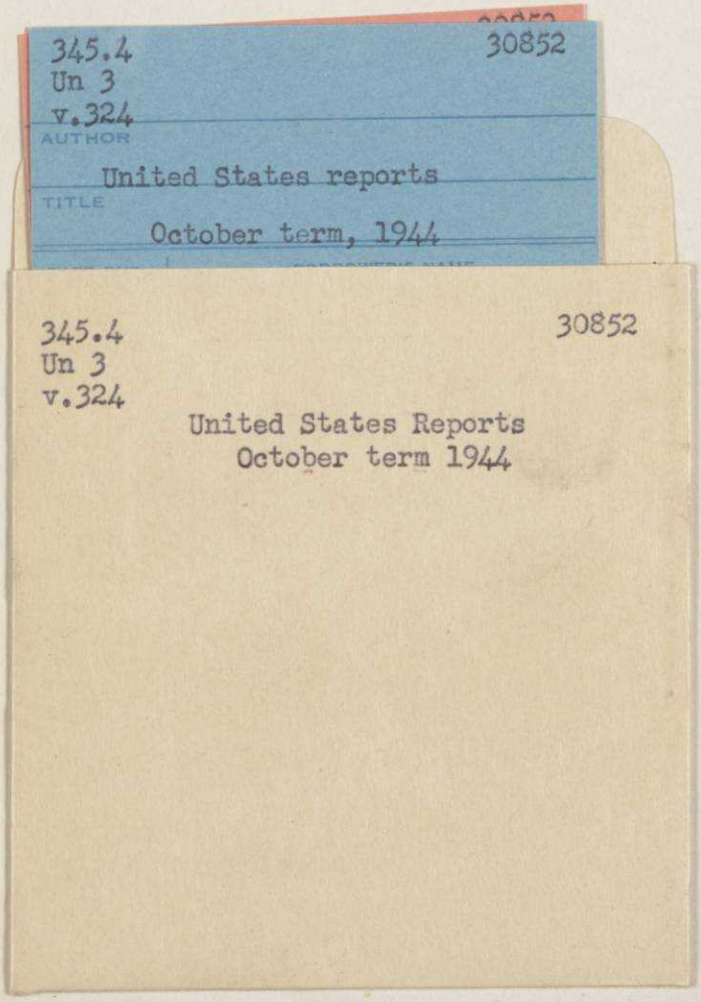
WHITE SLAVE ACT. See **Criminal Law**, 1.

WHOLESALE. See **Public Utilities**, 2.

WISCONSIN. See **Constitutional Law**, I, 2; II, 2.

Date Due

Demco 293-5			


345.4
Un 3
v.324
30852
AUTHOR
United States reports
TITLE
October term, 1944
345.4
Un 3
v.324
30852
United States Reports
October term 1944

345.4
Un 3
v.324
30852
AUTHOR

United States reports
TITLE

October term, 1944

DATE DUE | BORROWER'S NAME

DEMCO-240

DATE DUE	BORROWER'S NAME

345.4
Un 3
v.324
30852
AUTHOR

United States Reports

TITLE

October term, 1944

DATE DUE | BORROWER'S NAME

DEMCO-240

DATE DUE	BORROWER'S NAME

LSCMFDLP102733